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UNIVERSITÉ PANTHEON-SORBONNE – PARIS I

UNIVERSITY OF WARWICK

**THE JUDICIAL FUNCTION OF REGULATORY AUTHORITIES IN
FRANCE AND IN THE UNITED KINGDOM**

SUMMARY

TOME III

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1. TITLE: THE JUDICIAL FUNCTION OF REGULATORY AUTHORITIES IN ENGLAND AND FRANCE IN THE FIELD OF UTILITIES

2. WHY SUCH A RESEARCH

The research is at the crossroads of two changes in the French and English legal orders:

- First there is a growing tendency in both countries to deprive the Courts of their natural judicial powers to award them to regulatory authorities. The power to punish is, in the post-Macron world, a power that is increasingly transferred from the Courts to the administration. And the same trend can be witnessed in France. Whereas both countries were built on the idea that the power to punish should be separated from the power to legislate or to regulate, a change is occurring. Also, the power to settle private disputes on questions of access to an essential facility has been increasingly awarded to utility regulators in both countries. Although this power was at first discrete both in France and in the United Kingdom, it is now required by international instruments (at WTO or EU levels) and it has been recognized by statute in telecommunications, energy, mail or rail and airports. This is the first legal change: a move away from a model where Courts were at the centre of punishment or settlement of disputes to a model where regulators play the major role in this respect.
- This leads me to the second change both countries have undergone: europeanization. The powers we are studying are required by EU law, and ECHR law is also relevant to the exercise of this powers. Given this fact, the research question arises: **is europeanization leading to a convergence or a divergence in the way these powers are used? In other words: are regulatory proceedings converging or diverging and is regulatory accountability going towards a common model or not?**

3. DEFINITIONS

Because defining the precise meaning and scope of the judicial power under study will be the object of dedicated chapter we cannot enter into many details here. However, it is important to have in mind some basic definitions in order to avoid confusions. By “judicial function” we means three broad kinds of powers, that we will later call **remedies**, that have been granted to regulatory authorities in order to resolve problems in the enforcement of the law. **The study of the judicial function will, in effect, amount to studying the different regulatory remedies available in the sectors**, because the study of a function in law most of the time amounts to studying the products of such a function. The legislative function is about making statutes, the executive function is about performing legal acts that execute the commands of the legislature, the courts issue remedies (certiorari, prohibition, etc.).

The judicial function of regulatory authorities produces three different kinds of remedies: sanctions or penalties, dispute resolution and enforcement orders.

- **The power to punish:** we will have to study here the notion “administrative penalty”. It is sufficient at this point to bear in mind that administrative penalties can be broadly defined as penalties (there must be an element of punishment) that are imposed by administrative bodies (here regulatory authorities). We will use in this study as synonyms the notions administrative penalties, administrative sanctions, administrative repression.
- **The power to settle disputes:** this power must not be confused with arbitration or mediation. Arbitration leads to a decision that would be as binding as a court decision whereas mediation is nonbinding. The Courts have defined this power by separating it clearly from that of arbitrators or courts: “having regard to his role as guardian of the public interest, the Regulator is not constrained in the directions he may make by the wishes of the parties. The directions he gives may be different from those which an applicant for the directions sought. He may have a separate agenda. He is not a judge or arbitrator but performs a broader role than that required of a judicial or quasi judicial decision maker. In those circumstances he is not constrained by the wishes of the parties”.¹ The Competition Appeal Tribunal has expressed the same conception of this function saying that “Ofcom carries out its dispute resolution function as a regulator and not as a third party arbitrator. The Tribunal did not mean by this that nothing in OFCOM’s role in dispute resolution should be regarded as akin to the role

¹ The Queen On the application of London and Continental Stations and Property Limited v The Rail Regulator [2003] EWHC 2607 (Admin), at para 28. See also Winsor v Bloom [2002] EWCA Civ 955, at para 21.

of a commercial arbitrator, simply that was not OFCOM's only role. The fact that, as we have held, part of OFCOM's role is to determine a rate which is fair and reasonable as between the parties does not mean that Ofcom is transformed into a commercial arbitrator; this factor is combined with a requirement that it determine a rate which also accords with its regulatory objectives".² These two judgements help understanding the very specificity of this power.

- Finally but less importantly, regulators can issue **orders** to compel undertakings to abide by the conditions of their licence.

Despite the variety of these powers their unity lie in the fact that they have a **judicial character**, which explains that they must be exercised in a fair way (abiding by the principles of natural justice or the rights of the defence for example) and that they are **administrative in nature**, which means that judicial review would be available to challenge these decisions.

4. SCOPE: THE UTILITIES

In order to be clearer we would like to draw a board explaining the sectors and the regulatory authorities integrated in the scope of the research.

Sector	UK Regulator	French Regulator
Electronic communications	Ofcom	ARCEP
Mail	Ofcom	ARCEP
Broadcasting (radio and TV)	Ofcom	ARCEP
Energy	GEMA (Ofgem)	CRE
Rail	ORR	ARAF
Water	Ofwat	Not applicable

This is the core regulatory authorities whose powers we want to study.

5. THE RESULTS OF THE RESEARCH

- b. Given the question we asked the result of the research is clear: instead of creating a convergence, a divergence has occurred. We can even go further by saying in the case

² Competition Appeal Tribunal, T-Mobile (UK) Ltd v British Telecommunications Plc [2008] CAT 12 (20 May 2008), at para 181.

of France that Courts have used international law (especially the ECHR) in a way that has created a clear divergence in the way regulatory proceedings are carried out. Not only has convergence not happened but international law has been used in France as a vehicle to foster divergence.

6. A BRIEF LITERATURE REVIEW

How has this research been treated by scholars up to now:

- Concerning the debate on regulation, the literature is of course immense, in both countries. It would be impossible to expose it here and it is the object of a specific chapter. Economists, lawyers, political scientists have used this concept and elaborated different, sometimes complementary definitions of this concept. It is widely researched and debated, but it is now the specific focus of our research.
- What we are interested in is the way the powers are used to punish or settle disputes. Concerning administrative penalties we are unaware of any comparative law study between the United Kingdom and France. What do we have then? In France, the notion has been studied thoroughly but on a domestic law basis. In the UK the notion has received greater attention since Richard Macrory wrote his report. He then wrote some articles using this notion³. The focus of scholars like Braithwaite, Ayres⁴, Black or Baldwin⁵ have been more on how to design the best possible enforcement régime. It is aimed at proposing reforms to improve the system, to make it more responsive. This is not our focus. We are more interested in how the systems work in both countries and order to compare them. In the common law world, the notion was studied

³ Environmental Sanctions, Butterworths 6th Annual Environmental Law Conference, London ; Prospects for a UK Environmental Court Environmental Courts, UK Environmental Law Association, London May 2010 ; Civil Sanctions: Fairer and Better Environmental Enforcement? UK Environmental Law Association, London ; Reforming Regulatory Sanctions – An Integrated Model 4th Expert Group meeting on Application and Transposition of Community Law. European Commission, Brussels ; Regulatory Justice: Making Sanctions Effective Scottish Environmental Protection Agency Workshop, Edinburgh ; Environmental Sanctions – The New Dimensions UK Environmental Law Association, Edinburgh ; The Regulatory Enforcement and Sanctions Act 2008 Environmental Law : the New Regulatory Regime LexisNexis Conference, London ; Regulatory Enforcement and Sanctions The Regulatory State : Constitutional Implications International Association for Constitutional Law, London.

⁴ I. Ayres, J. Braithwaite, *Responsive regulation: transcending the deregulation debate*, Oxford, New York, Oxford University Press, 1992 ; J. Braithwaite, *Restorative justice & responsive regulation*, Oxford, Oxford University Press, 2002.

⁵ See J. Black, R. Baldwin, Really Responsive Regulation, *The Modern Law Review*, (2008) 71(1) 59-94, at p. 64.

thoroughly in the United States⁶, Canada⁷ and Australia⁸. In French comparative law studies there is one book but it focuses on constitutional review of administrative penalties⁹. It follows from this that the United Kingdom, having no constitutional review mechanism, is not studied. In other words there are no comprehensive comparative law study on administrative penalties between France and the United Kingdom. There are however comparative works on administrative penalties but they are a collection of national reports¹⁰. Our study would therefore add to the literature by trying to build a bridge between the notions in the two countries: how are they construed? How are their legal régime organized.

- As far as dispute resolution is concerned, the French and English literature does not deal specifically with our aim. There is one comparative study done under the auspices of The British Institute of International and Comparative Law. The Institute has made a study on dispute resolution powers of regulatory authorities in Europe but only in the telecommunications sector and on the basis of national reports¹¹. As a consequence, there is no comprehensive study on the subject covering all the utilities and engaging in a reflection about this power. How can one account for this power? The report does not try to distinguish from arbitration or mediation or to understand its rationale.

⁶ See J. Landis, *The administrative process*, New Haven, Yale University Press, 1938, at p. 89-91; L. R. Altree, "Administrative Sanctions: Regulation and Adjudication", *Stanford Law Review*, Vol. 16, No. 3 (May, 1964), pp. 630-648. See also F. H. Thomforde Jr, "Controlling Administrative Sanctions", 74 *Mich. L. Rev.* 710 (1975-1976).

⁷ See Law Reform Commission of Canada, *Sanctions*, "Compliance Policy and Administrative Law", prepared by Howard R. Eddy, 1981, at p. 11.

⁸ See *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95).

⁹ F. Moderne, *Sanctions administratives et justice constitutionnelle : contribution à l'étude du jus puniendi de l'État dans les démocraties contemporaines*, Economica, 1993.

¹⁰ J. McEldowney, *Report on Administrative Sanctions in the United Kingdom*, (to be published). See also the reports by the European Commission: *The system of administrative and penal sanctions in the member States of the European Communities*. The UK Report was written by L.H. Leigh.

¹¹ See B.I.I.C.L., *Effective Access and Procedure In Telecommunications Disputes in Europe*; Mads Andenas, Stefan Zleptnig, 'Telecommunications Dispute Resolution: Procedure and Effectiveness' (2004) 15 *European Business Law Review* pp. 477-663.

7. METHODOLOGY & METHODS

There is no clear methodological framework for comparative law.¹² The theoretical framework will be quite simple all along the research. The main problem we will have to tackle is comparison. As far as comparison is concerned, two different situations arise that may require the use of two different kinds of methodologies.

Most of the time the power under study will have its source in EU law. In telecommunications, energy, the power to punish or to settle disputes was implemented in domestic laws but the origin of the power comes from European directives. The comparison is then simple and does not require must theoretical framework. The analysis of the implementation in both countries can be sufficient.

But sometimes more theoretical background will be required. Comparative law - and comparative administrative law are not different in this respect - can build, study and compare notions using a functionalist approach. There is no clear methodological framework for comparative law.¹³ However we have used two methods. As Örucu argues “the true basis of comparative law is ‘functional equivalence’. Two distinct currents of functionalism are on offer: the ‘functionalist method’, one of the best-known working tools in comparative law, and ‘functionalism’ in the sense that law responds to human needs and therefore all rules and institutions have the purpose of answering these needs. The functional – institutional approach answers the question ‘Which institution in system B performs an equivalent function to the one under survey in system A?’ From the answer to this question the concept of ‘functional equivalence’ emerges. Comparative lawyers seek out institutions having the same role, i.e., having ‘functional comparability’, or solving the same problem, ‘similarity of solutions’. What is undertaken here can also be the ‘functional juxtaposition’ of comparable solutions. The problem-solving approach – the other side of the same coin – asks the question, ‘How is a specific social or legal problem, encountered both in society A and society B, resolved?’; i.e., ‘Which legal or other institutions cope with this problem?’ This approach, similar to the ‘functionalist’ approach, springs from the belief that similar problems have similar solutions across legal systems, though reached by different routes. It is said that ‘the fact that the problem is one and the same warrants the comparability’ (Schmitthoff, 1939). According to the functional – institutional approach the above questions, once answered, are immediately translated into functional questions. Functional inquiry also suits the utilitarian approach to comparative law”¹⁴.

Here we have privileged the functional – institutional approach. In order to define what is an administrative decision for example we will explain what are the definitions available in both legal systems but the question we will ask ourselves is: as an administrative decision in France is a decision whose characters make it amenable to judicial review, what are the decisions in English law that are attached the same consequence? The same will be true for administrative penalties: as an administrative penalty in France is a decision whose

¹² See A. Esin Örucu, Methodology of comparative law, The Elgar Encyclopedia of Comparative Law Smits, Jan M. (ed.), at p. 442.

¹³ See A. Esin Örucu, Methodology of comparative law, The Elgar Encyclopedia of Comparative Law Smits, Jan M. (ed.), at p. 442.

¹⁴ See A. Esin Örucu, Methodology of comparative law, at p. 443.

consequence is that it has to be pronounced according to the rules of natural justice, what are the decisions in English law that bear the same consequences?

This method will help us discover, understand and these legal institutions in both countries and will help us have a homogeneous treatment when we study the legal régime applicable in chapter 6 and 7.

Did we use more practical methods?

Because of the huge differences in the day to day working of regulatory authorities we have been obliged to use interviews in order to understand how the regulatory process was structured in the UK. Despite the publication of guidance by agencies the practical working of the administrative process inside English agencies is very opaque. Therefore we have had to make interviews, in order to understand who was responsible for what and, above all, if there was a separation of functions inside agencies. The main legal problem that French agencies faced was the willing of Courts to separate inside agencies the powers to prosecute, from the power to investigate and the power to sanction. I therefore wanted to check how these functions operated inside English agencies. For this reason, I made interviews of persons in charge inside these agencies. The main question was: is it the same person who takes the decision to prosecute, who investigates and who finally decide the penalty.

8. EXPLANATION OF THE STRUCTURE AND PRELIMINARY CHAPTER OUTLINE

Explanation of the structure:

Our first endeavour in this study is to understand why such powers were granted to regulatory authorities. That's is why we need to give some historical background to this study, starting from the beginning, that is how the British and French legal systems thought about enforcement. The history of how and why Parliament departed from this starting point and how international law took over and imposed the granting of coercive powers to regulatory authorities is the object of the first chapter.

How the Courts responded to this evolution? Chapter 2 deals with how the Courts responded to this new evolution. Here a difference has to be made between the two countries. Because of the evolution of the French legal system towards constitutionalization, administrative penalties were accepted but closely limited by the French Constitutional Council. Concerning dispute resolution, despite its impact on property and contract, there is a very limited case law in both countries.

Chapter 3 is concerned with the rationale underlying the granting of these powers to regulatory bodies. We content that it is in the shortcomings of private and public law and in the deficiencies of the Courts that lye the ultimate explanation. Private law (especially contract and property) may have some anticompetitive effect that dispute resolution helps curtailing. Criminal law shows, in France and in the United Kingdom, some inadequacies to the challenges regulatory systems face.

Chapter 4 will specifically deal with defining precisely the remedies under study in order to be able afterwards (in chapter 6 and 7) to study their legal régime. This is where comparative law methodology is mainly used. All the remedies under study are administrative decisions. How can we define an administrative decision in comparative administrative law? Then we go on with trying to find a workable definition of what would be an administrative penalty in the UK and France. Finally regulatory dispute resolution is defined in order to separate it from other means of dispute resolution such as arbitration, mediation or the resort to the courts and in order to show how it is specific and novel (the notion of access is at the core of this function).

Chapter 5 tries to understand what regulation is starting from the definition we can find in scholarly works. We contend that if we want to understand regulation as a legal notion we have to give it a narrow meaning: institutionalizing a market based on competition. That's what the remedies we are studying are about: dispute resolution is about compelling the incumbent to open its network at a fair price and sanctions are about ensuring that market principles are respected.

Chapter 6 and 7 are about understand how the regulatory proceedings work in both countries and how regulators are accountable when they are using their powers. Chapter 6 contends that principles of English and French administrative law were very close, therefore the two countries came from the same point. But international law (EC and especially ECHR law) was used by French Courts to foster a divergence in the way regulatory proceedings are carried out now. Despite much scholarly work that claim

that legal system will go towards a common model our field of study shows that administrative law remains very national. This is also the object of this chapter to understand why.

Chapter 7 arrives at the same conclusion. Judicial review, regulatory liability for unlawful action, democratic accountability is still very much dominated by national logics and French and English laws on these points are not similar.

Outline of the Chapters:

Introduction

Chapter 1: History of the regulatory remedies in the United Kingdom and France

- 1.1 The development of licence enforcement in the UK and France
 - 1. The French case law on licence enforcement
 - 2. The common law on licence enforcement
 - a. Comparative perspectives on the definition of a licence
 - b. Enforcement powers under the common law
 - 3. The developments of administrative enforcement in the sectors under study
- 1.2 Dispute resolution: the emergence of a new power
 - 1. The legal consequences of the economic revolution in the US and its consequence in the UK
 - 2. The emergence and development of a dispute resolution function on question of access in France
- 1.3 The internationalization of regulatory remedies: an increasingly international and European power
 - 1. The role of the GATT
 - 2. The role of the European Union: an increasing interests in the enforcement powers of regulatory authorities and a possible emergence of such a function at European level?
- 1.4 The further expansion of regulatory remedies in the UK and France
 - 1. Administrative repression: dramatic expansion
 - 2. Dispute resolution: expansion and divergence between the UK and France

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Chapter 2: The Courts' answer to the rise of administrative enforcement

2.1 Comparative perspectives on administrative enforcement: common law v continental law traditions

2.2 French and English Administrative Law Traditions: a convergence of the solutions

1. English tradition exposed
2. French tradition explained
3. Administrative enforcement in the UK and France: from principle to reality, the dark side of legal administrative history

2.2 From Convergence to Divergence: The French Courts' response to the contemporary rise of regulatory enforcement powers

2.3 International Courts and administrative enforcement

1. The ECt HR and administrative sanctions
2. The ECJ and administrative sanctions

*

Chapter 3: The Rationale for Regulatory Remedies

3.1 The shortcomings of private law (contract property and tort law)

1. Contract law and regulation: the elements of the conflicts
 - a. Regulation, contract law and the problem of power
 - b. Regulation, contract law and the problem of refusals to deal
 - c. Regulation, contract law and the problem of determining the content of the contract
2. Tort law and regulation: inadequacies
3. Property law and regulation: contradiction, dispute resolution and new property arrangements

3.2 The shortcomings of criminal law

3.3 The shortcomings of competition law

3.4 The problems inherent to civil and common law legal systems

3.6 The shortcomings of courts

3.7 The ideological explanations: the influence of the Law & Economics movement

*

Chapter 4: Definition and Scope of Regulatory enforcement decisions

4.1 The nature of regulatory remedies: the notion of administrative adjudication in comparative English and French administrative law

1. Administrative decisions under French administrative law
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- 4.2 The definition and scope of administrative penalties: in search of a definition
1. Administrative penalties in French administrative law
 2. Administrative penalties in English administrative law: in search of a definition
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CHAPTER 1: HISTORY OF THE REGULATORY REMEDIES IN THE UNITED KINGDOM AND FRANCE

This chapter is concerned with the historical development of the regulatory remedies in the United Kingdom and France (penalties, dispute resolution, enforcement orders). The difficulty of this analysis lies in the scope of the research: the study of all the utility sectors could lead to a disparate study of statutory provisions without any clear line and any clear objective. The second difficulty is related to the two main sets of powers under analysis: administrative penalties and dispute resolution. In this respect also it seems, at first glance, hard to find a general trend to study the legal development of these powers.

How is such a line to be found? As we are dealing with disparate *ad hoc* statutory provisions, suited to each sector, it will be our first task to try to establish the principles governing administrative enforcement in both countries in the case law. To go further in the analysis it is necessary to establish the specificity of such sectors: they are all, in the United Kingdom and France, under a licensing regime. The first question is therefore: what are the powers of public bodies when they are enforcing licence conditions under the English and French case law?

Once we have established the “natural administrative powers” attached to licence enforcement, it will be easier to assess to what extent Parliaments depart or adopt such principles. We will see that in both countries the legal provisions governing licence enforcement are at first in line with the jurisprudential conception. The departure begins in both countries in broadcasting and is also greatly influenced by the implementation of EC competition law that provides for administrative sanctions. The history of the progressive departure from the jurisprudential principle will be a first line in order to understand the law.

But this does not explain the recourse to dispute resolution on access at the beginning the 1980s. We will trace back this function showing how in both countries the reasons for it and how progressively the two countries use this function differently: while the United Kingdom has a coherent approach (limiting this function to utilities) France uses it in different areas such as cinema, copyright and broadcasting.

There is another historical development that it is important to highlight: the internationalization of regulatory enforcement. EC law, WTO law was first interested in dispute resolution before extending its interest to administrative penalties.

Thus four steps have to be distinguished historically. At first domestic statutory laws on licence enforcement were very much in line with the jurisprudential principles (1.1). Similarly the dispute resolution function was limited. Its use was discrete but it is nonetheless necessary to understand the purpose it served (1.2). The second step is characterized by the internationalization of administrative enforcement: both on the “civil” side (dispute resolution being promoted as a necessary function in EC and WTO law) and on the “criminal” side (EC law being increasingly interested in administrative penalties) (1.3). Finally, the last phase is marked by a “blooming” of administration enforcement, whose scope and forms are however different in the two countries (1.4).

1.1 THE DEVELOPMENT OF LICENCE ENFORCEMENT IN THE UNITED KINGDOM AND FRANCE

The first task is to establish the principles governing licence enforcement in the United Kingdom and France in the case law, because all the utilities sectors are based on a licensing scheme. That's why, in order to assess the originality of the statutory provisions it is necessary to understand the jurisprudence on licence enforcement in the United Kingdom and France. It will also be an occasion to reflect on the nature of licences in English and French administrative law and show how judges conceptualize these decisions differently.

1. The French case law on licence enforcement

As we will show in chapter 6, the French legal doctrine loathed administrative penalties. Because it gave the administration the power to punish its own decisions it was thought to be against the principle of the separation of powers and it also reminded of the doctrine of what is probably in a French legal mind the equivalent of the Star Chamber to a common lawyer: the King's practice to use "sealed letters" ("lettres de cachet") to imprison such people as Voltaire, Diderot, Sade (the fate of the Bastille prison is linked to the feeling of arbitrariness attached to these decisions).

However, the legal doctrine acknowledges a legitimate sector where the administration can coerce people: it was when the administration was related to private persons or undertakings by a legal link, a licensing scheme. Auby wrote that administrative enforcement should be limited to the situations where the administration is related to the person punished with a licence. If the administration were free to punish outside this sphere, it would then be encroaching on the jurisdiction of the criminal law. The second condition for a legitimate administrative repression according to the same writer is that the administration can only punish the offences contained in the licence. Finally Auby argued that to be legitimate the sanction itself should be limited to the suspension or the revocation of the licence: in other words any penalty not restricted to these two powers would be encroaching on the criminal sphere. Financial penalties were in this respect condemned.¹⁵

It appears that the case law is completely in line with such a doctrinal description of the proper sphere of administrative repression.

The penalties attached to the breach of a licence condition were clarified progressively by the State's Council. The power to revoke the licence did not raise any issue for the administrative judge because it is only logical that if a licence is granted under the requirement that certain obligations have to be respected, breach of these conditions can entail the revocation of the licence.¹⁶ The power of suspension of the licence took longer to be allowed by the State's Council. First the State's Council admitted that the administration could include within the

¹⁵ J.-M. Auby, "Les sanctions administratives en matière de circulation automobile", *Dalloz*, chron. XXV, 1952, pp. 111-118, at p. 112.

¹⁶ Conseil d'État, 12 juillet 1929, *Du Hays*, D. 1930.III.21. See Marcel Waline's comment on the case.

obligation attached to the licence a suspension provision in case of a breach.¹⁷ Secondly, the State's Council admitted a general power of suspension to punish a breach.¹⁸

Apart from the power to revoke or suspend the licence administrative bodies have no other way to enforce the licence. If they want a financial penalty to be inflicted they have to sue the offender in the criminal court (a special provision of the criminal code penalised the breach of administrative decisions). This position was soon reaffirmed in the *Benkerrou* case.¹⁹

2. The common law on licence enforcement

The comparison of licence enforcement in the United Kingdom and France is complicated because the two countries do not share the same conception of what a licence is.

a. Definition of the notion of licence

In French law, there is no doubt as to the nature of licences. Licences belong to a class of decisions that we could call prior approval decisions whose aim is to authorize an illegal activity. That is why only Parliament can establish such a scheme. In other words, this class of decisions are administrative decisions that authorize an illegal activity.

By contrast, common law judges tended to see licences as contracts.

Judgments saying that licences are nothing more than contracts are numerous. This is the opinion of Scarman L.J. about a local authority's decision to revoke the licence of a market trader to operate from a stall on a market controlled by the authority. The judge does not hesitate to say that the trader and the local authority have "a contractual relationship"²⁰:

"A trader, or a member of the public, can only acquire effectively the opportunity to trade in this market if he can obtain a licence, which no doubt as between him and the corporation is contractual".

Justice Pill refused to accept that termination of a licence to work as market a stallholder could be amenable to judicial review.²¹ Many other decisions hold that licence are nothing more than contracts and that therefore private law remedies may be more suited to the case than judicial review.²²

¹⁷ Conseil d'État, 14 août 1871, Couillaud, Recueil Lebon p. 126

¹⁸ Conseil d'État, 12 juillet 1929, Du Hays ; Conseil d'État, 15 mai 1936, Bélot, D. 1937.III.1, at p. 2.

¹⁹ Conseil d'État, Ass. 7 juillet 2004, Ministre de l'Intérieur c. Benkerrou, n° 255136.

²⁰ R. v Barnsley MBC Ex p. Hook [1976] 1 W.L.R. 1052.

²¹ R. v Durham City Council Ex p. Robinson [1992] N.P.C. 5.

²² The Queen on the application of Birmingham and Solihull Taxi Association, Sajid Butt v Birmingham International Airport Limited [2009] EWHC 1913 (Admin); R. v. Barnsley Metropolitan Borough Council, ex p. Hook, [1976] 1 W.L.R. 1052 (C.A.); R. v. Basildon District Council, ex p. Brown (1981) 79 L.G.R. 655, The Times, February 24, 1981, see the opinion of Lord Justice Dunn that differs from that of Lord Denning and Lord Templeman; R. v. Wear Valley District Council, ex p. Binks [1985] 2 All E.R. 699; Horsnell v Boston BC [2005] EWHC 1311; Mercury Communications Ltd. v Director General of Telecommunications and Another [1996] 1 W.L.R. 48.

However as Arrowsmith has shown, there is a growing tendency to accept judicial review in cases involving licences.²³ Moreover Lord Herschell in *Boulter* (in this case licensing was made by justices of the peace) observed that the licence was a decision of the justices of the peace, it was not considered as a contract but as a privilege awarded in the public interest:

“The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the Court to enable it rightly to exercise its discretion whether to grant that privilege or not”.²⁴

For judicial review to be available in case of a termination of a licence an element of public law must be present. If it affects the common law right to trade in a market²⁵ or the right to trade in a public place, especially if the power is exercised under statutory authority,²⁶ such an element may be present because of the nature of the authority in question i.e. a public authority “established by statute to exercise statutory powers and perform statutory duties”.²⁷

These judgments seem limited to markets. However, a review of recent cases shows a growing tendency to see licences as public law instruments (i.e. administrative decisions). In a case involving public house licensing Lord Justice Toulson observed that:

“the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function”.²⁸

Lord Justice Mummery said in *Floe Telecom*:

“The decision of the national regulatory authority to grant a licence and the carrying out of that decision is an administrative act done under and in accordance with the law. A licence is obtained to do things that it is unlawful to do without that licence. It is the legal mechanism for authorising something which is required by the general law to be officially authorised”.²⁹

²³ S. Arrowsmith, “Judicial review and the contractual powers of public authorities” [Law Quarterly Review 1990, 277-292]; S. Arrowsmith, *Civil liability and Public Authorities*, Winteringham, South Humberside, Earls Gate Press, 1992, 85-89.

²⁴ *Boulter v The Justices of Kent* [1897] A.C. 556.

²⁵ *R. v. Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 1 W.L.R. 1052

²⁶ *Wear Valley District Council, ex p. Binks* [1985] 2 All E.R. “the licence was in essence one which permitted the applicant to trade in a public place and was distinguishable from licences relating to land to which the public did not have access. There was a public law element in the authority’s discretion in the licensing of street trading, which was recognised in the Local Government (Miscellaneous Provisions) Act 1980 Sch 4. These factors, together with the fact that the applicant depended on the business for her income, persuaded the court to hold that the rules of natural justice were applicable. The authority’s decision would be quashed accordingly”.

²⁷ *R. v. Basildon District Council, ex p. Brown*,. See also R. Ward, “Revocation of a Market Stallholder’s Licence” [The Modern Law Review, vol. 45, n°5, (sept. 1982), pp. 588-593]; S. H. Bailey, “Judicial review of contracting decisions” [Public Law, 2007, 444-463, 452].

²⁸ *Hope and Glory Public House Ltd, R v City of Westminster Magistrates Court & Ors* [2011] EWCA Civ 31 (26 January 2011), at para 41.

²⁹ *Floe Telecom Ltd v Office of Communications* [2009] EWCA Civ 47 at para 103.

But perhaps the clearest definition of the licence was given in the broadcasting sector.

Mr Justice Cranston refused to see that a licence could be assimilated to a private contract and said about the licensing function of Ofcom:

“In my view these licences are not contracts. A contractual analysis distorts their juridical character. The licences are public law instruments. They constitute statutory authorisation permitting the licensees to undertake activities that would otherwise be unlawful and, in this case, place them under particular obligations, breach of which exposes them to the risk of the imposition of statutory financial penalties or ultimately to revocation of the licences. In granting them, the licensing authority acts pursuant to its statutory duties and functions, and there is no intention to enter into any private law legal relations with the licensees. There is no express agreement between the parties in the contract sense. In the main the conditions in the licences are derived directly from statutory provisions”.³⁰

This solution was endorsed subsequently by the Competition Appeal Tribunal.³¹

With the development of administrative law in the United Kingdom there is a growing tendency among judges to explain very clearly what distinguishes a licence from a contract. The purpose of a licence is to authorize an unlawful activity. It is moreover a unilateral act and not a contract: it regulates only the conduct of the authorized person; it is not an exchange of consents.

b. Enforcement powers under the common law

In order to enforce licence conditions, public bodies can either revoke or suspend the licence in question. According to de Smith and Craig reviewing the authorities, licences are considered by judges as privileges and not as conferring any right. The decision to terminate the licence thus does not breach any right.³²

According to Lord Goddard

“the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. The licence is nothing but a permission, and, if a man is given permission to do something, it is natural that the person who gives the permission will be able to withdraw the permission”³³.

Similarly, Lord Griffiths has argued that

³⁰ Data Broadcasting International Ltd & Anor R (on the application of) v The Office of Communications [2010] EWHC 1243 (Admin) (28 May 2010), at para 88.

³¹ British Telecommunications Plc v Office of Communications (Partial Private Circuits) [2011] CAT 5, at para 197-198.

³² S. A. de Smith, *Judicial Review of Administrative Action*, Stevens, 3rd ed., 1973, p. 195; P. Craig, *Administrative Law*, Sweet & Maxwell, 2008, 6th ed, p. 374, para 12-006.

³³ R v. Metropolitan Police Commissioner; Ex p. Parker - [1953] 2 All ER 717, 719-720. See also per Lord Radcliffe in *Nakkuda Ali v. M. F. de S. Jayaratne* [1951] A.C. 66, 78.

“if the court concludes that the companies are not fit and proper persons to hold gaming licences, it is difficult to conceive of any grounds upon which it would be right to exercise a discretion not to cancel the licence”.³⁴

Lord Goddard has also opined that the power to suspend a licence is inherent to licensing schemes.³⁵

As a conclusion, it is possible to say that it derives from this analysis that the administrative enforcement of a licence in the United Kingdom and France is limited either to the termination or to the suspension of the licence. The description Jean-Marie Auby gives also applies here³⁶.

It is now possible to analyse the evolution of administrative enforcement in the utilities sectors having in mind how the jurisprudence in each countries treats these powers. Apart from the two measures mentioned, the administration has no other power and has to resort to criminal courts if it wants a financial penalty to be inflicted.

3. The developments of administrative enforcement in relation to utilities

In the United Kingdom since the creation of the Independent Television Authority in 1954³⁷, administrative enforcement has very much conformed to the above principles, i.e. administrative agencies had only a power to order the undertaking to respect the licence conditions and a power to terminate or suspend the license. These powers will hard to use in the context of utilities.

So regulatory authorities tried to use in general what is called “sunshine regulation” in order to force undertakings to comply with the law: instead of using their enforcement powers they tried to draw the public’s attention to the issues. By raising people’s awareness, undertakings felt a pressure to conform to their commitments. That’s how “sunshine regulation” worked. But this proved very ineffective indeed, especially in the field of broadcasting.

Thus it is first in broadcasting, with the Broadcasting Act 1990³⁸, that a power to inflict financial penalties was created. For neither the Telecommunications Act 1984 nor the Gas and Electricity Acts granted such a power. In these sectors (telecommunications and energy) the powers of the new Director Generals were limited to securing compliance with licence conditions by issuing an order. No other power was granted to the first agencies in the utilities to enforce licence conditions. Understandably, the powers to revoke or suspend the licence were never used.

This evolution, towards granting the power to inflict financial penalties, can be understood easily because of the nature of the sectors: the powers to terminate or suspend the license are

³⁴ Regina v Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd. and Another [1982] Q.B. 304, at p. 316.

³⁵ R v Metropolitan Police Commissioner, Ex p. Parker, 720.

³⁶ See J.-M. Auby, “Les sanctions administratives en matière de circulation automobile”, Dalloz, chron. XXV, 1952, pp. 111-118, note 1.

³⁷ See Television Act 1954 (chap. 55).

³⁸ See s. 41.

impracticable in the field of utilities. Would it be even thinkable to shut down electricity or water because of a breach of a licence condition?

The first French regulatory agencies in the 1980s (essentially in broadcasting) had only a power to issue an order demanding compliance and to revoke or suspend the licence. But given the impact of such decisions these sanctions were not used at all. Broadcasting was the first sector where Parliament granted in 1989 a power to inflict financial penalties.

The rise of financial penalties is therefore contemporaneous in both countries.

After having studied the power to enforce licence conditions, it is requisite to enquire into the power to settle disputes on questions of access.

1.2 DISPUTE RESOLUTION: THE EMERGENCE OF A NEW POWER

It is not easy to understand the creation of such a power. In the UK its creation was discrete for it was not contained in statute but in BT's licence (hence the problem of jurisdiction the Mercury case was confronted to).

This power is closely linked to the developments of the 1980s and the problem of reconciling competition and privatization: if you privatize the incumbent provider, the network becomes private property; if the network becomes private property the incumbent has a power to exclude new entrants and prevent competition from happening. Competition and privatization are two contradictory goals in the field of utilities. Dispute resolution comes as a solution.

In order to understand the history of such a power, one has to understand the conceptual revolution that happened in law and economics (1). The power of regulatory dispute resolution emerged in law sooner in France, it was in an unexpected sector: cinema (2).

1. The legal consequences of the economic revolution in the USA and its consequence in the UK

It is in the USA that the idea leading to a radical change in the regulation of utilities emerged. The United Kingdom and France regulated their utilities pretty much the same way: public property and monopoly were the common features of the regulation of utilities in both countries (except for water which has never been nationalized in France because it was regulated by the use of public procurement and public contracts). The USA never used public property (except in relation to mail). By contrast, monopoly was a common feature of all utilities on both sides of the Atlantic Ocean.

The use of monopoly to manage utilities came to be progressively put into question and severely criticized on several fronts in the USA: first, the economic idea of natural monopoly was criticized and completely reshaped, secondly, the use of licensing (that closes the market) and the regulation of prices were the objects of further attack.

The notion of natural monopoly emerged in the 19th century to serve as a justification for the failure of competition in utilities³⁹. It justified the monopoly and the role of the regulator as a protection of the monopoly.⁴⁰

³⁹ The definition of what a "natural monopoly" is given by economics: "An industry is characterized by natural monopoly when the number of inputs required to produce a good or service (and therefore the cost of production) is lower for a single provider than if the good or service were provided by a number of suppliers, and the single firm can satisfy all of the market's demand. This is generally so when production benefits from economies of scale and economies of scope. Economies of scale exist if the long - run average cost of production falls as the quantity of goods or services produced increases. They may exist when production requires a large fixed cost that is spread over the increasing units of output increases." (Okeoghene Odudu "natural monopoly", The New Oxford Companion to Law, P. Cane and J. Conaghan (ed), Oxford University Press).

⁴⁰ C. D. Foster, Privatization, public ownership and the regulation of natural monopoly, préc., p. XX; D. Custos, La Commission fédérale américaine des communications à l'heure de la régulation des autoroutes de l'information, Paris, Montréal, l'Harmattan, Coll. Logiques juridiques, 1999, at p. 333.

But economic studies undermined this justification for the monopoly showing that the domain of the effective monopoly became bigger than the domain of the real natural monopoly. In effect, utility companies further expended their monopoly to related activities but with no justification for the monopoly: for example, in the telecommunications sector, the telecommunications' monopolies had also, most of the time, a monopoly over telecommunications devices such as telephones. The notion of natural monopoly cannot justify this extension. The first conceptual attack was therefore to show that the effective monopoly differed from the natural one, undermining the justification for a monopoly.

Furthermore, new technological discoveries effectively undermined the monopoly. The railways had to compete with the road and in energy gas had to compete with oil⁴¹ so that, on the whole the natural monopoly was not so natural after all.

Economists also put into question the justification of licensing and price regulation. Licensing has the effect of closing the market and undermines completely effective competition. Price regulation is also attacked because of the formula used: rate of return regulation was criticized by Kahn who preferred the use of the marginal cost formula.⁴²

This change of formula (from rate of return to marginal cost prices) is far from neutral. It signals that the role of the public authorities when setting prices should no longer take into account principles of fairness and reasonableness but to mimic the effect of the market.

These criticisms can be explained because of the revolution economics underwent during these years. It was at this moment that economists began to rethink the nature and the role of the market. The notion of market contestability changes radically the role of the market in the utilities.

The paradigm that explained economic thinking and the justification for monopoly was the paradigm of the perfect market, of pure and perfect competition. In this model, where the market fails the State can intervene and a monopoly can be justified. During these years (70's and 80's), William J. Baumol, John C. Panzar and Robert D. Willig showed that a market does not have to be perfect to produce its full effect and police the conduct of companies. The important thing is that the market has to be contestable.⁴³ Hence licensing is doomed to be attacked: a licensing scheme is a legal impediment to a perfectly contestable market.

So it is argued that public policy has to move away from its previous goal (protecting the monopoly) to a new aim: making the market as contestable as possible. State's action changed its objective in order to promote all the necessary policies to make markets as contestable as possible.

This had two legal consequences. First, legal rules that diminish contestability have to be abolished and, in this respect, both licensing and price regulation are severely criticized.

⁴¹ See A. E. Kahn, *The Economics of Regulation*, vol. I, at p. 64.

⁴² A. E. Kahn, *The Economics of Regulation*, vol. I, p. 65. On Kahn's role see T. K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*, Belknap Press of Harvard University Press, 1984, p. 223-224.

⁴³ W. J. Baumol, J. C. Panzar, R. D. Willig, *Contestable Markets and the Theory of Industry Structure*: see the essays by E. E. Bailey, D. Fischer, H. C. Quirnbach, New York, London, Harcourt Brace Jovanovich, 1982. See also H. Demsetz, *Why Regulate Utilities?*, *Journal of Law & Economics*, Apr. 1968, vol. 11, pp. 55-65).

Licensing effectively closes the market and price regulation prevents new entrants from practising lower prices.

Secondly, public policy has to be aimed at favouring contestability. This means that in the utilities sectors all barriers to entry should be removed and that barriers to exit the market should not be not high. As far as barriers to entry regulators should favour new entrants and license them. The problem has more to do with the barriers to exit the market. In the utilities sectors investments in the network are so high that they become sunk costs if the new entrant fails to compete effectively with the incumbent. Public policy should therefore be aimed at reducing sunk costs. As it would be unpracticable to duplicate infrastructures, the State should ensure that their possession are neutral.

In this respect, dispute resolution whose purpose is to grant access to the network, aims at neutralising network effects and advantages. Regulatory dispute resolution can be understood as a way to share the network. Thanks to the legal device, duplication of the network becomes unnecessary and the possession of the network becomes neutral because a new entrant can always resort to the regulator to grant it access to the network.

That's how economics can help understanding this new power. It remains to be explained how this power developed in law. In law dispute resolution is linked with the notions of interconnection and access. Interconnection is about connecting two networks so that one person belonging to one network can for example call someone else from another network. Access is more difficult. Access is about allowing a new entrants to compete on your network. When a new entrant is granted access consumers can choose their provider. Dispute resolution is very much linked with the notion of access that was recognized in law only in the 90's.

The notion of interconnection is old and it was easy to understand that networks had to be interconnected in order to produce their full effects. In the UK the two competing companies in telecommunications BT and Mercury had to interconnect their networks so that a client from one company could call the client of the other. This was not hard to admit. The notion of access was harder to accept and that's why regulatory dispute resolution really emerged late.

It was really in the 1990s in the USA and in the United Kingdom that the notion of access emerged. Whereas the notion of interconnection did not raise any issue, the notion of access was harder to accept because it really meant a breach of the incumbent's right of property on its network. Access meant that incumbents had to open their network so that their competitors could access their clients and compete with them through their property.⁴⁴

The "duopoly review" the government made at the beginning of the 1990s was a response to the will to end the situation of duopoly (BT and Mercury) and to really open the market to competition⁴⁵ because the two new operators seemed ready to answer this challenge. It was also a response to the policies at international level to open the telecommunications market to competition. The European Community⁴⁶, the USA, Japan began a liberalization movement and, furthermore, technological progress in these fields made the policy all the more

⁴⁴ E. Noam, *Telecommunications in Europe*, New York, Oxford, Oxford University Press, 1992, at chapter 41 and 42.

⁴⁵ Competition and choice: telecommunications policy for the 1990s, préc., p.4.

⁴⁶ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services OJ 1990 L192/10.

necessary⁴⁷. Finally, the GATT became interested in liberalizing telecommunications at an international level.

The real legal change came in the 1990s with the emergence of the notion of access. The change of the international landscape and especially the will to open telecommunications markets to competition within the framework of the GATT can explain this shift. At the same time the UK announced its will to end the duopoly (BT and Mercury) and open the market to competition.

Up until this period (even in the USA) the idea of natural monopoly was still prevalent (and explained that in the AT&T judgement the local loop⁴⁸ was not opened to competition). Even in the UK, competition in the 1980s did not concern this segment. The 1990s were concerned with full competition on all the segments of the network. On 24 September, a new condition was introduced in BT's licence to the effect that BT had to offer equal access so that every client can effectively choose the telecommunications provider it wants.

The reflection on the need to equip the Director Generals with a function to settle disputes about access questions came naturally with these developments. This function is seen as a guarantee for competitors that they would not suffer from unfair practices by BT.⁴⁹ Similarly in the railways sector this function appears.⁵⁰

So, at the beginning of the 1990s in the United Kingdom the power to settle disputes begins to take shape. It is not theorized nor systematised but one can understand that it is linked to the notion of access (it is now accepted that incumbent network providers have to give access to their network in order for competition to emerge). There is no debate that the regulator should undertake this function.

2. The emergence and development of a dispute resolution function on question of access in France

It was not expected that an administrative function to settle disputes on a question of access in France would emerge in the cinema sector.

The Cinema Mediator was created by an Act of Parliament enacted on 29 July 1982. We have not found any equivalent in any other country of this body.

The creation of this institution was obscure. However in the 1970s an important litigation occurred between independent movie theatres owners and film distributors. The latter sometimes refused to provide some movies in order to reserve them for their theatre network.

The former brought their case before the Competition Commission alleging that the latter had engaged in concerted practices and abuses of dominant positions. In an advice dated 28 June

⁴⁷ See Report of the Committee on Financing the B.B.C., A. Peacock, 1985/86, Cmnd. 9824 ; Duopoly Review, n° 4.11 and chap. 5, p. 20).

⁴⁸ The local loop is the last part of the network. It is the physical link between the subscriber terminal and the switching exchange (A Dictionary of Computing in Computing).

⁴⁹ Department of Trade and Industry, Competition and choice: Telecommunications policy for the 1990s, 1990/91, Cm 1461 at n°7.15.

⁵⁰ See Railways Act de 1993, schedule 4: "Access agreements: applications for access contracts".

1979 the Commission criticized the practices, recommended the adoption of competition law remedies and the drafting of a code of conduct governing the relations between the two parties. The Commission did not have the power to issue a binding decision at that time. It had only an advisory role and it was the Minister for the Economy which could take ultimately binding measures.

The decision of the Minister was in line with the recommendations of the Commission. A growing awareness of the need to establish fair relations and to put an end to the anti-competitive practices in the sector explains the beginning of reflection in the industry. The idea to establish a Mediator (an ombudsman) emerged at the beginning of the 1980s, and the Competition Commission recommended in 1982 that the Mediator should be equipped with a power to settle the disputes between the members of the industry. But the Commission did not recommend that the Mediator should have a power to issue binding decisions.

The creation of an ombudsman with the power to settle dispute using a legal power was slow and the legal power of the ombudsman was granted during the discussion in Parliament by an amendment to the bill. Parliament wanted to equip the institutions with sufficient legal authority to carry out its task with as much effectiveness as possible.

The power to settle disputes in the cinema industry was created pragmatically. It seemed the most practical answer to the anti-competitive practices in place in the industry. The same power was introduced but later in the telecommunications sector and more discretely. No independent regulator was established; the task was undertaken by the Minister. In France, it was the implementation of the European Directives in telecommunications and energy that prompted the creation of independent regulators to carry out the task of resolving disputes.

The second stage of the history of regulatory enforcement in the United Kingdom and France is concerned with international developments. The GATT and the EU became in the 1990s the main forums for liberalization and further conceptualized the need to equip regulators with enforcement powers.

1.3 THE INTERNATIONALIZATION OF REGULATORY REMEDIES: AN INCREASINGLY INTERNATIONAL AND EUROPEAN POWER

The role of the GATT will be studied first, before analysing the relevant EU provisions.

1. The role of the GATT

The role of the USA in promoting liberalization of telecommunications is apparent from its pursuit of this goal within the GATT and NAFTA.⁵¹ But the introduction of telecommunications within the framework of the Uruguay Round was slow.⁵²

An ad hoc group was constituted in 1994 at the Marrakech summit⁵³ whose agenda was to arrive at a consensus by 1996. The negotiations failed in 1996 but eventually succeeded one year later, a document was signed called the WTO reference paper on basic telecommunications⁵⁴. This document is concerned with related regulatory issues.⁵⁵

The document requires States to establish independent regulatory authorities for telecommunications:

“The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions and the procedures used by regulators shall be impartial with respect to all market participants”.⁵⁶

It also requires States to establish a dispute resolution scheme:

“A service supplier requesting interconnection with a major supplier will have recourse, either: (a) at any time or (b) after a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates

⁵¹ I. H. Shefrin, “The North American Free Trade Agreement Telecommunications in perspective”, *Telecommunications Policy*, January/February 1993, 14-26. Chapter 13 of the Agreement is about telecommunications; S. Globerman, P. Booth, “The Canada-US Free Trade Agreement and the telecommunications industry”, *Telecommunications Policy*, December 1989, 319-328.

⁵² M. Bronckers, P. Larouche, *The World Trade Organization: Legal, Economic and Political Analysis*, Springer US, 2007, Part II, B, 989-1040.

⁵³ The Negotiating Group on Basic Telecommunications (N.G.B.T.): P. Holmes, J. Kempton, F. McGowan, “International competition policy and telecommunications Lessons from the EU and prospects for the WTO”, *Telecommunications Policy*, 1996, vol. 20, n° 10, 755, 763-764.

⁵⁴ W. J. Drake, E. M. Noam, “The WTO deal on basic telecommunications Big bang or little whimper?”, *Telecommunications Policy*, 1997, vol. 21, n° 9/10, 799-818.

⁵⁵ C. Blouin, “The WTO Agreement on Basic Telecommunications: a reevaluation”, *Telecommunications Policy*, vol. 24, 2000, 135-142, 139; M. Fredebeul-Krein, A. Freytag, “Telecommunications and WTO discipline An assessment of the WTO agreement on telecommunication services”, *Telecommunications Policy*, 1997, vol. 21, n° 6, 477-491, 480-481.

⁵⁶ At § 5. Rachel Frid, “The Telecommunications Pact Under the GATS—Another Step Towards the Rule of Law”, 1997, vol. 24, n° 2, *Legal issues of economic integration*, 67-96, 87.

for interconnection within a reasonable period of time, to the extent that these have not been established previously".⁵⁷

The European negotiations and the establishment of the first Directives in telecommunications can be understood only with reference to this international background. The dispute resolution scheme in telecommunications in the 1997 Directive⁵⁸ and the Telecommunications Act 1996 in the USA implement the GATT provisions. The same can be seen in aviation. Directive 2009/12/EC of the European Parliament and of the Council of 11 March on airport charges also provides for a dispute resolution mechanism on airport charges that is an implementation of a recommendation made by the International Civil Aviation Organization (ICAO).⁵⁹

But it is at the European level that the dispute resolution function is systematised and imposed.

2. The role of the European Union: an increasing interest in the enforcement powers of regulatory authorities and a possible emergence of such a function at European level?

The European Union became first interested (understandably) by the dispute resolution function of regulatory authorities in order to ensure access to the networks and effective competition. The interest in administrative repression came later.

In Europe, the Maastricht Treaty gave a new impetus to market integration in the field of utilities. It effectively gave a new and firm legal basis to the European Commission policy:

“the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. Within the framework of a system of open and competitive markets, action by the Community shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks”.⁶⁰

⁵⁷ V. At §2.5. L. Tuthill, “The GATS and new rules for regulators”, Telecommunications Policy, 1997, vol. 21, n°. 9/10, pp. 783 798, at p. 794.

⁵⁸ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) OJ 1997 L199/32.

⁵⁹ See ICAO documents: Conference on the Economics of Airports and Air Navigation Services, Montreal 19-28 June 2000 (ANSCConf 2000): <http://www.icao.int/icao/en/atb/meetings/2000/ansconf2000/index.html>. The relevant working papers discussed at the Conference on dispute resolutions are : WPs 12, 26, 46 and 91. The report of the Conference is WP/115, available here: <http://www.icao.int/icao/en/atb/meetings/2000/ansconf2000/docs/wp115e.pdf> (dispute resolution is part of Agenda Item 4). The paragraph on “First resort mechanism” for dispute resolution appears for the first time in Doc 9082 in its sixth edition (2001), as recommended by ANSCConf 2000.

⁶⁰ Maastricht Treaty, article 129b on “trans-european networks” provides: “1. To help achieve the objectives referred to in Articles 7a and 130a and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting up of an area without internal frontiers, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. 2. Within the framework of a system of open and competitive markets, action by the Community shall aim at promoting the interconnection and inter-operability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Community.”

This led the way to the various directives and especially to Directive 97/33/EC⁶¹ that establishes, firmly, a power to settle interconnection and access disputes in telecommunications. The power was confirmed in later directives⁶² and extended to the electricity⁶³ and gas⁶⁴ sectors as well as airports⁶⁵ sometimes in a less clear way⁶⁶.

Concerning administrative penalties, EU Directives at first did not provide explicitly that NRA should be equipped with a power to impose financial penalties. The early directives provided that NRAs should monitor the development of the sector and should be able, where necessary, to order an undertaking to stop breaching a condition of its licence. Directives do not really provide for a sanctioning power.

However, in 2002, recital 27 of the Authorisation Directive explains that:

“The penalties for noncompliance with conditions under the general authorisation should be commensurate with the infringement. Save in exceptional circumstances, it would not be proportionate to suspend or withdraw the right to provide electronic communications services or the right to use radio frequencies or numbers where an undertaking did not comply with one or more of the conditions under the general authorisation”⁶⁷.

But article 10 (3) of this directive shows that granting a power to impose financial penalties on NRAs is still a faculty and not an obligation:

“Member States may empower the relevant authorities to impose financial penalties where appropriate”.

⁶¹ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), article 9(5): “In the event of an interconnection dispute between organizations in a Member State, the national regulatory authority of that Member State shall, at the request of either party, take steps to resolve the dispute within six months of this request. The resolution of the dispute shall represent a fair balance between the legitimate interests of both parties”.

⁶² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), article 20. An important report was commissioned and explains the importance of dispute resolution: “The proposals in this chapter rely on the idea that negotiation will gradually take over from regulation as the basis for determining interconnect service supply conditions. This makes it especially important that the negotiation process works well. But a significant number of respondents, both entrants and incumbents, report that the current negotiation and dispute resolution processes do not work efficiently and that these problems will persist in the long term” (Ovum, D. Lewin, D. Rogerson, A review of the Interconnect Directive - A final report to the Information Society Directorate, October 1999, at para 4.13).

⁶³ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, article 20(3) as amended by article 23(5) of Directive 2003/54/EC.

⁶⁴ Directive 2003/55/EC, article 25(5).

⁶⁵ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (Text with EEA relevance), article 11.

⁶⁶ In the railways sector see: Directive 2001/14/EC, article 30(2): “An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager”.

⁶⁷ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive).

In 2009, the directives relating to electronic communications and energy recognized the necessity to grant NRAs a power to impose financial penalties. Thus “May” becomes a “Shall”:

“Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented”.⁶⁸

This change was prompted by an economic study commissioned by the Commission and entitled “An Assessment of the Regulatory Framework for Electronic Communications – Growth and Investment in the EU e-Communications Sector”⁶⁹ showed that administrative penalties had a positive effect on regulatory certainty, which in turn had a positive effect on investment. That’s why recital 51 explains these results thus:

“Experience in the implementation of the EU regulatory framework indicates that existing provisions empowering national regulatory authorities to impose fines have failed to provide an adequate incentive to comply with regulatory requirements. Adequate enforcement powers can contribute to the timely implementation of the EU regulatory framework and therefore foster regulatory certainty, which is an important driver for investment. The lack of effective powers in the event of noncompliance applies across the regulatory framework. The introduction of a new provision in Directive 2002/21/EC (Framework Directive) to deal with breaches of obligations under the Framework Directive and Specific Directives should therefore ensure the application of consistent and coherent principles to enforcement and penalties for the whole EU regulatory framework”.

So independence is no longer the sole driver of investment. Administrative penalties are now part and parcel of regulatory design for utilities in the EU.

This evolution can be also seen in the energy sector. Whereas the 2003 directives do not concern themselves with enforcement powers the “2009 package” in electricity and gas provides explicitly for such a power. Recital 37 of the electricity directive says that:

“Energy regulators should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them”.⁷⁰

But in this case, the directive leaves to the Member States the possibility to grant this power to a court of law. A similar evolution can be seen in the gas sector.⁷¹

This evolution in the energy sector can be explained by the impact assessment carried out by the European Commission. The European Commission clearly wanted to enhance the role of national regulators by increasing their powers because “market functioning should also benefit from strong, independent regulators, helping to boost the EU competitiveness in line

⁶⁸ Directive 2009/140/EC, article 21a.

⁶⁹ An Assessment of the Regulatory Framework for Electronic Communications – Growth and Investment in the EU e-Communications Sector », Final Report To The European Commission DG Information Society and Media By London Economics In association with Pricewaterhouse Coopers, July 2006, passim..

⁷⁰ Directive 2009/72/EC. See also article 37(4) of the same directive.

⁷¹ Compare Directive 2003/55/EC and Directive 2009/73/EC.

with the Lisbon strategy”⁷². Moreover “strengthened regulator powers may decrease market distortions resulting in more competitive energy markets”.⁷³

The second step is to equip newly created European agencies with these powers. The power to settle trans-border disputes is for the time being resolved by ad hoc provisions in the relevant Directives. Two types of rules are used: either the directives provide for the co-ordination of the NRAs or they provide for a mechanism to resolve jurisdictional conflicts between two or more NRAs.

In relation to electronic communications the directives provide that “any party may refer the dispute to the national regulatory authorities concerned”. In order to promote harmonization in the enforcement of EU law, the directive further says “The competent national regulatory authorities shall coordinate their efforts and shall have the right to consult BEREC in order to bring about a consistent resolution of the dispute”.⁷⁴ If an NRA decides to consult BEREC then the resolution of the dispute is suspended until the European agency has given its opinion.

A mechanism of cooperation under the supervision of a European agency was also chosen for the energy sector. This provides:

“Regulatory authorities shall closely consult and cooperate with each other, and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks” on cross-border issues.⁷⁵

These agencies are new, and they have not yet decided their procedures nor settled any disputes. In energy, it is also envisaged that ACER may have to intervene in some circumstances:

“For cross-border infrastructure, the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only: (a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities; or (b) upon a joint request from the competent national regulatory authorities”.⁷⁶

The provisions for ACER seem to give this agency a real legal (i.e. binding) power of decision. However BEREC, in the field of electronic communications seems to have only a power of recommendation, of a non-binding character:

⁷² Commission staff working document accompanying the legislative package on the internal market for electricity and gas (COM(2007) 528 final, COM(2007) 529 final, COM(2007) 530 final, COM(2007) 531 final, COM(2007) 532 final, SEC(2007) 1180), Impact Assessment, at p. 45.

⁷³ Ibidem.

⁷⁴ Directive 2009/140/EC, article 21(1) and (2). Draft BEREC report on cross-border issues under Article 28 USD, Public Consultation, 9 December 2010 – 13 January 2011, BoR (10) 62, at p. 28.

⁷⁵ Directive 2009/72/CE, article 38 (electricity); Directive 2009/73/CE, article 42 (gas).

⁷⁶ Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, article 8(1). ERGEG, European Energy Regulators welcome the Commission’s Communication on Infrastructure, Press Release (PR-10-09).

“The tasks of BEREC shall be (g) to be consulted and to deliver opinions on cross-border disputes in accordance with Article 21 of Directive 2002/21/EC (Framework Directive)”.⁷⁷

In conclusion, it seems that international law has played an important part in strengthening the enforcement and dispute resolution powers of regulatory authorities. However it remains unclear as to what the powers of the European agencies will be in the future.

⁷⁷ Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, article 3(1).

1.4 THE FURTHER EXPANSION OF REGULATORY REMEDIES IN THE UNITED KINGDOM AND FRANCE

International law and economic discourse has firmly established the legitimacy and importance of regulatory powers. Both dispute resolution and enforcement powers will be developed and refined. However, there are some differences between the two countries, especially as far as dispute resolution is concerned.

1. Administrative repression: dramatic expansion

In English law, the explosion of administrative repression in the 2000s is impressive. Whereas administrative penalties were barely known previously in the country, these years have seen an impressive development of this power. Utility regulators will progressively be equipped with powers to inflict financial penalties under the Communications Act 2003⁷⁸ and in relation to the energy⁷⁹, mail⁸⁰ and water sectors⁸¹.

But this trend is not limited to the sectors under study and should be placed in the broad picture that makes administrative repression a new feature of the English Constitution. The Macrory Report was very influential in showing that Courts were less effective than administrative bodies and that, therefore, the power to inflict penalties should be transferred from the Courts to the regulators⁸².

The Regulatory Enforcement and Sanctions Act 2008 is the emblematic statute in this respect.⁸³ Schedule 6 gives a list of the sectors concerned by the decriminalisation process (i.e. offenses are no longer criminal offense sanctioned by criminal courts but offenses sanctioned by administrative bodies): for the United Kingdom 142 acts are concerned and 141 for Wales⁸⁴. The most striking feature is that the power to decriminalize was awarded to ministers and not to Parliament. They can make orders providing for civil sanctions of many kinds: fixed monetary penalties⁸⁵, discretionary requirements⁸⁶, stop notices⁸⁷. Licensing⁸⁸, environment⁸⁹, consumer protection⁹⁰ are concerned also.

⁷⁸ Communications Act 2003, article 96.

⁷⁹ The Utilities Act 2000 amends the Electricity Act 1989 (new article 27A) and the Gas Act 1986 (new article 30A) in order to give the newly established Gas and Electricity Markets Authority (Ofgem) a power to impose financial penalties.

⁸⁰ Postal Services Act 2000 (c. 26), section 30. The 2011 Act transfers all the powers of Postcomm to Ofcom.

⁸¹ Water Act 2003, section 47 and 48.

⁸² R. Macrory (2006) Regulatory Justice : Making Sanctions Effective Final Report, Macrory Review, Cabinet Office, London.

⁸³ Regulatory Enforcement and Sanctions Act 2008 (c 13). See R. Macrory, "Reforming regulatory sanctions - a personal perspective", Environmental Law Review, 2009, pp. 69-74; C. Abbot, "The Regulatory Enforcement and Sanctions Act 2008", Environmental Law Review, 2009, pp. 38-45.

⁸⁴ Regulatory Enforcement and Sanctions Act 2008, schedule 6.

⁸⁵ Regulatory Enforcement and Sanctions Act 2008, part 3, section 39.

It has been argued that deregulation has in fact lead to an explosion of regulations.⁹¹ It has also in practice entailed a surge in administrative repression.

The evolution is not as clear-cut in France although now all utility regulators have a power to inflict financial penalties.

The main difference between the two countries lies in the extent to which dispute resolution is relied upon.

2. Dispute resolution: expansion and divergence between the United Kingdom and France

After the creation of this function in relation to the cinema industry, the subsequent implementation of EC directives has led the French Parliament to grant such a power to all utility regulators in the electronic communications⁹², mail⁹³, electricity⁹⁴, gas⁹⁵ and finally rail⁹⁶ sectors.

Similarly in the UK such a power has been granted officially to Ofcom⁹⁷ and Ofgem⁹⁸ and to the Office of the Rail Regulator⁹⁹. In the Mail sector, however, provisions for such a power was only made in 2011. Previously, the power was in Royal Mail's licence¹⁰⁰.

⁸⁶ Regulatory Enforcement and Sanctions Act 2008, section 42.

⁸⁷ Regulatory Enforcement and Sanctions Act 2008, section 46.

⁸⁸ Licensing Act 2003.

⁸⁹ Environment Act 1995 (c. 25), section 110.

⁹⁰ Consumer Protection Act 1987 (chap. 43), Part II Consumer Safety, section 12.

⁹¹ S. K. Vogel, *Freer markets, more rules: regulatory reform in advanced industrial countries*, Cornell Studies in Political Economy, Cornell University Press, 1998.

⁹² La loi n° 96-659 du 26 juillet 1996 de réglementation des télécommunications (JORF n°174 du 27 juillet 1996, pp 11384-11397).

⁹³ La loi n° 2005-516 du 20 mai 2005 relative à la régulation des activités postales.

⁹⁴ V. La loi n° 2000-108 du 10 février 2000 relative à la modernisation et au développement du service public de l'électricité (JORF n°35 du 11 février 2000, pp. 2143-2159), article 38.

⁹⁵ V. La loi n° 2003-8 du 3 janvier 2003 relative aux marchés du gaz et de l'électricité et au service public de l'énergie (JORF du 4 janvier 2003, pp. 265-278), article 13.

⁹⁶ Loi n° 2009-1503 du 8 décembre 2009 relative à l'organisation et à la régulation des transports ferroviaires et portant diverses dispositions relatives aux transports (JORF n°0285 du 9 décembre 2009, p. 21226), article 16.

⁹⁷ Communications Act 2003, sections 185-191. See also J. Hulsmann, H. James, "Communications regulation - Armed for action: complaints to Ofcom under the UK's new regime", *Competition Law Insight*, November 2003, 18-23.

⁹⁸ The Utilities Act 2000 amends the Electricity and Gas Acts in order to grant the regulator such a power: Electricity Act 1989, section 23 and Gas Act 1986, section 27A.

⁹⁹ Railways Act 1993, schedule 4 entitled "Access agreements: applications for access contracts".

Despite this apparent convergence, the United Kingdom and France use this power differently. The United Kingdom has shown a coherent and above all consistent approach to this power: it is now extended and limited to all utilities. Even water is concerned.

However in France, dispute resolution on access has expanded to various areas. As we saw it did not begin its entry into the legal system in utilities but in the cinema business. It has now been extended to areas where it is felt that bargaining powers are too unbalanced such as broadcasting or copyright.

Water cannot be concerned in France because it is dealt with at local level by a system of public procurement and public contracts. As Chadwick remarked in the 19th century France chose in the water sector competition for the market over competition in the market¹⁰¹.

In broadcasting, the creation of such a power followed the introduction of the Digital terrestrial television. Channels from cable and satellite lobbied the government in order to introduce such a procedure in order to counterbalance the power of the providers that own the networks. The underlying objective was to establish fair commercial relations in this sector and ensure that providers did not abuse their position because they own the network and are therefore able to negotiate conditions that would compromise the viability of the channels. Such a power would also bolster pluralism in broadcasting was erected as a constitutional principle by the Constitutional Council. If providers are able to decide the future of the channel this could, in the long run, be a threat to a diversity of the broadcasting landscape.

In copyright the rationale was different. The dispute resolution procedure aims at giving access to a property but the goal is to balance the rights of copyright owners to protect their creation with technical measures and the right of private copying. The regulator established was granted a power to settle disputes in this field and to order copyright owners to give access to the content for the sake of private copying. The goal of this legislation is not fair competition as it is in other sector, rather it is concerned with access to property and constraining private power stemming from property rights.

In conclusion, the situation in both countries can be summarized thus. Whereas France and the United Kingdom shared the same principle of licence enforcement, refusing to grant public bodies with powers to inflict financial penalties, their legal system has changed radically. Criminal law is now in competition with administrative law in the field of repression. In the UK as well as in France a change has occurred and it now seems common to grant powers to inflict financial penalties to public bodies.

As far as dispute resolution is concerned the scope of the power is different in both countries. The United Kingdom chose a very consistent approach to this power whereas France chose to extend it in order to ensure commercial fairness in sectors where the bargaining power is really unequal due to the existence of an essential facility.

¹⁰⁰ See Royal Mail licence (Part 1 of Condition 9 of Royal Mail's licence). Postal Services Act 2011, Schedule 3, Part 2, section 13.

¹⁰¹ E. Chadwick, "Results of Different Principles of Legislation in Europe: Of Competition for the Field as Compared with Competition within the Field of Service" *Journal of the Royal Statistical Society*, series A22, 381–420 (1859).

CHAPTER 2: ADMINISTRATIVE ENFORCEMENT: THE ENGLISH AND THE FRENCH TRADITIONS AND CURRENT DEVELOPMENTS

We have studied so far how, why and to what extent English and French Parliaments decided to grant and extent enforcement powers of every sort (both of a civil and a criminal nature) to regulatory authorities. We have seen how enforcement of licences was traditionally conceptualised differently in both countries, licences being thought of as contracts or privileges up until recently in England whereas they were and are held to be administrative unilateral decisions in France. Administrative bodies in charge of enforcing licences had only a power to revoke or suspend the licence in the two countries; it is only recently that a power to fine has been granted to them. Previously this power could only be used by criminal courts.

We need therefore to understand the position of the law as to enforcement in both countries. Why, on which grounds was the administration prevented from enforcing its own acts and had to resort to the judge. We will start using the common understanding of this problem in comparative administrative law scholarship. Goodnow had showed that two models existed: one where the administration could enforce its own regulations and one based on Courts intervention. This presentation is clear and exact. It is the position at common law. However, we will see that Goodnow and Schwartz after him misunderstood French law.

We will see that although France and the United Kingdom started from similar administrative law principles the constitutionalization of the French legal order lead to a completely different outcome. The Constitutional Council in France established a strict framework for administrative penalties: Parliament is limited in its power to establish administrative penalties and Parliament has to provide for sufficient guarantees (rights of the defence, principle of legality, proportionality, etc.).

Finally concerning dispute resolution, the case law is rare. Although it seems clear that without parliamentary authority, administrative bodies cannot interfere with property rights and the freedom of contract, judges have not been reluctant to admit that regulatory authorities could wield such powers. The Constitutional Council in France, and in the common law the US Supreme Courts did not see any principled objection to this power.

We will begin by an examination of both models in order to have a clear intellectual framework to think about the English and French situations as regards administrative enforcement (2.1). We will then examine to what extent administrative law principles regarding administrative enforcement result in similar results in England and France (2.2). We will then proceed by studying the contemporary developments. The divergence lies in the fact that the Constitutional Council in France established a clear framework for administrative penalties (2.3). The next step will be to analyse the international judges answer to administrative penalties: what is the position of the ECJ or the ECt HR? (2.4). We will end by briefly showing the jurisprudential silence surrounding the rise of dispute resolution on access (2.5).

2.1 COMPARATIVE PERSPECTIVES ON ADMINISTRATIVE ENFORCEMENT: COMMON LAW V CONTINENTAL LAW TRADITIONS

In the common law scholarship, the position of the different legal systems as regards administrative enforcement has been very well exposed and explained by Goodnow and Schwartz. Their studies provide a clear and useful way to understand the English and French positions.

Goodnow asks the right question: when Parliament or an administration has passed a statute, a regulation or made an adjudication, the legal command contained in these documents shall be executed. The question is then: how each legal system ensures that the law shall be executed. Goodnow devotes interesting developments on the “means of execution” of the will of the State. He contrasts two methods for executing the will of the State in comparative administrative law: “In general there are two methods of executing the will of the state. Either the administration may proceed of its own motion to the execution of its orders by the use of the proper means, subject to the control of the courts, which may, on the instance of the individual, affected by its action, interfere to protect his rights; or it is necessary for the administration to apply to the courts in the first instance to enforce its orders. The latter method is the usual one in the United States and England, although there are cases even in those countries in which the administration may proceed without having recourse to any other authority; while the former method seems to be the rule upon the continent”.¹⁰²

For Goodnow the reason for the common law rule lies in the history of the justices of the peace. This local institution combined administrative and judicial functions and, while they were progressively stripped off their administrative function, they retained the monopoly over legal enforcement. Although this explanation may have some appeal. We will show further one that Goodnow silences the main reason for this: the consequence of the principle of the separation of power on enforcement. The separation of power can be interpreted both in terms of separation and specialisation: criminal courts should have the monopoly for enforcing the law.

Goodnow contrasts this rule, the separation between regulation, adjudication and enforcement that he calls the “English method of executing the will of the state”, with the direct execution of administrative orders which “is the rule on the continent”. The choice of administrative enforcement on the continent is accounted for by the greater separation of administrative and judicial functions, the greater trust in the administration and the feeling that efficiency can justify this combination.

This dichotomy is intellectually correct. Bernard Schwartz uses the same categories. His account of the Anglo-American v French systems is the same as Goodnow’s: “In the Anglo-American world administrative action depends for its enforcement on sanctions imposed by the courts. Penalties for disobedience are imposed by the courts, which are thus the ultimate enforcers of administrative action. In France... all decisions of the French administration are effective at once, and those to whom they are directed must comply with them or suffer the legal consequence entailed by failure to comply... In France as in most Continental countries,

¹⁰² F. J. Goodnow, *Comparative administrative law, an analysis of the administrative systems, national and local, of the United States, England, France and Germany*, G. P. Putnam, 1893, Book II, at p. 123-124.

the administration has always been vested with authority directly to execute its own decisions, by force if need be”.¹⁰³

The classical account of models of legal enforcement contrast two systems: the common law system, or the “English method” as Goodnow says, where enforcement is in principle ensured by Courts and the continental system where the administration can impose penalties for the enforcement of its regulation on its own motion.

We need to look closer at each system in order to put into question this classical account, as far as France is concerned.

¹⁰³ B. Schwartz, *French administrative law and the common-law world*, New York University Press, 1954, at pp. 103-104. See also N. N. Ghosh, *Comparative administrative law, with special reference to the organization and legal position of the administrative authorities in British India*, Calcutta, Butterworth & co., 1919, at p. 590.

2.2 FRENCH AND ENGLISH ADMINISTRATIVE LAW TRADITIONS: A CONVERGENCE OF THE SOLUTIONS

After having exposed the English tradition of court-based enforcement and explained its bases (1) we will inquire into the French law on enforcement (2). We will show how Goodnow and Schwartz's accounts misunderstood the French law on enforcement.

1. English tradition exposed

The English tradition was clearly exposed in a report by the Select Committee on the Constitution. The discussion of the Regulatory Enforcement and Sanctions Bill was the occasion for the Committee to explain the English tradition on enforcement.¹⁰⁴

In a paragraph entitled "Civil sanctions v. Prosecutions in the Ordinary Criminal Courts", the Committee first acknowledged that the phenomenon of administrative sanctions was not completely new in the United Kingdom: the Competition Act 1998, the Financial Services and Markets Act 2000 for example gave administrative bodies the power to impose monetary penalties on private companies.

However, the Committee, very interestingly, expresses concerns that the accumulation of statutes is "part of a more general retreat from reliance on the criminal justice system alone as a means to control wrongdoing". This retreat goes against the "core meaning of the rule of law" in England that A.V. Dicey exposed clearly: "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".¹⁰⁵

The Committee continues and says that "although many aspects of Dicey's account of the rule of law are now contested, this passage in our view continues to provide a powerful reminder of the importance of the role of ordinary courts, rather than the executive, in dispensing justice and punishment".

What is the basis of this principle of the rule of law? Why is enforcement in England entrusted solely to Courts?

It seems to us that the rejection of administrative enforcement in England lies not so much in the role of justices of the peace as in the judges' fight against the executive. Coke provides the first explanations. His judgements are the first to say that the executive should not interfere in enforcement actions. *Prohibitions del Roy* and the *Bonham's* case provide two foundations for the rejection of administrative enforcement.

In *Prohibition del Roy* several rules are laid down to the effect of preventing the King from interfering in the judicial sphere and especially in inflicting penalties. First Coke says that the King can no longer "adjudge any case, either criminall, as Treason, Felony, &c. or betwixt party and party, concerning his Inheritance, Chattels, or Goods... but this ought to be

¹⁰⁴ See Select Committee on Constitution First Report, at para 7-9.

¹⁰⁵ Introduction to the Study of the Law of the Constitution, 10th edition, London: Macmillan, 1959, at p. 188.

determined and adjudged in some Court of Justice, according to the Law and Custom of England”. Secondly, Coke says that the King cannot create any offence by proclamation: this is the first exposition of the principle of the legality of offenses that Beccaria will systematize one century later: offenses can only be created by statute: “the King cannot change any part of the Common Law, nor create any Offence by his Proclamation, which was not an Offence before, without Parliament”.¹⁰⁶

For Paul Craig this case is to be interpreted thus: “they were and have subsequently been affirmed as authority respectively for the propositions that the monarch did not have autonomous judicial power, nor any general regulatory power that could be exercised independently of Parliament”.¹⁰⁷

The Bonham’s case provides another foundation against administrative enforcement: the principle that no one can be a judge in his own cause: “The Censors, cannot be Judges, Ministers, and parties; Judges, to give sentence or judgement; Ministers to make summons; and Parties, to have the moiety of the forfeiture, quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem sui rei esse judicem”.¹⁰⁸

The common law expressly rejected administrative enforcement in *Re Wiseman, Re Manchester Corporation Cab Committee*.¹⁰⁹ Moreover, The House of Lords held that a penalty could not be imposed on the basis of very general provisions. In *Wheeler v Leicester City Council*,¹¹⁰ the Council passed a resolution banning the Leicester Rugby Football Club from using a ground for one year because it accepted to make a tour in South Africa during the apartheid. The House quashed this decision. It held that “the council had power under the Race Relations Act 1976 s.17 to consider the best interests of race relations when exercising its statutory discretion in the management of the recreation ground but that since the club was not guilty of any infringement of the law or improper conduct, the resolution penalising it for failing to support the council’s policy by publicly condemning the tour, was unreasonable and in breach of the council’s duty to act fairly”. The penalty amounted to a misuse of its statutory power because Parliament did not provide for such a penalty expressly: “general powers such as those conferred by the Open Spaces Act 1906 and the Public Health Acts cannot in general be lawfully exercised by discriminating against those who hold particular lawful views or refuse to express certain views. Such general powers are conferred by Parliament for the purpose of administering public property for the benefit of the public at large, irrespective of their views or beliefs. If it were permissible in exercising such powers to take into account the views expressed or held by individuals, Parliament must be taken to have implicitly authorised the doing of an act by the local authority inconsistent with the fundamental freedoms of speech and conscience. Accordingly I do not consider that general words in an

¹⁰⁶ Prohibitions Del Roy, Michaelmas 5 Jac. I, 1607, in 6 Edward Coke, et al., *The Reports of Sir Edward Coke*, Knt. In Thirteen Parts (New ed.) 280 (1826).

¹⁰⁷ P. Craig, *Political Constitutionalism and Judicial Review*, at p. 12 in *Effective Judicial Review: A Cornerstone of Good Governance*, C. Forsyth, M. Elliott, S. Jhaveri, A. Scully-Hill, M. Ramsden, eds., Oxford University Press, Forthcoming; Oxford Legal Studies Research Paper No. 58/2009.

¹⁰⁸ *Bonham’s Case*, in *The Selected Writings of Sir Edward Coke*, at p. 264-275.

¹⁰⁹ *Re Wiseman, Re Manchester Corp’n Cab Committee* (1886) 3 TLR 12, CA. See *Halsbury’s Laws of England*, Local Government (vol. 69, 2009, 5th ed., Powers and Duties of Local Authorities, n° 569 « Enforcement of byelaws », note 1).

¹¹⁰ [1985] 3 W.L.R. 335.

act of Parliament can be taken as authorising interference with these basic immunities which are the foundation of our freedom. Parliament (being sovereign) can legislate so as to do so; but it cannot be taken to have conferred such a right on others save by express words”.

A fortiori, the common law strongly opposes the taking of liberty and property by the administration without parliamentary authorization. The protection of liberty is protected by the writ of Habeas Corpus. As Dicey put it: “personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, i.e. (speaking again in very general terms indeed) under some legal warrant or authority,— and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle. These methods are twofold;— namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus”.¹¹¹ This prohibition was expressed more recently by the Court of Appeal in *AN v Secretary of State for the Home Department*.¹¹² Lord Justice Maurice Kay quoted Lord Atkin who observed in *Eshugbayi Eleko v Officer Administering the Government of Nigeria* “that ‘no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice’”. Lord Justice Maurice Kay adds decisively: “Recently, with the approval of the other members of the House, I cited Lord Atkin’s observations in the *Eleko* case (...). It represents the traditional common law view”.

And property is also protected by the law on trespass, which was famously used in *Entick v Carrington*.¹¹³ As Peter Cane puts it: “ever since the famous case of *Entick v. Carrington* (1765) 19 St Tr 1030 the law of tort has played an important role in protecting citizens against unlawful interference with person and property by public officials”.¹¹⁴

Without parliamentary approval, it is a law well established that the administration does not have any enforcement power. One could cite as a counter-example self-regulatory bodies that derive their sanctioning powers from the consent of their members and that wield sanctioning powers¹¹⁵, but it is an exception that could be explained having recourse to institutional theory.

Contrary to what Goodnow and Schwartz argue, it will be seen that France shares the same principle: enforcement should be in principle entrusted to Courts and the administration does not enjoy enforcement powers.

¹¹¹ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, at p. 199.

¹¹² [2010] EWCA Civ 869 (28 July 2010), at §33.

¹¹³ *Entick v. Carrington* (1765) 19 St. Tr. 1030. See more recent applications: *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869 (28 July 2010); *WL (Congo) & KM (Jamaica)* [2011] UKSC 12.

¹¹⁴ P. Cane, *Responsibility in Law and Morality*, Oxford, Hart, 2002, at p. 260.

¹¹⁵ *Regina v Panel on Take-overs and Mergers, Ex parte Datafin Plc. and Another* [1987] 2 W.L.R. 699. See C. F. Forsyth, “The scope of judicial review: “public duty” not “source of power””, *Public Law*, 1987 356; R. Falkner, “Judicial review of the Take-over Panel and self-regulatory organisations”, *Journal of International Banking Law*, 1987, 103; T. Lowe, “Public law and self-regulation”, *Company Lawyer*, 1987, 115; P. Cane, “Self regulation and judicial review”, *Civil Justice Quarterly*, 1987, 324.

2. *French tradition explained*

Schwartz and Goodnow misunderstood the French legal position as regards administrative enforcement. First the principle of legality prevents the administration from punishing anyone if Parliament has not provided for a penalty. Secondly a general provision of the penal code allowed the administration to sue anyone who breached an administrative rule. Therefore there was no need for administrative enforcement.

Schwartz's misunderstanding lies not so much in the legality of administrative penalties under French law as in another problem: administrative power to take action when an individual refuses to obey and where Parliament has not provided for any sanction.

The Saint Just case Schwartz comments tried to deal with this problem. As summarized by Schwartz this case "arose out of a law regulating religious associations that prohibited the formation of religious congregations without special legislative authorization. A ministerial decree rendered in execution of the law ordered the immediate closing of a particular unauthorized congregational establishment. Neither the law nor the decree provided any penalty for noncompliance, and the members of the congregation refused to comply with the order. The prefect then ordered the local police to evict them and to keep the premises closed under seal".¹¹⁶ It should be born in mind that three years latter Parliament legislated and passed a final statute separating the State from the Church.

In this case the government commissioner very well explained that in principle the administration should resort to the criminal court to have its decrees enforced, but that in exceptional circumstances, administrative enforcement could be admitted because "it is not admissible for a law to be unenforced or for public authority to be disobeyed; that an error in draftsmanship, an omission, a lacuna on the part of the legislature cannot make its prescriptions sterile; that, in the relations between public authority and individuals, obligation and coercion are indissolubly linked together; that obedience to an order legally given by competent authority, if it is not obtained voluntarily, must be obtained by compulsion. Here it is the private interests, the rights of individuals that must yield to the necessity of having the law enforced."¹¹⁷

Administrative law concerning administrative enforcement is therefore legal under these conditions that are still good law:

- Either if a statute authorizes it or in case of emergency, for, as the government commissioner Romieu puts it in the Saint-Just case, "when the house is on fire, you will not ask the judge the authorization to send for the firemen".
- Or if four conditions are met: the statute must be silent (no sanctions were provided for), there must be a statutory obligation and a resistance on the part of the people refusing to obey and the enforcement must be strictly limited to meet the objective of the law.

¹¹⁶ See B. Schwartz, *French administrative law and the common-law world*, op. cit., p. 104; Tribunal des conflits, 2 décembre 1902, Société immobilière de Saint-Just, Rec. 713, concl. Romieu (D. 1903.3.41, concl. Romieu ; S. 1904.3.17, concl. Romieu, note Hauriou).

¹¹⁷ It is Schwartz's translation of Romieu's conclusions that we quote.

- And all these conditions can be reviewed by the administrative court as a matter of course.

Emergency can also justify administrative enforcement in the common law world. What Romieu says, when the house is on fire you will not ask the judge the permission to send the firemen applies as a matter of common sense.¹¹⁸

In conclusion, apart from the very limited and exceptional circumstances where the administration is allowed to enforce its own decisions, the law is that, without parliamentary approval the administration could not resort to administrative penalties or physical administrative enforcement.

Even though both legal systems have established principles on administrative enforcement that seem favourable to individuals, history shows that both countries have been willing to depart from these principles.

3. Administrative enforcement in England and France: from principle to reality, the dark side of legal administrative history

The study of the principles must not hide the fact that both legal systems have from time to time admitted the recourse to administrative enforcement. Arthurs recalls that administrative enforcement was used in the nineteenthth century with the Factories Act 1833. But the powers of the inspectors was so strong that it was soon abolished, which shows to what extent the common law was traditionally strongly opposed to administrative enforcement. Equally the power of the Railway Commission to licence and where a breach had been found to revoke the licence was an expression of administrative enforcement. Similarly a strong reaction provoked the transfer of this power to the courts.¹¹⁹

But, as well as in France, the dark side of administrative repression was mostly confined to the wars periods and to the colonies. Administrative imprisonment, without the recourse of any courts was used against Germans in the United Kingdom¹²⁰ and against Jews in France.

¹¹⁸ In private law, emergency situations can justify trespass: "The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a Court of Justice" (*The Earl of Lonsdale v Nelson and Others* (1823) 107 E.R. 396, p. 401). See also « A party has no right to enter upon the land of another in order to abate a nuisance of filth, without previous notice or request to the owner of the land to remove it, unless it appears that the latter was the original wrong-doer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health" (*Jones v Williams*, 152 E.R. 764). In public law also the emergency theory applies. The emergency in cases involving public health can justify the destruction of goods such as tainted meat: "The legislature generally cannot be considered to have intended that a man's property may be destroyed without giving him an opportunity of being heard, but here the paramount object would appear to be the speedy destruction of a noisome and unwholesome thing" (*White, Redfern* (1879-80) L.R. 5 Q.B.D. 15, p. 18). See also *The Queen v Davey and Others* [1899] 2 Q.B. 301. See S. A. de Smith, *Judicial Review of Administrative Action*, at p. 168, footnotes n° 33, 34.

¹¹⁹ H. Arthurs, "Without the law": administrative justice and legal pluralism in nineteenth century England, at p. 120 and pp. 351-352.

¹²⁰ A. Grynberg, "1939-1940 : l'internement en temps de guerre - Les politiques de la France et de la Grande-Bretagne", *Vingtième Siècle. Revue d'histoire*, 1997, vol. 54, n° 54, pp. 24-33. See Emergency Powers Defense Act 1939. See Loi du 3 septembre 1940 relative aux mesures à prendre, sur instruction du gouvernement, à l'égard des individus dangereux pour la défense nationale ou la sécurité publique; Ordonnance du 18 novembre

Even today, judges accept the use of the prerogative even for the deportation of populations of former colonies.¹²¹ The colonies were also in France a place where the general rule did not produce its full effects.¹²²

England and France shared a common attachment to the principle that Courts should have a monopoly over repression; rule that was not applied similarly for everyone under English or French law.

The constitutionalization of the French legal order entailed a divergence. The Constitutional Council while accepting administrative enforcement drew some limits to it and forced Parliament to provide safeguards inspired from criminal law. The Constitutional Council in fact “criminalized” the regime of administrative sanctions in France.

1943 sur l'internement administratif des individus dangereux pour la défense nationale ou la sécurité publique (J.O.R.F. 1943, p. 287). See Giraudier, *Les bastilles de Vichy : répression politique et internement administratif : 1940-1944*, Paris, Tallandier, 2009; P. Fabre, *Le Conseil d'État et Vichy : le contentieux de l'antisémitisme*, Publications de la Sorbonne, 2001.

¹²¹ *Campbell v Hall*, (1774) 1 Cowp. 204. See T. Poole, « United Kingdom: The royal prerogative », *International Journal of Constitutional Law*, 2010 8(1), pp. 146-155. See also *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs or Bancoult* (No. 2), (2008) UKHL 61.

¹²² See on Tunisia: M. Bach-Hamba, *La Justice tunisienne. Organisation et fonctionnement actuels. Projet de réorganisation*, 1917 p. 12.

2.2 FROM CONVERGENCE TO DIVERGENCE: THE FRENCH COURTS' RESPONSE TO THE CONTEMPORARY RISE OF REGULATORY ENFORCEMENT POWERS

The French Constitutional Council has explained to what extent Parliament can give enforcement powers to the administration and under which conditions. Limits and conditions are intertwined in the constitutional case law.

With the constitutionalization of the French legal system after the enactment of the Fifth Constitution in 1958 the question indeed changed. Before, Parliament could authorize the administration to inflict any penalty, even imprisonment as the legislation during the Second World War amply shows (the prefect could decide to imprison the Resistance fighters or Jews and did so, as history amply shows). In the 1980s and the creation of regulatory authorities the Constitutional Council had to answer the question: how far can Parliament go in enacting administrative sanctions? Did the principle of the separation of powers prevented Parliament from enacting administrative sanctions?

The answer the Constitutional Council made was that “neither the principle of the separation of powers, nor any other principle or rule of constitutional status, precludes an administrative authority, acting within its powers as a public body, from exercising its power to impose penalties needed to enable it to carry out its tasks once the exercising of this power is accompanied by statutory measures designed to ensure the protection of constitutionally guaranteed rights and freedoms”.¹²³ This solution was first discovered in the decision concerning the Audiovisual High Council where the Constitutional Council held that the imposition of sanctions by an administrative agency did not violate the principle of the separation of powers.¹²⁴

As a consequence, administrative sanctions are constitutionally admissible provided that Parliament ensures that constitutional rights and liberties are protected. Firstly, Parliament is not allowed to grant administrative agencies powers that would result in the deprivation of liberty (sanctions of imprisonment). In a recent decision the Council added to the list of liberties that are under the sole protection of Courts the freedom of expression. It held that “The powers to impose penalties created by the challenged provisions vest the Committee for the protection of copyright, which is not a court of law, with the power to restrict or deny access to the Internet by access holders. The powers vested in this administrative authority are not limited to a specific category of persons but extend to the entire population. The powers of this Committee may thus lead to restricting the right of any person to exercise his right to express himself and communicate freely, in particular from his own home. In these conditions, in view of the freedom guaranteed by Article 11 of the Declaration of 1789 [on the freedom of expression], Parliament was not at liberty, irrespective of the guarantees accompanying the imposition of penalties, to vest an administrative authority with such powers for the purpose of protecting holders of copyright and related rights”. In this decision the Constitutional Council said that freedom of expression implied the right of access to the Internet and further forbade Parliament from enacting administrative sanctions restricting the freedom of expression. Only a court of law could do that. The statutory provision was therefore void.

¹²³ See Constitutional Council, Decision n° 2009-580 of June 10th 2009, at § 14.

¹²⁴ Decision 88-248 DC of 17 January 1989.

Secondly, “Parliament is required to provide for sufficient safeguard in the law to ensure that sanctions imposed by an administrative agency do not jeopardize or encroach on the rights and liberties guaranteed by the Constitution”¹²⁵: “In particular due respect must be shown for the principle of the legality of offences and punishments and the rights of the defence, principles which apply to all penalties intended to serve as a punishment, even though Parliament has left it to a non-judicial authority to impose such penalties”.

Contrary to English law where, due to sovereignty of Parliament, Parliament can establish whatever system of sanctions it wants; in France Parliament is limited in this respect in two ways: the scope of administrative sanctions is limited by fundamental rights and liberties and by the conditions it provides for the protection of the liberties sanctions encroach on.

It is now requisite to study the position of international law judges: the ECt HR, and the ECJ.

¹²⁵ Decision 89-260 DC of 28 July 1989. See Administrative sanctions in fisheries law, P. Cacaud, M. Kuruc, M. Spreij (ed)., Volume 82 of FAO legislative study, at p. 8.

2.3 INTERNATIONAL COURTS AND ADMINISTRATIVE ENFORCEMENT

We will study first the position of the ECt HR (1) and then review the position of the ECJ as regards administrative sanctions (2).

1. *The ECt HR and administrative sanctions*

Given the different legal positions in Europe regarding administrative enforcement, the ECt HR chose a neutral position. Administrative enforcement is not condemned in principle but it has to abide by the principles of article 6 ECHR on the right to a fair trial.

The Court explained its position in the case *Öztürk v. Germany*. The Court is not opposed to administrative penalties and to the process of decriminalization: “The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line”. The Court even acknowledges the advantages of the policy of transfer offenses from the criminal law to administrative law: “By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (...) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules”. That’s why “the Convention is not opposed to the moves towards “decriminalisation” which are taking place - in extremely varied forms - in the member States of the Council of Europe”.¹²⁶

Having said that, the ECt HR says that removing an offence of the criminal law under domestic provisions has no effect on the operation of article 6. That’s why the Court had to adopt an autonomous conception of the notions of “criminal” and “civil” for the purpose of article 6, able to encompass regulatory sanctions.

Another question administrative penalties raise is the problem of the presumption of innocence. As regulatory offenses are in general “strict liability offenses” (to use an English criminal law notion) the administrative disciplinary body does not have to prove any intention. This could run against the presumption of innocence protected by article 6(2). The Court held in this respect that as “presumptions of fact or of law operate in every legal system... the Convention does not prohibit such presumptions in principle”. However, the Convention requires “States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.¹²⁷ The presumption should not be applied automatically, the burden of establishing guilt should remain with the prosecution,¹²⁸ and presumptions should also be rebuttable.¹²⁹

What is the position of the ECJ?

¹²⁶ Application n° 8544/79, Case of *Öztürk v. Germany*, at para 49.

¹²⁷ Application n° 10519/83, Case of *Salabiaku v. France*, at para 28.

¹²⁸ *Lingens and Leitgens v Austria* (1981) 4 EHRR 373 at 390-391.

¹²⁹ *X v United Kingdom* 42 CD 135 (1972). See Lester, Pannick & Herberg: *Human Rights Law and Practice/Chapter 4 The European Convention on Human Rights*, at 4.6.61.

2. *The ECJ and administrative sanctions*

Contrary to the English and French principles of administrative law, community law obeys to a different system: administrative enforcement has been, from the beginning of the European construction, the sole means of enforcing the rules of the treaties. Especially, with respect to competition law, administrative penalties pronounced by the European Commission have been the sole means of enforcement. Private enforcement of competition law is only a recent concern. This is all the stranger than competition law was implemented in Europe under the close monitoring of American diplomats following the Marshall Plan but never was the idea to use the American way of private enforcement of competition law. David Gerber explained this oddity by the influence of German ordoliberals on the establishment of European competition law rules.¹³⁰ An element that is silenced by David Gerber is that administrative enforcement is completely accepted in Germany.

Within this context one can understand that the ECJ was not opposed to administrative enforcement.

Firstly, the ECJ held that any penalty whether criminal or administrative in nature should rest on a clear and unambiguous legal basis: “In that respect it must be emphasized that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis”.¹³¹ This principle is applicable both to EC sanctions and to domestic administrative sanctions that are enforcing EC law.¹³²

The question for the EU legal system can more fundamentally: can the European Commission create an administrative penalty to enforce EC law? The answer to this question was ambiguous before the case *Commission v Germany*.¹³³ The difficulty lied in the interpretation of article 145 and 155 of the Treaty. But the ECJ explains that penalties fall within the category of implementing measures which can thus be delegated to the Commission: “articles 145 and 155 establish a distinction between rules which, since they are essential to the subject-matter envisaged, must be reserved to the Council’s power, and those which, being merely of an implementing nature, may be delegated to the Commission. In the agricultural sector only provisions intended to give concrete shape to the fundamental guidelines of Community policy may be classified as essential. That is not true of penalties, such as a surcharge on the reimbursement, with interest of a subsidy paid, or exclusion for a certain period of a trader from the subsidies scheme, which are intended to underpin the policy options chosen by ensuring the proper financial management of the Community funds designated for their attainment”.

That’s why the ECJ held that “in the context of the common agricultural policy the Commission has power to provide for penalties such as exclusions from the scheme of

¹³⁰ D. J. Gerber, *Law and competition in twentieth century Europe: protecting Prometheus*, Oxford, Oxford University Press, 2001.

¹³¹ Case 117/83 *Karl Könecke GmbH & Co. KG, Fleischwarenfabrik, v Bundesanstalt für landwirtschaftliche Marktordnung* [1984] ECR 3291 at para 11.

¹³² J. A. E. Vervaele, “Administrative Sanctioning Powers of and in the Community, towards a System of European Administrative Sanctions?” in *Administrative Law Application and Enforcement of Community Law in the Netherlands*, (1994), pp. 161-202, at p. 178.

¹³³

subsidies and surcharges on amounts wrongly received and having to be repaid,... Those penalties in fact come within the implementing powers which the Council may delegate to the Commission under Articles 145 and 155 of the Treaty”.

The protection of the presumption of innocence could also raise an issue as regards administrative sanction whose objective character could violate this principle. The problem was solved in a decision on market abuse offenses. Article 2 (1) of Directive 2003/6 created a presumption in cases of insider dealings. However the ECJ held that “the principle of the presumption of innocence does not preclude the presumption in Article 2 (1) of Directive 2003/6 that the intention of the author of insider dealing can be inferred implicitly from the constituent material elements of that infringement, provided that presumption is open to rebuttal and the rights of the defence are guaranteed”.¹³⁴

The ECJ explains that in order to protect the integrity of financial markets the Community legislature provided for an “objective definition of the constituent elements of prohibited insider dealing”. However the absence of a mental element does not “mean that provision needs to be interpreted in such a way that any primary insider in possession of inside information who enters into a market transaction, automatically falls within the prohibition on insider dealing”. The presumption cannot therefore be automatic and can be rebutted.

In conclusion, the ECHR and EU laws are more favourable in principle to administrative sanctions but they want to subject these powers to proper safeguards.

What is the judge’s position as regards the dispute resolution function?

¹³⁴ Case C-45/08 Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA) [2009] ECR I-12073 at para 44.

2.4 COURTS AND DISPUTE RESOLUTION: THE STORY OF A SILENCE

Even though dispute resolution of question of access constitute a breach of the freedom of contract and of the right of property, judges have not been opposed to this power and they have not been willing to provide for special and enhanced guarantees. The common law position (1) is similar to that of the French (2).

1. *The common law position*

In this respect however, England and France do not have the same history. The role of the justices of the peace combining administrative and judicial functions, and the role of some important tribunals such as the Employment Tribunal, the Copyright Tribunal¹³⁵ or the Lands Tribunal have no equivalents in France. What Andrew Leggatt named in his report “party and party tribunals”¹³⁶, does not exist in France. If they exist they belong to the civil legal order.

Despite this long tradition the rule exist that without statutory authority, an administrative body cannot breach private persons’ freedom of contract. In this respect a local authority cannot attach a condition to a licence affecting “the contractual relationship between dealer and purchaser”.¹³⁷ Similarly and very clearly in *Mixnam’s Properties Ltd v Chertsey Urban District Council*,¹³⁸ Lord Reid observed that “In the present case there appears to me to be a fundamental difference between prescribing what must or must not be done on a site and restricting the site owner’s ordinary freedom to contract with his licensees on matters which do not relate to the manner of use of the site. Conditions can make the site owner responsible for the proper use of the site and it is then for him to make such contracts with his licensees as the general law permits. I can find nothing in the Act of 1960 suggesting any intention to authorise local authorities to go beyond laying down conditions relating to the use of sites, and in my opinion the general words in section 5 cannot be read as entitling them to do so”. And Lord Upjohn added more decidedly: “Secondly, freedom to contract between the subjects of this country is a fundamental right even today, and if Parliament intends to empower a third party to make conditions which regulate the terms of contracts to be made between others then even when there is an appeal to a court of law against such conditions, it must do so in quite clear terms (...) Nothing in my view could be more dangerous than to assume by inference that Parliament intended that a very large number of local authorities all over the country should be clothed with such arbitrary and all-embracing powers unless it has given them a clear mandate to do so. I find no such clear mandate in the Act”.¹³⁹

¹³⁵ Lorsque les parties ne peuvent s’accorder entre elles, ce *tribunal* décide des termes et des conditions des licences proposées par les instances d’autorisation dans le domaine de la propriété intellectuelle (v. Rapport Leggatt préc., §3.31).

¹³⁶ V. Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users - One System, One Service, 16 August 2001, §3.17.

¹³⁷ *Stewart v Perth and Kinross Council* [2004] UKHL 16.

¹³⁸ [1965] A.C. 735.

¹³⁹ *Mixnam’s Properties Ltd v Chertsey Urban District Council*, at p. 764A–C. See contra: *R. v Independent Television Commission* [1999] E.M.L.R. 880.

However, as far as dispute resolution before regulatory authorities is concerned the Act clearly empowers the regulators to intervene in the freedom of contract, to settle the dispute, to set the prices and force the access. There has been no litigation on this point.

The United States Supreme Court has also upheld such a power. Traditionally the regulatory power to set a price was reviewed according to the 5th amendment on takings. A price that is set at a level that is so low that it becomes confiscatory can amount to a taking for the Supreme Court. That's what the litigants argued in the Verizon case. This case shows that the takings jurisprudence is applicable to the dispute resolution power of telecommunications regulators.¹⁴⁰ The question was whether the use of the Total Element Long Run Incremental Cost (TELRIC) method amounted to such a takings. In order to succeed incumbents had to show their firm's operations would be rendered unsuccessful¹⁴¹ or that "the rate fails to give a reasonable rate of return on equity given the risks of the regime".¹⁴²

Their claim failed but the Verizon case shows that in the US, due to the Chevron doctrine, administrative law will provide little help to litigate dispute resolution adjudication whereas constitutional law can provide a useful method to control that the prices set do not amount to a taking. Interestingly, but not surprisingly, in this case the U.S. Supreme Court held that dispute resolutions could be not reviewed according to the cases on physical invasions: it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim [involving] a 'regulatory taking'," "making the physical invasions category inapplicable to an access regime."¹⁴³

What is the French position as regards administrative interference in private relations, and contracts?

2. The French position

In France as well administrative interference in the freedom of contract of private persons without clear statutory basis makes the decisions a nullity.¹⁴⁴

Concerning dispute resolution before regulatory authorities neither the State's Council nor the Constitutional Council raised any objection. However a decision of the Constitutional Council can be of interest in order to show which rights and liberties this function breaches.

It was a statutory scheme aimed at implementing the Directive of May 22nd 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The directive was aimed at balancing the need to protect copyright owners who have an "exclusive right to authorise or prohibit direct or indirect, temporary or permanent

¹⁴⁰ Verizon Comm., Inc. v. Federal Communications Commission, 535 U.S. 467, 523 (2002). See M. J. Legg, "Verizon Communications, Inc. v Federal Communications Commission-Telecommunications Access Pricing And Regulator Accountability Through Administrative Law And Takings Jurisprudence", Federal Communications Law Journal, May 2004, 563, at pp. 581-582.

¹⁴¹ Federal Power Comm'n. v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944).

¹⁴² Duquesne Light Co. v. Barasch, 488 U.S. 299, 315 (1989). See M. J. Legg's article at p. 581.

¹⁴³ See M. J. Legg's article at p. 582.

¹⁴⁴ Conseil d'État, Sect., 3 octobre 1980, Fédération Française des Professionnels Immobiliers et Commerciaux Chambre régionale de la 19^e région Est et autre, n° 12955, Recueil Lebon, p. 348.

reproduction by any means and in any form” and the right to protect their work using any effective technological measures with the rights of reproduction for private use.

In order to balance the protection of copyright and the right to private use, the French Parliament established a regulator equipped with a function to settle disputes. The statutory provisions are “designed to reconcile "interoperability" of materials and software on the one hand and recourse to technological measures designed to prevent or limit use of a work not authorised by the copyright holder or holder of a related right on the other hand; in particular indent 1 of the new Article L 331-7 provides that "any software editor, any manufacturer of technological systems and any service operator may, in the event of refusal of access to information essential for interoperability, request the Authority regulating technological protection measures to guarantee the interoperability of existing systems and services, while respecting the rights of the parties, and to obtain from the holder of the rights to the technological measure the information essential for such operability"”.¹⁴⁵

Parliament forgot when drafting the statute to protect the property rights of the persons who designed the technological measures to protect the work so that effectively the administrative body could order the copyright owner to give access to the protected content without compensating them.

That’s why the Constitutional Council held that “Section 14 states that the Authority regulating technological protection measures is vested with the task of guaranteeing the "interoperability" of existing systems and services "while respecting the rights of the parties"; this provision should be read as applying both to copyright holders or holders of related rights having recourse to protective measures and to holders of rights in the technological protective measures themselves; in the event of the latter refusing to communicate information essential for "interoperability" such communication will require payment of compensation; were this not the case, the provisions of Article 17 of the Declaration of 1789 whereby "Since the right the Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior compensation has been paid" would not be respected.

If the holders of rights in the technological protective measures refuse to communicate information essential for “interoperability” and the Authority grants access the rights holder must be compensated because such access amount to a takings.

In conclusion, French law as well as the common law has not erected any barriers or provided specific protections as far as dispute resolution is concerned. As dispute resolution breaches the right of property, network owners should be compensated but even in the US the method used to calculate compensation such as TELRIC was not held unconstitutional.

¹⁴⁵ Case n° 2006-540 DC.

CHAPTER 3: THE RATIONALE FOR REGULATORY REMEDIES

After having studied the development of regulatory enforcement in England and France, it is necessary to understand the rationale underpinning such an evolution.

Two kinds of rationales can be highlighted. First, the development of administrative solutions can be explained by the shortcomings of existing laws and courts. Secondly, ideological influences, especially in at European level and in the United Kingdom, have played an important part in justifying the use of administrative rather than court procedures.

The legal explanations will lead us to analyse the shortcomings of private law (contract, property and tort law) and the limits of criminal law, at a substantive level. Dispute resolution on question of access can be understood legally if one shows that there were, in existing laws, no other substantive alternatives to the legislative arrangements arrived at. It is the shortcomings of contract, tort and property law that explain the rise of regulatory dispute resolution.

The rise of administrative penalties in England and France can also be explained by the shortcomings of substantive criminal law. As will be seen these shortcomings are different in both countries. For example, one of the traditional justifications of administrative penalties in France was that it was not possible to try a company for a criminal conduct. Legal entities were immune from criminal liability up to the 1990s. This is different in the United Kingdom for example but it shows that where “common laws” (whether private or public) cannot afford a suitable remedy, Parliaments have to devise new ones.

The shortcomings of competition law have also to be taken into account in order to understand the establishment of specific and tailored remedies to the new needs.

The rise of administrative enforcement cannot only be accounted for at a substantial level, i.e. the shortcomings of the laws. Even though the two are closely linked, Court systems have inherent limits. Many arguments have been mobilized to justify the eviction of the judge from the regulatory sphere: cost, informality and the preference for less confrontational solutions, speed, expertise, and unnecessary procedural technicalities. Also one has to acknowledge the role of EU law in the eviction of the judge: as the European commission is looking for convergence and the building of networks of agencies, judges are ill suited for this task. As we can see many arguments militate in disfavour of courts today.

Finally the ideological context can explain these developments especially at EU and UK level. No evidence of any influence of Law & Economics has been shown in France. Law & Economics has given a firm intellectual justification for the eviction of the judge from the civil and criminal spheres.

3.1 THE SHORTCOMINGS OF PRIVATE LAW (CONTRACT PROPERTY AND TORT LAW)

In order to explain the development of dispute resolution in England and France, one has to take into account the legal background of this development. It will be seen that the profound liberal conception of contract and property make these legal instruments ill suited for the task they would have to carry in a regulatory environment. More than that, they would even be useless. Even though it is customary in comparative law to highlight differences of contract and property between common and civil law countries, some solutions to the same problems would lead to the same results in both countries. If Parliaments had left the utilities only to the operation of contract and property no competition would have appeared and the same problem the nineteenthth century experienced would have repeated themselves: combinations, trusts but no competition.

This part is essential to understand the definition of regulation we will give in chapter 5. It is the anticompetitive effects of contract and property that justify regulation. Furthermore we will see that tort law, when it has been used has provided only little help.

1. Contract law and regulation: the elements of the conflicts

Contrary to common thinking on contract law, it is far from being neutral. As Hugh Collins puts it: “private law regards itself within its own internal discourses, it can also be examined from an external point of view as one mechanism by which the state seeks to regulate markets. Private law certainly has similar effects in steering market behaviour to other types of social and economic regulation of business activity”.¹⁴⁶

But in steering markets, contract law, in certain areas where there are essential facilities, becomes anticompetitive and also serves the purpose of the incumbent.

Three problems can here be identified: contract law does not give answer and hides the problem of power in commercial relationships (a), it does not offer any solution to the problem of refusal to contract (which is what dispute resolution is about) (b), it does not help to determine the content of the contract and especially the price (c). Both analyses are true for English and French contract law.

a. Regulation, contract law and the problem of power

As both legal systems are indifferent to the problems of inequality of bargaining power and fairness in contractual relations they offer to solution in utilities.

In this respect English and French contract law are both indifferent to the inequality of bargaining power. This is not a new observation. Max Weber and sociologists have made this argument for a long time. For Ewing, commenting Weber’s thought “There is no doubt that he believed that the capitalists have benefited quite directly from a normative system that

¹⁴⁶ H. Collins, *Regulating Contracts*, esp. *Private Law as Regulation*, at p. 57-58.

raises contractual relations to the pure abstraction of formal equality and guaranteed rights for all while facilitating the entrenchment of exploitative economic relations”.¹⁴⁷

In French contract scholars acknowledge that contract law can be used by the stronger to impose its will to the weaker. In this sense, dispute resolution in the field of utilities addresses directly this problem. Such a procedure has for example been implemented in the field of cinema at the beginning of the 1980s because small movie theatres began to be victims of deliberate policies by major integrated movie companies to evict them from the market and to deny them some of the most profitable movies to keep them for their own circuit of theatre. In this domain the operation of contract is clear, is dispute resolution was not created small theatres would have disappeared and only multiplexes, owned by distributors and producers would have survived. It is the same in the utilities the incumbent can impose its condition and erase completely competition because contract law allows it to do so.

Contract law has traditionally occulted this problem in France, whereas in administrative contract law the problem of power is central and has been adequately dealt with by the administrative judge because it was thought that the public service had to be preserved and the users of the service had to be treated fairly.

However this picture has evolved and contract law increasingly takes into account the problem of bargaining power. The idea of protecting the weaker party has penetrated deeply contract law but judges use the notion of vitiated consent through the notions of duress (“violence”), abuse or “cause” of the contract.¹⁴⁸

Judith Rochfeld as well as Hugh Collins highlight the possible impact of human rights on contract law in taking into account the weaker party, but the ECt HR has not gone as far yet.¹⁴⁹ But in our sectors it is mostly through dispute resolution that such a solution has been found.

In English contract law the same conclusion applies. Freedom of contract being held so sacred that judges do not want to interfere: “If there is one thing more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract”.¹⁵⁰ The idea of power can however enter into play through the notion of duress or undue influence.¹⁵¹ Similarly the notions of considerations or frustration of contract can be of use. Lord Denning

¹⁴⁷ S. Ewing, *Formal Justice and The Spirit of Capitalism: Max Weber's Sociology of Law*, 21 *Law and Society Review* 487.

¹⁴⁸ D. Mazeaud, *Les nouveaux instruments de l'équilibre contractuel Ne risque-t-on pas d'aller trop loin ?*, in C. Jamin, D. Mazeaud, *La nouvelle crise du contrat*, Paris, Dalloz, Coll. *Thèmes et commentaires* 2003, pp. 135-151, at n° 10

¹⁴⁹ J. Rochfeld, *Du statut contractuel “de protection de la partie faible” : les interférences du droit des contrats, du droit du marché et des droits de l'homme*, in *Études offertes à Geneviève Viney*, Paris, L.G.D.J., Lextenso éd., 2008, pp. 835-866, spéc. p. 836; H. Collins, « *The Impact of Human Rights Law on Contract Law In Europe* » (2011) 22 *European Business Law Review* pp. 425–435.

¹⁵⁰ *Printing and Numerical Registering v Sampson* (1875) LR 19 Eq 462, Sir George Jessel MR.

¹⁵¹ R. Stone, *The modern law of contract*, London, New York, Routledge-Cavendish, 2009, at pp. 419 for the notion of duress and pp. 439 for the notion of undue influence.

tried in *Lloyds Bank Ltd v Bundy* to introduce a notion of inequality of bargaining power but without much success.¹⁵² There is no general duty to negotiate in good faith.

In the sectors under study however some directives provide for an obligation to negotiate in good faith. However it has not been implemented in domestic English and French law.¹⁵³ It is interesting to note that neither Parliaments in France and in England has implemented the requirement to negotiate in good faith that exist in some directives. Just for comparison's sake the US Congress has provided for a duty to negotiate interconnection on good faith in the Telecommunications Act of 1996.¹⁵⁴ That's why some English scholars explain that, as contract law does not provide the requisite remedy for weaker parties administrative bodies using consumer and competition law are better equipped to address this issue.¹⁵⁵

In addition for being blind to the problem of weaker parties both English and French contract law have refused to introduce the notion of fairness into contract. The French Civil Supreme court has consistently and decidedly refused to introduce equity or fairness into contract law. The same refusal has been expressed in common law courts: "The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority... but also upon considerations of business"¹⁵⁶.

In regulated sectors, the French Parliament expressly invites the regulators while resolving disputes on access to use fairness and equity.¹⁵⁷ The same provision is not to be found in England, since the 1980s on the contrary the discretion of regulators to set prices was restricted by the use of the famous RPI-X formula and therefore fairness was of no use. But the notion of fairness is sometimes used in judicial review cases.¹⁵⁸

The problem of power is central to the dispute resolution function of regulatory authorities. This function finds also a solution to the problem of forcing to contract.

b. Regulation, contract law and the problem of refusals to deal

¹⁵² *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, at p. 339; Chitty on Contracts, at n°1-022.

¹⁵³ V. Directive 2002/19/EC on access, recital 5, article 12(1)(b): "Operators may be required inter alia: (b) to negotiate in good faith with undertakings requesting access". Directive 2002/21/EC, recital 32; Directive 96/92/EC, article 20(2); Directive 2003/55/EC (gas), article 19(3) amended in directive 2009/73/CE, article 32(3). In domestic laws, in France see article D. 310, Code des postes et des communications électroniques. This condition does not exist in English statutes. It can be found however in some documents published by British Telecom such as the Standard Interconnect Agreement (article 2).

¹⁵⁴ Article 251(c)(1) of the Telecommunications Act.

¹⁵⁵ D. Harris, D. Campbell, R. Halson, Remedies in contract and tort, Cambridge, New York, Cambridge University Press, 2nd ed, 2006, at pp. 68.

¹⁵⁶ [1997] A.C. 514, p. 218, per Lord Hoffmann. See Chitty on Contracts 30th ed., n°1-023.

¹⁵⁷ See in broadcasting : Loi de 1986 relative à la liberté de communications, article 3-1 and article 17-1; in Rail : loi du 8 décembre 2009, article 16 ; in electronic communications Code des postes et des communications électroniques, article 34-8-I-b and 36-8.

¹⁵⁸ *The Queen on the Application of T-Mobile (UK) Ltd, Vodafone Ltd, Orange Personal Communication Services Ltd v The Competition Commission, The Director-General of Telecommunications* [2003] EWHC 1566 Admin.

In French contract law, as well as in English contract law the freedom of contract is based on the idea of individual autonomy.

In French law it means that someone must be free to contract or to refuse to deal. There is no such thing as a legal obligation to contract. Forcing someone to contract is even a vitiating factor of the consent that is at the basis of the formation of a contract. English contract law knows the same rule. The only way where an undertaking can be compelled by law to deal is when a common carrier is concerned in English law or a public service in France.

Both legal systems do not regulate refusals to deal. However they have outlawed some motives of refusal: a refusal based on discrimination can be held unlawful.

Dispute resolutions address specifically this problem. Statutes and EC directives provide explicitly that this process is available in case of a refusal, in case more generally were negotiations fail because the stronger party, the incumbent who owns the networks, refuses to give access to its property.¹⁵⁹ In France incumbents have tried to challenge these decisions before the Paris Court of Appeal arguing that the regulator's direction to give access was a breach of their freedom of contract. The Court held that the regulator was given this power by Parliament and could restrict the freedom of contract of network operators for public policy purposes. In the utilities field in England undertakings have not tried to challenge the dispute resolution decisions on the ground that they were infringing this freedom. However in competition law, the CAT has answered this challenge saying that "As to the importance of freedom of contract, it is trite law that the special responsibility of dominant firms overrides the freedom of such firms to behave as they wish to the detriment of competition".¹⁶⁰

Dispute resolution is thus a solution as to the problems that the freedom of contract entail when bargaining powers are unequal due to the existence of a network. Moreover, dispute resolution proves to be an effective solution to the problem of determining the content of the contract, especially the price, problem that is not addressed by contract law.

c. Regulation, contract law and the problem of determining the content of the contract

Dispute resolution, contrary to contract law is a way to regulate the content of the contract. In England, this idea seems to be consensual and judges have a very clear idea that dispute resolution before regulatory authorities does not amount to what a commercial arbitrator or a judge does: "It is not actually a full third party arbitral mechanism of the kind one sees in, for

¹⁵⁹ Directive 2002/19/EC, article 12(1) ("A national regulatory authority may, ..., impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest"); Directive 2009/72/EC, article 32; Directive 2009/73/EC, article 32. In French law see: Code des postes et des communications électroniques, article L. 36-8; Loi du 10 février 2000 relative à la modernisation et au développement du service public de l'électricité, article 38. In English law: see Ofcom, Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives "Ofcom recognises that companies may refuse to enter into negotiations or introduce unreasonable delay in an attempt to stall negotiations. In such cases, the party asking Ofcom to resolve a dispute should demonstrate that it has taken reasonable steps to engage the other party in commercial negotiations. Ofcom will usually accept, as an alternative to documentary evidence of commercial negotiations, evidence which suggests that one party has tactically refused to negotiate".

¹⁶⁰ Burgess (t/a JJ Burgess & Sons) v Office of Fair Trading [2005] CAT 25, at § 337.

example, a rent review clause. The arbiter in clause 13 is the regulator [clause 13 gives the possibility in the interconnection agreement to have the dispute settled by the regulator]. The regulator's powers are conferred and constrained by statute, and while Ofcom's are extensive they do not include the power to be a third party arbitrator. In truth clause 13 does not invoke that latter sort of status. The sort of dispute that clause 13 contemplates is a form of interconnection dispute, which Ofcom would resolve as regulator, not as a third party dispute resolver. Its intervention would therefore be as regulator, and would be a form of regulation. It therefore falls to be disregarded, as a matter of principle, just as OFCOM's general presence as a regulator with a potential effect on the conduct of the putatively regulated person falls to be disregarded, for the reasons given above. This is the same point that we have considered and dealt with above. Accordingly we do not consider that the Clause 13 mechanism for dispute resolution has any material effect on the question of whether H3G had or has SMP".¹⁶¹

The Competition Appeal Tribunal is therefore very clear about the role of the regulator and about what dispute resolution amounts to. This position is in contradiction with what contract law is about. Contract law does not aim at regulating contracts; it is indifferent to public interest considerations. It tries to be as neutral as possible concerning the public interest. Traditionally in France, the conception of the freedom of contract made parties the only judge of what was good and justified and did not accept interferences. Civil judges were not here to tell what the parties should put in their contract.

As Lord Diplock puts it: "It is no part of the function of a court of justice to dictate to charterers and shipowners the terms of the contracts into which they ought to enter on the freight market; but it is an important function of a court, and particularly of your Lordships' House, to provide them with legal certainty at the negotiation stage as to what it is that they are agreeing to and if there is that certainty, then when occasion arises for a court to enforce the contract or to award damages for its breach, the fact that the members of the court themselves may think that one of the parties was unwise in agreeing to assume a particular misfortune risk or unlucky in its proving more expensive to him than he expected, has nothing to do with the merits of the case or with enabling justice to be done. The only merits of the case are that parties who have bargained on equal terms in a free market should stick to their agreements. Justice is done by seeing that they do so or compensating the party who has kept his promise for any loss he has sustained by the failure of the other party to keep his".¹⁶²

What Lord Diplock says here, that judges are not here to replace the parties' will could be expressed in the same terms by French contract law scholars.

The core problem in network industries as far as questions of access are concerned is the problem of the price. In French contract law, as Marie-Anne Frison-Roche says, the question

¹⁶¹ V. Hutchison 3G (UK) Limited v The Office of Communications [2005] CAT 39, §138. See also Ofcom, Draft Enforcement Guidelines, Ofcom's draft guidelines for the handling of competition complaints, and complaints and disputes concerning regulatory rules, 6 July 2006, p. 31, §6.1; Ofcom, Determination to resolve a dispute between Rapture Television plc and British Sky Broadcasting Ltd about EPG listing charges, p. 22, §4.6.

¹⁶² Federal Commerce and Navigation Co. Ltd. v Tradax Export S.A. [1978] A.C. 1, at p. 8. See also W. Stanley Jevons, *The State in Relation to Labour*, 1882, p. 2 : "It is all very well for theorists and 'cabinet philosophers' to argue about what people ought to do; but if we learn from unquestionable statistical returns that thousands of hapless persons do, as a matter of fact, get crushed to death, or variously maimed, by unfenced machinery, these are calamities which no theory can mitigate". See also P. S. Atiyah, *The rise and fall of freedom of contract*, at p. 332.

of the price is something the law does not want to concern itself with.¹⁶³ French contract law does not want to have anything to do with prices. Only the notion of abuse in French contract law can help regulating the level of the price. But the sanction of the abuse is the termination of the contract or damages but the French Civil Supreme Court does not authorize the judge to set a new price.

The same is true in English contract law: there is a “general refusal of the courts to deny them effect on the ground of unfairness or inequality, for example where an inadequate price has been stipulated for the sale of property”.¹⁶⁴ And frustration would be very much inadequate as a remedy in network industries for even though it can help when a change of circumstances has an impact on prices the retrospective termination of the contract is precisely what regulation tries to avoid. The purpose of regulation in network utilities is the development of contractual agreements and competition and not their termination.

The common carrier jurisprudence in England and the public service one in France can be an answer to the question of the price but not as effective as what regulators are doing. And, more importantly, common carriers have a duty to serve all at a reasonable price but the notion of reasonableness here is different from that of prices oriented to cost as developed in utilities in order to foster competition. Common carrier and public services are more interested with protecting users than protecting competitors.

That’s precisely what regulators concern themselves with and more adequately than traditional contract law remedies either in public or in private law.

As a conclusion, one can understand that contract law does not offer any appropriate remedy for the purposes regulation pursues. As will be seen, tort law suffer also from shortcomings that explain the recourse to a special remedy before regulators.

2. Tort law and regulation: inadequacies

An analysis of the cases can help showing which problems tort law faces when questions of access are raised. It appears that in the common law, the main problem was a question of substance; the judge did not accept there plaintiffs had any remedy because Parliament did not provide for such a remedy in the statute. In France, the cases show that it is more the problem of the adversarial nature of the procedure that prevented tort law from being an effective remedy to the problems undertakings faced. This does not mean that the adversarial nature of the proceedings in civil law are not a problem also in the common law but the cases did not raise this issue. On the other hand the common law question about whether Parliament have provided a remedy tort in the statute could not exist in France. As we will show in chapter 7 when we will compare public liability in England and France, the theory of aquilian relativity has never been accepted in France (except in criminal law) therefore Parliament does not have to provide for a remedy, a fault is an absolute concept in French tort law, which means that any breach of a statute or a regulation amounts to a fault.

The analysis of the English tort law position when questions of access to a network arise is difficult because of a dearth of cases. However an interesting litigation has occurred in the

¹⁶³ M.-A. Frison-Roche, *Qu’est-ce qu’un prix en droit ? Du droit des contrats au droit de la régulation*, in *Études à la mémoire de Fernand Charles Jeantet*, p. 177.

¹⁶⁴ Chitty on Contracts, 30th ed, at n° 1-020.

Caribbean islands and was judged according to English tort law principles in London.¹⁶⁵ Subsidiary companies in the Digicel group, as new entrants in the telecommunications market in various Caribbean jurisdictions asked the judge to award them damages in respect of the delays Cable & Wireless companies, as the incumbent telecommunications operators, had made in granting interconnection. They alleged that the delay amounted to a breach of duties owed under the relevant legislation and licences. They also sought damages for conspiracy against the defendant.

The judge found that “the relevant primary legislation had been passed for the benefit of the public interest and not for the benefit and protection of private rights and interests”. Thus the alleged “breach of the relevant primary and secondary legislation was not actionable as a breach of statutory duty”. Linking breach of statutory duty and conspiracy the second ground failed also: “a breach of a statutory obligation, which was not an actionable breach, and which was not a criminal offence, did not constitute “unlawful means” for the purpose of the tort of conspiracy to injure by unlawful means”.

However in Barbados the breaches of the telecommunications legislation were found to be actionable, but the claimant failed to establish that interconnection in Barbados was delayed by reason of the breach of duty: accordingly, the claim for damages failed. Thus even where the breach was actionable the causal link between the delay and the breach could not be proved and the action failed.

This case shows that tort law cannot be deterrent enough to force incumbent to open speedily their network. We can understand then why regulatory dispute resolution has to be swift (in general directives provide for a compulsory time frame, four months or less).

When tort law is used for the same purpose but on the ground of breach of competition law the result is not satisfactory either. The litigation in New Zealand that ended in a judgement of the Privy Council was triggered because the new entrant asked for damages for an alleged abuse of a dominant position. New Zealand was the only country to choose to open its utilities using only competition law. The litigation, that we will study a little bit further when we analyse the shortcomings of competition law to open a market to competition in the utilities, proved to be a failure. It was time consuming and expensive and proved to be in disfavour of the new entrant that finally threatened that of the judgement of the Privy Council was to be applied it would refuse to open its own network to the incumbent. The government had to intervene and showed clear dissatisfaction with the outcome of the policy. Finally the Telecommunications Act 2001 gave the Commerce Commission (the Commission in charge of competition law enforcement) the powers of a sector specific regulator and a dispute resolution power.¹⁶⁶

In France tort law does not fail because of a substantial problem because the notion of fault is absolute and objective in France, which means that Parliament does not have to provide a remedy for a breach of statutory duty for any illegality is a tort. The problem undertakings face is to prove the alleged discriminatory behaviour of the incumbent. The inquisitorial procedure before regulatory authorities give the regulator the powers to prove the conducts whereas before the civil judge the adversarial procedure proves to be in disfavour of the weaker party. It does not mean that this problem could not arise also in the common law but the cases are not concerned with this problem.

¹⁶⁵ Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch).

¹⁶⁶ Telecommunications Act 2001, section 20.

We have not found any similar case on access. However there are some cases where new entrants tried to go to court for alleged unfair competition conducts, misleading advertising, and smear campaigns.

A similar case was judge before the competition authority and the civil judge about unfair competition. Before the civil judge the claimant has to prove its allegations. The inability to prove the facts entailed the failure of the litigation. However before the Competition authority, the outcome was different because the authority used its inquisitorial powers to gather evidence about the unfair competition practices (misleading and false information given for example proved after the seizure of documents showing the systematic disparagement of competitors). The Competition authority, on the same case and for the same facts, judged that an abuse of a dominant position was proved.

The difficulty to prove the fault before the civil judge explains the tactics now used by undertakings: they first file a claim before the regulator or the competition authority to have it sanctioned. The sanction proves the fault and companies only have to prove their prejudice and the causal link before the civil judge in order to be awarded damages.

Contract and tort law provide inadequate remedies in order to open the utilities markets. We will see also that property law explains in both countries the need for a specific remedy, dispute resolution on access.

3. Property law and regulation: contradiction, dispute resolution and new property arrangements

Liberalization policies faced an inherent contradiction: if you privatize the incumbent, principles of private property law and especially the principle of exclusivity clashes with the objective to promote competition on the network. In his Commentaries, Blackstone famously describes “ownership as sole and despotic dominion in total exclusion of the rights of others”.¹⁶⁷

Private property and development of competition on a private network are therefore two contradictory policies. Dispute resolution that can force the incumbent to contract and give access to a private property can thus help overcoming this contradiction.

This contradiction also explains the new property arrangements that were put in place in the United States and in the United Kingdom for example. In the United States, the model of collaborative governance in the electricity market promotes the management of the network by all the stakeholders in a new structure, the independent system operator (ISO). ISOs are non-for profit organizations.¹⁶⁸ This new property structure is aimed at separating commercial activities from the ownership of the network, in order not to give an incentive to the network

¹⁶⁷ See also T. Merrill, “Property and the Right to Exclude”(1998) 77 Neb. L. Rev. 730; L. Katz, Exclusion and Exclusivity in Property Law (April 1, 2008) Legal Studies Research Paper Series n° 08-02

¹⁶⁸ C. H. Koch, “Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring”, in Transatlantic Perspectives on Administrative Law, H. C.H. Hofman, R. L. Weaver (eds), Bruylant, Droit administratif / Administrative law, n° 7, 2011.

operator to close the market. Similarly, in the United Kingdom the electricity network belongs to a separate structure that cannot compete in the retail or the production market.¹⁶⁹

This explains the struggle between the European Commission and some countries like France. In the last electricity package the Commission wanted to promote a model of structural separation between infrastructure ownership and commercial activities. It did not succeed.

The legal analysis of English and French private laws can help understanding the rationale for the invention of a dispute resolution function to solve the questions of access. In addition to this power regulators can impose severe monetary penalties. The power to punish was previously vested only in criminal courts both in England and France. How can we account for this change?

¹⁶⁹ M. G. Pollitt Lessons from the History of Independent System Operators in the Energy Sector, with applications to the Water Sector, EPRG Working Paper 1125, Cambridge Working Paper in Economics 1153.

3.2 THE SHORTCOMINGS OF CRIMINAL LAW

Criminal law presents many shortcomings in both countries that can explain the explosion of administrative repression in both countries, although the reasons may sometimes be different. It is a topical question for criminal lawyers in both countries have tried to defend the criminal law that faces eviction from the legal spheres in many areas.¹⁷⁰

Many arguments have been developed in order to explain the shortcomings of criminal law, but they may be different in both countries.

A major justification for administrative penalties in France was the fact that up until the reform of the penal code in 1994 companies could not be held criminally liable for their acts. This justification does not work in the common law that has not found it difficult to help companies responsible in a criminal trial,¹⁷¹ even though they have no soul to damn or no body to kick.¹⁷² French courts have refused to manipulate the element of intention or mens rea in order to allow corporations to be convicted. Given this fact one can understand that administrative penalties, that have traditionally been used to punish corporation, presented a great advantage over criminal courts.

The principle of personal liability that is at the cornerstone of French criminal law protects so strongly corporations and their managers that administrative penalties became and still are the only way to punish corporations for acts done by their members. The State's Council, as we will see, adapted the principle of personal liability in order to ensure regulatory effectiveness.

Another argument used is the severity of the criminal penalties. It is thought that for minor offenses the criminal penalty seems too strong. In France, many writers have argued that criminal law is ineffective because it is not applied. Enforcers have the feelings that it would be too harsh on offender to try them in the criminal courts for minor offenses. The stigma that a criminal conviction bears is deterring enforcement. That's why Macrory proposed to reserve the criminal conviction to the most serious offenses and give to regulatory agencies less important offenses.¹⁷³

On the whole it appears that the trend is the same in France and the United Kingdom. Administrative repression serves as a way to punish minor offenses where it is thought that a criminal conviction would be too strong a penalty.

On the other hand English criminal law has found ways to punish corporate offenses that French criminal law refused even to consider. In France the strict application of the principle of personal liability as well as the impossibility to punish corporation until 1994 explained the choice for administrative penalties. In this respect French criminal law seems less effective to tackle corporate crime than English criminal law.

¹⁷⁰ See in England: A. Ashworth, L. Zedner, "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions", *Crim Law and Philos* (2008) 2:21–51. See in France: Y. Mayaud, "La justice pénale dans le monde des affaires", *Justices. Revue de droit processuel*, 1995, n° 1, p. 35-43.

¹⁷¹ Archbold Criminal Pleading Evidence & Practice, 2010 Ed, n° 1-78. C. Wells, *Corporations and criminal responsibility*, Oxford, New York, Oxford University Press, 2nd ed., 2001.

¹⁷² J. C. Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment", *Michigan Law Review* Vol. 79, No. 3 (Jan., 1981), pp. 386-459.

¹⁷³ Macrory Report, at p.38, n° 3.6.

Another element can explain the choice for regulatory remedies: the shortcomings of competition law.

3.3 THE SHORTCOMINGS OF COMPETITION LAW

All the dispute resolution cases solved by utility regulators may also be solved using competition law. The refusal to deal and give access to an essential facility such as the network could amount to an abuse of a dominant position. And it is a specificity of European law that sector specific regulation and competition law apply simultaneously to the conduct of utilities. In the US however the Supreme Court has refused in *Trinko* that competition law could apply in addition to sector specific regulation.

Thus, a specific conduct can be resolved by both means. However the problem is different in the UK and in France. In the UK all utility regulators are also competition law enforcers, they can therefore chose the best tool to solve the specific problem they have to face. In France on the contrary competition law enforcement is vested in a single body. That's why some companies chose to use both venues: engage in a dispute resolution in order to obtain a swift and efficient remedy and file a competition law claim if they think that there is a structural problem to be solved.

However international experience, especially in New Zealand, shows that sole reliance on competition law to open a market will end up in a failure. The litigation in New Zealand proved time consuming, costly and ineffective: "The events in New Zealand illustrate the need for a government agency to act as an arbitrator that settles disputes between the incumbent and entrants".¹⁷⁴ Indeed the Privy Council judgement proved to be in favour of the incumbent. Thus the new entrant stopped all negotiations and threatened to stop all investments in its network if this judgement was applied instead of the judgement of the Court of Appeal. The delay proved unacceptable and discredited this model. Now the competition authority was granted a power to settle disputes on access and interconnection in the telecommunications industry.¹⁷⁵

Sector specific regulators enjoy two kinds of advantages. First they have a specific and detailed knowledge of the sector they are regulating. As they are constantly monitoring the sector they know if their decision has been implemented whereas the competition authority having much more cases to deal with may not be able to supervise the implementation of its decision effectively.

Secondly, the methods used are different. Whereas competition law is based on economic theory and assessment of the relevant market using data based on the perception of consumers, the data regulators have to use is completely different in nature. Accounting methods are much more important for regulators because they have to set the access price towards the cost

¹⁷⁴ D. Gabel, W. Pollard, "Privatization, Deregulation, And Competition: Learning From The Cases Of Telecommunications In New Zealand And The United Kingdom", The National Regulatory Research Institute, January 1995, NRRI 94-32, p. 111.

¹⁷⁵ Telecom Corporation of New Zealand Ltd & Ors v Clear Communications Ltd. [1994] C.L.C. 1312. See C. Blanchard, "Telecommunications regulation in New Zealand: Light-handed regulation and the Privy Council's judgment", Telecommunications Policy, vol. 19, Issue 6, pp. 465-475; C. Blanchard, "Telecommunications regulation in New Zealand: How effective is "light-handed" regulation?", Telecommunications Policy, vol. 18, issue 2 (1994), pp. 154-164; C. Blanchard, "Telecommunications regulation in New Zealand: the Court of Appeal's decision. Clear Communications v Telecom Corporation", Telecommunications Policy, vol. 18, issue 9 (1994), pp. 725-733; C. Blanchard, "Telecommunications regulation in New Zealand: How effective is "light-handed" regulation?", Telecommunications Policy, vol. 18, issue 2 (1994), pp. 156-157.

of the network. Thus they have to process accounting data, which is a different job than studying economic theories and focusing on market shares and notions of abuse.

Thirdly, sector specific regulators are compelled by law to solve the dispute in a given amount of time: a few months; whereas competition investigation can last a year. Energy directives provide for a two-month period¹⁷⁶ whereas electronic communications directives provide for four months.¹⁷⁷

Fourthly, and more substantially if one studies the problem of margin squeeze, competition authorities are not equipped to deal with this problem as efficiently as sector specific regulators: “Under competition law, the margin squeeze principle prohibits only downstream gross profit margins which are so low (or negative) as to be exclusionary. Competition law does not give a competition authority any basis for ordering a vertically integrated dominant company to take a lower proportion of its overall profit, if any, upstream, so as to increase the profits of its downstream competitors, or its own downstream profits. By contrast, access price regimes can severely constrain the ability of the incumbent to make a margin on the upstream market (s).”¹⁷⁸ Competition law can only provide for general and not specific remedies.

As Pierre Larouche summarizes, competition law suffers from three different kinds of shortcomings as compared with sector specific regulation in the field of telecommunications:

- Gaps where competition law does not provide a “conclusive answer to an existing problem, or might even provide support for two or more options that are not necessarily compatible with one another”
- Challenges that it cannot remedy alone: changes in market structure (when the market becomes more and more competitive the focus should be less on “monitoring the incumbent” than on “overseeing the sector as a whole”, which means that the problem would not be one of dominance but one of “coordination of competitive behaviour”), convergence (between telecommunications, internet and broadcasting) and globalization
- Downsides: uniformization because EC antitrust has to be implement in a coherent way throughout Europe whereas utility markets may not have reached the same level of development; lack of flexibility because substantive, procedural and institutional antitrust enforcement is framed in broad and general terms; and opaqueness because the proceedings are very much closed and stakeholder cannot participate easily as is usual in administrative enforcement.¹⁷⁹

In conclusion, competition law suffers also from drawbacks that explain the drawing up of specific remedies. But substantive law (contract, tort, property, competition laws) cannot be

¹⁷⁶ Directive 2003/54/EC (electricity), article 23(5); Directive 2003/55/CE (gas), article 25(5).

¹⁷⁷ Directive 2002/21/EC, article 20(1).

¹⁷⁸ D. Geradin, R. O’Donoghue, “The concurrent application of competition law and regulation: the case of margin squeeze abuses in the telecommunications sector”, *Jnl of Competition Law & Economics* (June 2005) 1 (2): 355-425.

¹⁷⁹ P. Larouche, *Competition Law and Regulation in European Telecommunications*, Hart Publishing, 2000, at pp. 322.

studied in isolation from the institutions in charge of enforcing it. That's why the shortcoming of the legal systems and of courts has also to be studied.

3.4 THE PROBLEMS INHERENT TO CIVIL AND COMMON LAW LEGAL SYSTEMS

The English and French legal systems suffer from rigidities that explain the choice of a third way with administrative enforcement.

In the common law legal system it is often said that the rule of precedent can explain the rigidities of the system and the preference for administrative tribunals. Administrative tribunals are indeed not authorized to establish and are not bound to follow precedents.¹⁸⁰ The rule on precedent may be ill suited for administrative adjudication where other methods can achieve the same goal: certainty and equality before the law. Administrative tribunals can indeed provide guidance in order to achieve consistency in decision-making. This may prove more effective than the rule on precedent. At any rate, this rule would not be suited for dispute resolution or for administrative penalties.

In France, the problem regulatory dispute resolution can help solving is the problem is dualism. The disputes concerning access contract being private disputes on private contracts would be dealt with by civil courts. However sometimes the disputes involves issues related to the licence that belong to the jurisdiction of administrative courts. These disputes could lead in effect to the civil judge being compelled to make ask a preliminary ruling to the administrative judge if a question of interpretation arises.

In effect administrative powers (dispute resolution and administrative penalties) can be explained because of the rigidities of court systems. The institutional point of view on the shortcomings of courts and judges has to be studied now.

¹⁸⁰ *Merchandise Transport Ltd v. British Transport Commission* (1962) 2 Q.B. 173 concerning the Transport Tribunal. See Report of the Committee on Administrative Tribunals and Enquiries, at § 263.

3.5 THE SHORTCOMINGS OF COURTS

Judges and courts suffer from many shortcomings.

The first that comes in mind is the problem of European coordination. The European Commission has established network of agencies in order to achieve consistency in decision-making and a harmonious implementation of EU law. This would not have been possible if Courts had been the primary enforcers of utilities laws. Network governance that is being established in Europe is clearly in favour of the use of administrative agencies over courts.

Secondly both the civil and the criminal judges suffer from inevitable downsides. The civil judge that is being replaced by the dispute resolution process before regulatory authorities is criticized for not being fast enough. The disputes on access and interconnection have to be resolved in two months (in the energy sector) or four months (in the electronic communications sector). These time limits are clear problems for judges.

Moreover there is an element of technicality that is used also in order to justify the preference given to administrative remedies. However here the argument is not as strong in France as it is in the United Kingdom. It is indeed very often used in France but (as we will show in chapter 6) regulators are managed by judges, especially from the administrative courts. The standing committee of the energy regulator that adjudicates on dispute resolution questions and penalties is only staffed with judges. Furthermore judicial review in France is done by regular judges (both from civil and administrative courts): that's why this argument does not have the same force in France. However in the United Kingdom regulators are staffed with managers, experts and tribunals also (the CAT is staffed with judges and experts) and judges in judicial review cases have shown a reluctance in reviewing the findings of experts tribunals: "It is not open to this court to reach a different conclusion other than the one which, in my view, the Commission was entitled to reach".¹⁸¹ That's why many scholars or commentators have concluded that judicial review was inadequate in these instances.¹⁸²

Cost, especially in the United Kingdom is an element that is very often cited to justify not resorting to Courts.¹⁸³ This is not an argument that is used in France. In our field of study the argument of cost can play an important part at the beginning of the liberalization where the incumbent is much richer than new entrants and thus has less to loose in litigation. However as the market becomes more mature the bargaining power and the threat of litigation becomes less obvious.

¹⁸¹ *The Queen on the Application of T-Mobile (UK) Ltd, Vodafone Ltd, Orange Personal Communication Services Ltd v The Competition Commission, The Director-General of Telecommunications*, Queens Bench Division Administrative Court, 27 June 2003, [2003] EWHC 1566 Admin.

¹⁸² M. Walker, *Mobile phone charges inquiry and judicial review. A worrying failure of analysis*, NYP, The British Institute of International and Comparative Law, Practitioner Workshop, 16 September 2003 quoted by C. Graham, "Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK", at p. 256 in *National courts and the standard of review in competition law and economic regulation*, ed. by Od. Essens, A. Gerbrandy, S. Lavrijssen, Groningen, Europa Law Publishing, 2009.

¹⁸³ L. Mulcahy, *Contract law in perspective*, London, New York, Routledge-Cavendish, 5th ed., 2008, p. 221; S. Macaulay, "Non-contractual relations in business – a preliminary study", (1963) 28 *American Sociological Review* 55; H. Beale, T. Dugdale, "Contracts between businessmen: planning and the use of contractual remedies" (1975) 2 *British Journal of Law and Society* 45; R. Lewis, "Contracts between businessmen: reform of the law of firm offers and an empirical study of tendering practices in the building industry", 1982, 9, *Journal of Law and Society*, p. 153.

However it seems clear that when judicial review is the only option and where there is no appeal on the merit there is no litigation in the United Kingdom in the utilities sectors. The cost of the litigation associated with the likely chance to lose because explains the dearth of cases in broadcasting or in dispute resolution in rail or mail for example. The combination of both elements makes the court choice in the United Kingdom very risky. In France by contrast, cost is not an issue that scholars point out as being a reason for the setting up of an administrative tribunal.

It has also been argued that the procedure before administrative bodies is less formal and less adversarial. As far as formality is concerned this argument may be decisive in the UK. In France, the process of judicialization of regulatory enforcement made the procedure less and less informal and more and more framed by human rights principles. In the UK however this argument is very often used to justify the preference for tribunal over courts. Another procedural advantage regulators enjoy over courts is their inquisitorial powers. The adversarial nature of the procedure in civil law procedure (as we showed earlier in tort law) puts the burden of proof on the claimant. In our fields of study it would be impossible for the claimant would have to use private documents held by the incumbent to prove that its prices are not oriented towards costs. This task is more suited to an administrative body that can ask for documents and moreover in dispute resolution cases it is the incumbent that has to prove that its prices are correct. This shifts the burden of proof in favour of new entrants. It is a supplementary advantage that creates a favourable environment for competition.

In addition Fuller has shown that courts are ill suited to deal with polycentric problems that he defines as: “We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a “polycentric” situation because it is “many centered” - each crossing of strands is a distinct center for distributing tensions”.¹⁸⁴ Regulatory issues are a typical example of polycentric issues that Courts find difficult to adjudicate upon. Robert Baldwin has shown in the case of the regulation of airlines that the combination inside agencies of regulatory and dispute resolution functions is an adequate solution to polycentric issues.¹⁸⁵

Concerning the criminal judge many deficiencies are highlighted. Scholars have shown that the criminal judge may be too slow for this kind of litigation and the onus of proof too high¹⁸⁶. Also, it is very technical and complex. Specialisation is also an important factor that plays in favour of administrative agencies because criminal judges are generalists. Hampton has shown the same point: “The infrequency of prosecutions means that magistrates rarely see regulatory offences. A magistrate will typically see a health and safety offence every 14 years, and an environmental case every 7 years”.¹⁸⁷

¹⁸⁴ L. L. Fuller, “The Forms and Limits of Adjudication”, (1978) 92 Harvard Law Review 353, at p. 395. J.W.F. Allison, “Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication”, The Cambridge Law Journal (1994), 53: 367-383.

¹⁸⁵ R. Baldwin, Regulating the airlines, at pp. 139 suiv..

¹⁸⁶ This point has been made at least twice by Anthony Ogus (A. Ogus, C. Abbot, « Sanctions for Pollution: Do We Have The Right Regime? » J Environmental Law (2002) 14(3): 283-298; A. Ogus, “Enforcing Regulation : Do we need the criminal law ?”, at p. 50).

¹⁸⁷ Hampton Report, at n° 2.79.

Hampton also showed that monetary penalties imposed by the criminal judge are too low to be effective and to have a real deterrent effect: “At present, regulatory penalties do not take the economic value of a breach into consideration and it is quite often in a business’ interest to pay the fine rather than comply. This is especially true where a business feels able to shrug off the reputational risk of prosecution. If businesses face no effective deterrent for illegal activity, some will be tempted to break the law, and regulators will need to inspect more businesses. The review encountered numerous examples where penalties fell far short of the commercial value of the regulatory breach”.¹⁸⁸

The same shortcomings are visible in both legal systems. Administrative enforcement on the other hand can answer these challenges more effectively and provide a cost effective way to handle these problems. Regulators are moreover equipped to provide a solution to complex, technical and polycentric issues.

Finally a last argument in favour of administrative enforcement has to be studied: the ideological shift towards effectiveness of the legal system.

¹⁸⁸ Hampton Report, n° 16-17. The same conclusion was arrived at by Anthony Ogus and C. Abbot (“Sanctions for Pollution: Do We Have The Right Regime?” J Environmental Law (2002) 14 (3): 283-298).

3.6 THE IDEOLOGICAL EXPLANATIONS: THE INFLUENCE OF THE LAW & ECONOMICS MOVEMENT

Our study has found that arguments based on Law & Economics discourse or on effectiveness and empirical studies have only played a role in the UK or at EU levels. In France neither in Parliament nor before regulators, nor even in academic scholarships are these arguments developed.

Economic analysis of law has played an important role in justifying administrative repression. Anthony Ogus explains that the choice of instruments should be aimed at “selecting the combination of intervention which, at the lowest administrative cost, in aggregate, and discounting for the probability of their occurrence, will generate costs for the offending firm likely to exceed the profits they secure for the illegal act”.¹⁸⁹ He goes on saying that the cheapest regime is administrative enforcement.

How did economic analysis arrive at such a result? Economics of crime have profoundly changed the aim and objective of the criminal system. Becker showed that offenders are rational actors, making a cost benefit analysis to justify their action. Thus if the likely cost of the offence is greater than the likely benefit then the individual will not break the law. Of course the underlying assumption of such an analysis is that we are all would be offenders and that we are not breaking the law because the cost benefit analysis seems in disfavour of such a choice. As Becker says: “The cost of different punishments to an offender can be made comparable by converting them into their monetary equivalent or worth, which, of course, is directly measured only for fines. For example, the cost of an imprisonment is the discounted sum of the earnings foregone and the value placed on the restrictions in consumption and freedom”.¹⁹⁰

Economic analysis of law starts from the principle that law enforcement has a cost. Therefore, the purpose of law enforcement is not to ensure absolute conformity, but optimal conformity.¹⁹¹ The legal system should set a level of acceptable delinquency in order to achieve optimal enforcement and ensure that the cost of enforcement does not exceed its benefit.

Starting from these assumption Courts seems more costly than administrative enforcement and do not therefore help in achieving optimal enforcement. Anthony Ogus showed that “It is very expensive for the enforcement agency to marshal sufficient evidence to obtain a conviction, given existing procedure of criminal procedure including, notably, the burden of proof, restrictive rules of evidence and (in very serious cases) requirement of a jury trial”.¹⁹²

¹⁸⁹ A. Ogus, “Enforcing Regulation: Do we need the criminal law?”, *New perspectives on economic crime*, ed. par H. Sjögren, G. Skogh, Cheltenham, Northampton, Mass., Edward Elgar, 2004, at p. 43 and 48-49.

¹⁹⁰ G. S. Becker, “Crime and Punishment: An Economic Approach”, *The Journal of Political Economy*, Vol. 76, No. 2 (Mar. - Apr., 1968), pp. 169-217, at p. 179 and 208.

¹⁹¹ George J. Stigler, “The Optimum Enforcement of Laws”, *The Journal of Political Economy*, Vol. 78, n° 3 (May - Jun., 1970), pp. 526-536.

¹⁹² A. Ogus, “Enforcing Regulation: Do we need the criminal law ?”, at p. 50; A. Ogus, C. Abbot, “Sanctions for Pollution: Do We Have The Right Regime?”, *J Environmental Law* (2002) 14(3): 283-298. V. aussi Rapport Macrory, préc., p. 23 (n°1.30 suiv.).

Responsive regulation can also help understanding the preference for administrative enforcement.¹⁹³ Carol Harlow and Richard Rawlings explain that responsive regulation is about “designing regulatory frameworks which stimulate and respond to the pre-existing regulatory capacities of firms, keeping regulatory intervention to the minimum required to achieve the desired outcome, while retaining the regulatory capacity to play a more forceful hand”.¹⁹⁴ The enforcement pyramid designed by the writers uses administrative enforcement as the first tool in the regulatory toolkit to ensure compliance: “Most regulatory action occurs at the base of the pyramid where attempts are initially made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance, imposition of civil monetary penalties; if this fails, criminal prosecution; if this fails, plant shutdown or temporary suspension of a license to operate; if this fails, permanent revocation of license.”¹⁹⁵ Regulatory action thus takes place both at the bottom and at the top of the pyramid. Criminal prosecution plays a very limited role within this theory. This is exactly what Ashworth criticizes: “For Braithwaite, the prevention of harm is a primary goal of social policy, and the criminal law is regarded as one among a number of mechanisms for bringing this about. It should therefore be used as and when it is efficient, and replaced by other mechanisms when it is not efficient and/or cost-effective. This view underlies the idea of responsive regulation, as a means of dealing with the varying contexts in which regulatory agencies have to operate”.¹⁹⁶

Economic analysis of law is also very influential at EU level. As we showed previously the last directives in energy and electronic communications strengthen the repressive regime for regulator. They provide expressly that regulators should be equipped with a power to inflict financial penalties. Why?

This change can be explained because an economic study made for the European Commission showed that administrative enforcement reinforces regulatory certainty that promotes regulatory outcome and market development. The study first highlights that “regulatory uncertainty was one important aspect of regulation that affects investment decisions” and thus growth of the sector. Secondly among the factors that “contribute to more regulatory certainty” there is “adequate NRA enforcement powers”.¹⁹⁷ Stakeholders expressed concerns “about the limits on the enforcement powers held by the NRAs and the limited sanctions that they were able to impose. It was felt that these factors often led to considerable delays in regulatory decisions and to a position of sometimes considerable legal uncertainty. It was suggested that both these factors contributed to inhibiting investment.”¹⁹⁸

¹⁹³ I. Ayres, J. Braithwaite, *Responsive Regulation: transcending the deregulation debate*, Oxford, New York, Oxford University Press, 1992. See also J. Braithwaite, “The New Regulatory State and the Transformation of Criminology”, *The British Journal of Criminology*, 2000, vol. 40, pp. 222-238.

¹⁹⁴ C. Harlow, R. Rawlings, *Law and Administration*, at p. 242.

¹⁹⁵ I. Ayres, J. Braithwaite, *Responsive Regulation: transcending the deregulation debate*, at pp. 35-36.

¹⁹⁶ A. Ashworth, “Is the Criminal Law a Lost Cause”, *Law Quarterly Review*, 2000, pp. 225. See also K. Yeung, *Securing Compliance - A Principled Approach*, Hart Publishing, Oxford, 2004.

¹⁹⁷ *An Assessment of the Regulatory Framework for Electronic Communications – Growth and Investment in the EU e-Communications Sector, Final Report*, at p. xiii.

¹⁹⁸ *An Assessment of the Regulatory Framework for Electronic Communications – Growth and Investment in the EU e-Communications Sector, Final Report*, at p. 117.

This study makes a clear link between enforcement powers, regulatory certainty and investment growth and explains the advantages that regulatory enforcement can have over courts.

CHAPTER 4: DEFINITION AND SCOPE OF REGULATORY ENFORCEMENT DECISIONS

Why defining the regulatory enforcement decisions available before regulatory authorities? This part is of crucial importance because if it the characters of the decisions that will entail the application of the specific legal regime that we will develop in chapters 6 and 7. Administrative penalties must be pronounced according to the rules of natural justice in English administrative law. An administrative penalty has also to obey the principle laid down in article 6 ECHR. The definition of the protections available before regulatory authorities will be detailed in chapter 6. In addition the fact that all these decisions are administrative decisions mean that in both England and France they can be challenged according to the public law procedure of judicial review (where no statutory appeal is available).

The precise definition of the decisions in comparative administrative law is not an easy task. Whereas the notion of administrative penalties, administrative decisions, administrative enforcement orders are clear in French administrative law and have received considerable scholarly attention, the notions are not defined in English administrative law. How could it then be possible to find a definition acceptable in both countries and having the same legal regime?

What both countries share in common is the lack of definition of what is a regulatory dispute resolution decision. But this function, having a basis in EU law, will be easier to theorize.

How will we then proceed? Comparative law, and comparative administrative law are not different in this respect, can build, study and compare notions using a functionalist approach. There is no clear methodological framework for comparative law.¹⁹⁹ However we have used two methods. As Örucu argues “the true basis of comparative law is ‘functional equivalence’”. Two distinct currents of functionalism are on offer: the ‘functionalist method’, one of the best-known working tools in comparative law, and ‘functionalism’ in the sense that law responds to human needs and therefore all rules and institutions have the purpose of answering these needs. The functional–institutional approach answers the question ‘Which institution in system B performs an equivalent function to the one under survey in system A?’ From the answer to this question the concept of ‘functional equivalence’ emerges. Comparative lawyers seek out institutions having the same role, i.e., having ‘functional comparability’, or solving the same problem, ‘similarity of solutions’. What is undertaken here can also be the ‘functional juxtaposition’ of comparable solutions. The problem-solving approach – the other side of the same coin – asks the question, ‘How is a specific social or legal problem, encountered both in society A and society B, resolved?’; i.e., ‘Which legal or other institutions cope with this problem?’ This approach, similar to the ‘functionalist’ approach, springs from the belief that similar problems have similar solutions across legal systems, though reached by different routes. It is said that ‘the fact that the problem is one and the same warrants the comparability’ (Schmitthoff, 1939). According to the functional–institutional approach the above questions, once answered, are immediately translated into

¹⁹⁹ See A. Esin Örucu, *Methodology of comparative law*, The Elgar Encyclopedia of Comparative Law Smits, Jan M. (ed.), at p. 442.

functional questions. Functional inquiry also suits the utilitarian approach to comparative law²⁰⁰.

Here we have privileged the functional–institutional approach. In order to define what is an administrative decision for example we will explain what are the definitions available in both legal systems but the question we will ask ourselves is: as an administrative decision in France is a decision whose characters make it amenable to judicial review, what are the decisions in English law that are attached the same consequence? The same will be true for administrative penalties: as an administrative penalty in France is a decision whose consequence is that it has to be pronounced according to the rules of natural justice, what are the decisions in English law that bear the same consequences?

This method will help us discover, understand and these legal institutions in both countries and will help us have a homogeneous treatment when we study the legal regime applicable in chapter 6 and 7.

We will begin by exploring what all these decisions share in common. They are all administrative decisions, even though there has been a doubt on this point in English law concerning dispute resolution decisions following the Mercury litigation (4.1). We will then have to define what are administrative penalties in comparative English and French administrative law (4.2). Finally we will try to define what is a dispute resolution decision, what are its specific features (4.3).

²⁰⁰ See A. Esin Örucu, *Methodology of comparative law*, at p. 443.

4.1 THE NATURE OF REGULATORY REMEDIES: THE NOTION OF ADMINISTRATIVE ADJUDICATION IN COMPARATIVE ENGLISH AND FRENCH ADMINISTRATIVE LAW

What is an administrative decision in English and French law? We will study both systems in order to end up with a definition.

1. Administrative decisions under French administrative law

In French administrative law, an administrative act has four characters:

- It is legal: it has to produce legal effects; a directive that contains non-imperative dispositions will not be considered an administrative act.
- It is unilateral: it can therefore be distinguished from administrative contracts;
- It is made by an administration: in this sense it has to be distinguished from statutes or court judgements. But this term is also too broad to define precisely the scope of administrative decisions, some decisions of an administration only pursue the “private interest” of the administration and not the general interest, for example when a public body manages commercial business or a private property: these decisions will be reviewed by civil courts. The scope of what the administration is needs therefore to be précised. A decision by a public body will benefit from a presumption of administrativeness. This presumption can be rebutted if the administration is acting as a private person would do. Conversely, decisions of private bodies will enjoy the opposite presumption. Chapus contends that public bodies are dual: either they act as a public power using the means of public administration (“gestion publique”) or they act as a private institution, using the means of private administration.
- It is made in the pursuit of a public service, which means for in public interest. These criteria can help rebutting the presumption of non-administrativeness of a decision made by a private body. A private body in charge of a public service will therefore be amenable to judicial review if it takes a decision about a public service and uses public power prerogatives.

The rule can be summarized thus:

- Decisions of public bodies are in principle administrative acts, they are assumed to be pursuing a public interest and using prerogative powers.
- Conversely decisions of private bodies can be amenable to judicial review only if it is proved that are made in the pursuit of a public service and use prerogative powers.²⁰¹

²⁰¹ On this question see: B. Seiller, *L'acte administratif*, Répertoire Dalloz de contentieux administratif ; R. Chapus, *Droit administratif général*, tome 1, at n°707; G. Dupuis, M.-J. Guédon, P. Chrétien, *Droit administratif*, at p. 457-458. D. Truchet, *Droit administratif*, at p. 106; P.-L. Frier, J. Petit, *Précis de droit administratif*, at p. 275; M. Waline, *Droit administratif*, at p. 347.

There is no doubt that all the decisions under study, imposing penalties, resolving disputes, enforcing conditions using an order are administrative decisions. They are unilateral; they are using public power prerogatives of the hardest kinds and public authorities that belong to the executive power make them. If any doubt subsisted the Constitutional Council has, concerning dispute resolutions decisions (that the House of Lords refused to classify as amenable to judicial review in the 1990s), held that they were actually administrative decisions.²⁰²

How can we define administrative decisions in English administrative law?

2. Administrative decisions under English administrative law

Administrative law textbooks in England do not study this question. Some, influenced by American administrative law, engage in a reflexion on rule making and adjudication but this assumes that the decisions (whether a rule or an adjudication) are administrative.²⁰³

How are we to define what is an administrative decision in English law? As we said earlier our purpose is smaller, our purpose is to find, in English and French law, the decisions that have the same legal consequences. An administrative decision in French administrative law is a decision amenable to judicial review. More precisely, for comparison's sake, it is a decision that can be quashed. As we will show in chapter 7 judicial review of administrative decisions in French law, or *ultra vires* review ("recours pour excès de pouvoir") amounts only to asking a quashing order. Prohibitions and mandamus can be sought in French administrative law but only if a *certiorari* is asked. Only *certiorari* is the equivalent of the *ultra vires* review or "recours pour excès de pouvoir" in French administrative law.

The question is therefore a simple one: which decisions can be amenable to *certiorari* under English administrative law? These decisions will be deemed to be administrative decisions for the purpose of the research and the comparison.

Perhaps the most authoritative obiter concerning the definition of decisions amenable to *certiorari* is by Atkin LJ: "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".²⁰⁴ Atkin identifies three elements making an administrative decision: the legal authority affecting rights and having a duty to act judicially.

It should be noted that the third element has not fallen into disuse: the duty to act judicially is not required according to the most authoritative writers. Paul Craig argues that "there are statements that it is no longer relevant how the function is described in determining the applicability of *certiorari*. (...) The argument that the judicial or administrative nature of the proceedings should not be relevant for the purposes of *certiorari* was confirmed by *O'Reilly v Mackman*. Lord Diplock, giving the unanimous decision of the court, stated that there was no

²⁰² Decision n° 96-378 DC, at §21.

²⁰³ P. P. Craig, *Administrative Law*, pp. 715.

²⁰⁴ *R. v Electricity Commissioners Ex p. London Electricity Joint Committee Co (1920) Ltd* [1924] 1 K.B. 171, at p. 205.

longer a requirement of a superadded duty to act judicially before the prerogative orders could apply”.²⁰⁵

Two elements are therefore necessary:

- As Paul Craig says the first element of definition is that “certiorari and prohibition will apply to quash any decision of a public law nature”.²⁰⁶ But what is then a “decision of a public law nature”. It appears that the source of the power is a decisive clue. If the power derives from statute or from the prerogative,²⁰⁷ it will be amenable to judicial review. The Datafin decision has shown that these sources of power are not the only one possible.

The definition of the administrativeness of an act under English administrative law is closely linked to the basis of judicial review. Even though there is a debate about a change in the basis of judicial review, it is undeniable that ultra vires was the basis. Therefore it is logical that, as judicial review was meant to prevent ultra vires decisions the source of the power is capital to determine the scope of decisions that can be amenable to judicial review.

- But it is not the only criteria. There is a presumption that decisions involving contractual relationships are not amenable to judicial review. This is where the second criteria can come into play. If the decisions affects the rights of subjects certiorari will lie.²⁰⁸

There is no doubt, as far as regulatory authorities, whose powers derive from statute, that their decisions are amenable to judicial review. There was and is a doubt for some of them concerning dispute resolution on access, following the Mercury case.

3. *Comparative comments*

What is striking in the way English and French administrative law think about administrativeness is a fundamental difference? Whereas the primary criteria in English law is a “material” criteria, the nature of the decision, its source; in France it is the nature of the body, the function comes afterwards.

It does not mean that in English administrative law, the nature of the body is indifferent. In fact many authorities inquire into the nature of the body. Lord Diplock in *O'Reilly v Mackman* defines public law and judicial review only using an institutional criterion: “Thus far I have regarded the board of visitors as in a special category. I have treated them like justices of the peace. But, in case I am wrong about this, I would go on to consider them simply as a public authority who can be supervised by means of judicial review.” And he

²⁰⁵ P. P. Craig, *Administrative Law*, at p. 833; H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 516.

²⁰⁶ P. Craig, *Administrative Law*, p. 829, n° 25-004; C. D. Campbell, “The nature of power as public in English judicial review”, *Cambridge Law Journal*, 2009, 68(1), pp. 90-117, at p. 90.

²⁰⁷ *R. v Criminal Injuries Compensation Board Ex p. Lain* [1967] 2 B.B. 864; *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

²⁰⁸ *R. v Barnsley Metropolitan Borough Council Ex p. Hook* [1976] 1 W.L.R. 1052. Even though contractual relationships were at stake here the fact that the decision of the municipality infringed a common law to trade in a market the decision to revoke the licence was amenable to judicial review.

further adds on the divide between public and private law: “Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects vis-à-vis public authorities”.

However the scope of judicial review is limited by property and contract law that create a quasi-presumption against judicial review. But this presumption is now diminishing. For comparison’s sake administrative contract in France are also not amenable to judicial review, a special review called full jurisdiction review is available for them. Only regulatory provisions of administrative contracts can be amenable to certiorari and quashed.

But a functional approach allows also challenging a decision of private bodies. In *Regina v Panel on Take-overs and Mergers, Ex parte Datafin Plc.* the Court of appeal held that the decisions of the Panel could be challenged by way of judicial review because “the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, which was supported by public law sanctions”.²⁰⁹

In conclusion, in both countries the nature of the body is an important factor but it is not decisive and the function of the body, labelled a public law function in England and public service in France, is of utmost importance.

4. The problem with dispute resolution decisions

Both countries, although in a different way, have a problem with these decisions.

The *Mercury Communications Ltd v Director General of Telecommunications*²¹⁰ shows the difficulty the House of Lords had to see the public law nature of these decisions, in fact it has not.

Lord Diplock in *O’Reilly* explained very well and decisively that it was be an abuse of process to use private law remedies to challenge a decision of a public body. However in the particular context, judges sought that only private law remedies could be effective enough to challenge the dispute resolution decision. The defendants challenged the determination to resolve the dispute made by the Director general of Telecommunications. It was a determination, on a private dispute by a public body established by statute. But the problem here was that the source of the power was in the licence.

The House admitted that “the Director General was performing public duties in connection with the provision of telecommunications”. But its determination was about the interpretation of the terms of a licence in relation to a dispute between two telecommunications companies. The determination was about “the effect of the terms of the contract between them”. Thus “the plaintiffs’ procedure by way of originating summons was at least as well suited to the determination of the issues as judicial review would be”. The determination being about a private contract, judicial review was thought to be unsuited for these kinds of disputes. Judges thought that private law procedures were more suited. Moreover, at that time the source of the power of the director general was not in the statute but in the licence.

²⁰⁹ *Regina v Panel on Take-overs and Mergers, Ex parte Datafin Plc. and Another* [1987] 2 W.L.R. 699.

²¹⁰ *V. Mercury Communications Ltd. v Director General of Telecommunications* [1996] 1 W.L.R. 48. A. McHarg, Regulation as a private law function? Public Law, 1995, 1995, Win, pp. 539-550.

But there is every reason to believe that this decision is no longer of any help to check if dispute resolution decisions are amenable to judicial review now. Indeed the dispute resolution power has now, in most sectors, a statutory basis and in electronic communications and energy the source is even in EU law that gives a right to a review.

But in France also an ambiguity has occurred. Even though there is no doubt that these decisions are administrative decisions, Parliament has decided to grant the jurisdiction to review these decisions to the civil law judge. The civil judge tries to use the same methods as the administrative judge but the code of civil procedure applies nonetheless. This will be discussed extensively in chapter 7.

After having established that the decisions of regulatory authorities are administrative decisions amenable today to judicial review we need to study more closely the definition of administrative penalties in English and French administrative law.

4.2 THE DEFINITION AND SCOPE OF ADMINISTRATIVE PENALTIES: IN SEARCH OF A DEFINITION

Whereas the definition of administrative penalties is simple in French administrative law, because they have received large scholarly attention, the definition is more difficult in English administrative law.

The second element of difficulty lies in the current normative complexity. The legal consequence of a penalty under English and French administrative law is that it must be amenable to judicial review but more importantly that it must attract the protection of natural justice principles. Administrative penalties are administrative decisions that inflict a sanction. The administration has to afford protections to persons affected by such penalties. Administrative penalties attract the rules of natural justice in English administrative law.

But now, with the coming into force of the Human Rights Act in England, administrative penalties are also under the protection of the ECHR, as it is in France. Administrative penalties are also decisions against which people have a right to a fair trial. This adds to the complexity of the definition.

We will briefly state the definition in French administrative law (1) before turning to English administrative law (2) and finally to the ECHR (3) making afterwards some briefs comparative comments (4).

1. Administrative penalties in French administrative law

The definition most lawyers agree is to call administrative penalties “administrative decisions that inflict a punishment for a breach of the laws”. It is an administrative decision, it amounts to a punishment, it pursues a repressive aim (and not a preventive one) in order to sanction a violation of statutes or regulations.²¹¹ They share some similarities with criminal penalties in the sense that they have a punitive content, they aim at punishing and the principle of legality imposes that an offense exists.

2. Administrative penalties in English administrative law: in search of a definition

The definition of administrative penalties in English law has received little scholarly attention. As John McEldowney puts it, “the use of sanctions for a breach of administrative rules or legal duties is a developing field of study within the United Kingdom”.²¹²

The search for a definition is also made difficult because of the fact that common law world usually prefers to use the term “civil sanction”. It is indeed the term Macrory uses in some of

²¹¹ See Conseil d’État, *Les pouvoirs de l’Administration dans le domaine des sanctions*, E.D.C.E., 1994, pp. 35-36.

²¹² See J. McEldowney, “Report on Administrative Sanctions in the United Kingdom”, forthcoming. See however “Breaking the rules”, A report by Justice, Chairman, Paul Sieghart, 1986, at p. 40.

his writings²¹³ and it is the term used in the Regulatory Enforcement and Sanctions Act 2008²¹⁴. The term civil is used in opposition to criminal sanctions. However, this term leads to a false legal conclusion, for it could also mean a sanction imposed by civil courts through private enforcement. Moreover the term “civil” hides the true legal nature of these decisions: they are administrative decisions subject to the supervisory jurisdiction of the Courts through judicial review. In his very influential report Macrory uses the term “administrative penalty” but does not as far as giving a legal definition²¹⁵.

We can first begin our search by examining the definitions given in other common law jurisdiction before enquiring into English law.

a. The definition in other common law jurisdictions

Although no precise definition has been given of administrative sanctions in the UK, it is possible to gain from the experience of other common law jurisdictions.

For example, in the United States, administrative sanctions have existed for a long time. In 1938, James Landis, in “The Administrative Process”, explains that the “the chief drive for the resort to the administrative process [with the Interstate Commerce Commission] in the field of railroad regulation arose from a recognition that the remedies that the courts could provide were insufficient to make effective the policies that were being demanded. These implements or remedies to effectuate policies can appropriately be called sanctions. Whereas the substance of law, its theories, and its techniques are the subject of continuing instruction and research, sanctions-the means whereby policies can most effectively be translated into reality-have received only casual notice... Sanctions, or the methods that exist for the realization of policies, may be thought of as constituting the armoury of government. But even a catalogue of that armoury is not in existence... One of the most interesting devices for the imposition of sanctions frequently characterizes the administrative process. This device blends within a single administrative agency both the power to initiate complaints and the power to determine whether the alleged facts which give rise to the complaint exist to such a degree as to justify the imposition of a penalty.”²¹⁶

More precisely, Lillian R. Altree, in an article written in 1964, defines administrative sanctions saying “Administrative adjudication, characterized by the exercise of a significant degree of discretion due to the inherent difficulty of ascertaining the specific standards of conduct dictated by the public interest, is the means by which administrative sanctions are imposed and regulatory policy brought directly to bear upon individuals “. She identifies three elements to characterize this notion: the “penal, remedial, and regulatory ingredients”²¹⁷. Interestingly for our study, the writer uses the term “remedial”, that she defines as follows: “The remedial ingredient is the approximate production of the situation that would have

²¹³ See R. Macrory, “Reforming Regulatory Sanctions—Designing a Systematic Approach”, in *The Regulatory State, Constitutional Implications*, op. cit., at p. 234.

²¹⁴ See Regulatory Enforcement and Sanctions Act 2008, Part 3.

²¹⁵ See Regulatory Justice: Making Sanctions Effective, Final Report, November 2006, at p. 41 sq.

²¹⁶ See J. Landis, *The administrative process*, New Haven, Yale University Press, 1938, at p. 89=91.

²¹⁷ See L. R. Altree, “Administrative Sanctions: Regulation and Adjudication”, *Stanford Law Review*, Vol. 16, No. 3 (May, 1964), pp. 630-648. See also F. H. Thomforde Jr, “Controlling Administrative Sanctions”, 74 *Mich. L. Rev.* 710 (1975-1976).

existed had primary norms been observed in the first instance. It too applies to past conduct, for which it exacts compensation from the wrongdoer. The remedial element characterizes many of the sanctions”.

The three elements identified by Lillian R. Altree are important to bear in mind.

Another common law jurisdiction has studied administrative sanctions. The Law Reform Commission of Canada published a study entitled “Sanctions, Compliance Policy and Administrative Law” in 1981 where it identified three elements to define administrative sanctions: (1) administrative action authorized by law; (2) taken to achieve client compliance, and (3) perceived by the client as significantly affecting its interests.²¹⁸

Compared with the definition given by Altree, the Canadian definition shares the penal and the remedial element. However, it emphasizes more the legal nature of the decision, the fact that it can only be classified as an administrative action, and therefore has to be distinguished from court decisions.

Finally, Australia has done some work to define these decisions.²¹⁹ It begins by distinguishing criminal, civil and administrative penalties. As we said earlier, the use of the term “civil penalties” as Macrory does, is confusing. The report defines administrative penalties saying “‘Administrative penalties’ in Australian federal law are broadly understood as being sanctions imposed by the regulator, or by the regulator’s enforcement of legislation, without intervention by a court or tribunal. The term is, however, widely used, or misused, to include processes that are themselves not penalties or administrative.”²²⁰ However, the Australian Law Reform Commission adopts a very narrow conception of administrative sanctions, that they call “true administrative penalties”, defined as “are automatic, non-discretionary monetary administrative penalties”.

Although this definition adds new elements to the definition (such as the degree of discretion that the regulatory body enjoys), the Commission endorses two elements: the penal and administrative characters of these decisions.

Which conclusions could we draw from all these definitions? Three elements are important to define administrative penalties for the purpose of a comparative administrative law research between France and the United Kingdom: first these decisions have to be classified as administrative decisions and not court decisions (on this point every common law jurisdictions and France agree), that’s why the term “civil sanction” has to be repudiated; secondly, these decisions have a penal element, they inflict a pain (a monetary penalty for example); thirdly, they share a remedial element in the sense that the purpose of these decisions is to deter and induce compliance because there has been a breach of a legal rule.

Is it possible to find, studying the English case law a workable definition of administrative penalties in English administrative law?

b. A definition of administrative penalties in English law

²¹⁸ See Law Reform Commission of Canada, Sanctions, “Compliance Policy and Administrative Law”, prepared by Howard R. Eddy, 1981, at p. 11.

²¹⁹ See Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95).

²²⁰ See Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95), at § 2.64 to 2.70.

The elements identified above can help find what is an administrative penalty in English law: there must be a punitive element, there must be a breach of a rule and the decision is an administrative decision.

Another important factor has to be born in mind for comparison's sake. The decisions identified have to attract the protection of natural justice for, in France, administrative sanction entail the application of the rights of the defence that are similar in content with natural justice principles. Although the scope of natural justice seems bigger than the scope of decisions protected by the rights of the defence, the question we have to answer is therefore: among the decisions that attract the application of natural justice are punitive decisions among them.

The first question is therefore: which decisions under English law entails the protection of natural justice principles?

Margherita Rendel, from a historical perspective confirms that there is a close link between administrative penalties (disciplinary cases) and the application of natural justice.²²¹ In the 1615 *Bagg's Case* or in *R. v University of Cambridge* of 1723 judges have imposed a duty to observe the principle of natural justice in cases where a disciplinary action is taken against a subject to deprive him of his professional activity.

The famous case that gave its fame to the duty to act in accordance with the principle of natural justice and fairness was *Ridge v Baldwin*. In this case there was an alleged breach because he had been negligent in the discharge of his duties as chief constable, and there was a punitive measure taken against him: he was dismissed. Lord Reid examines three cases of dismissals: in the case of a master servant relationship, in the case where the office is held at pleasure and finally "dismissal from an office where there must be something against a man to warrant his dismissal". The first two are rejected by the judge. He focuses his speech on the third kind. This sentence shows two elements: a punitive element (the dismissal) and an offense (the breach of a legal obligation).

These decisions, according to Lord Reid, are assuredly regulated by the principle of natural justice: "There I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defense or explanation". Where a decision is taken with the intent to punish an offense and whose consequence is to affect adversely property rights or privileges of persons there is no doubt that natural justice and fairness apply. Taking a property, fining, depriving someone of membership of a professional or social body are examples Lord Reid gives of decisions that cannot be determined without giving an opportunity to be heard. He also, interestingly, makes an analogy with the work of a judge "in imposing a penalty" or "imposing a sentence".

According to Paul Craig natural justice "will be dependent on the nature of the power exercised and its effect upon the individual concerned".²²² Concerning the first element Paul Craig says that "in the post-Ridge era the Courts have insisted that procedural fairness applies to disciplinary actions that impact on liberty interests, or adversely affect the individual".²²³

²²¹ M. Rendel, "Natural Justice and Disciplinary Cases in Britain and France", *Public Administration*, vol. 58, Issue 1, March 1980, pp. 67-86, at p. 69.

²²² P. Craig, *Administrative Law*, at p. 376.

²²³ P. Craig, *Administrative Law*, at p. 380-381.

This definition shows that administrative penalties exist within the framework of natural justice cases. The range of decisions that have to abide by procedural fairness seems larger than penalties but these decisions are comprised.

Thus there is no objection to define administrative penalties under English law as administrative decisions punishing someone for a breach of a legal rule.

But it is very likely, with the entry into force of the HRA that litigants will try to use the ECHR to challenge the penalty for the protections it affords are wider. It is therefore important to see how the ECt HR defines administrative penalties.

3. Administrative penalties under the ECHR

For the purpose of article 6 ECHR the right to a fair trial is available when a public authority determines “civil rights and obligations” or “any criminal charge against” someone.

On the civil side the proceedings before a public authority must be “decisive” for civil rights and obligations at stake. The civil side of article 6 is particularly used in disciplinary cases where disciplinary tribunals are adjudicating on whether someone should be deprived of his/her job. In *Le Compte v Belgium*, “the ECtHR held that article 6 applied to proceedings before a medical disciplinary tribunal which had suspended the applicant Belgian doctors, because those proceedings were directly decisive of the applicants' private law right to practise medicine”.²²⁴

Examples of civil rights for the purpose of article 6 and that have a sanctioning dimension include all the decisions concerning licences to practice a commercial activity or a profession.²²⁵ These decisions are especially relevant for our study as all the regulators have the power to revoke the licence they are in charge of awarding in the first place.

The concept of criminal charge is an autonomous concept so that the penalty does not have to be classified as criminal in domestic law. Administrative penalties are therefore concerned. In order to determine if a determination amounts to a criminal charge the ECt HR uses three criteria that are not cumulative:

- The classification of the proceedings in domestic law;
- The nature of the offence itself; or
- The severity of the penalty that may be imposed.²²⁶

²²⁴ Applications 7299/75, 7496/76: *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, ECtHR. See Lester, Pannick & Herberg: *Human Rights Law and Practice/Chapter 4 The European Convention on Human Rights*, at n° 4.6.6.

²²⁵ Application 10873/84: *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309, ECtHR; Application 8848/80: *Bentham v Netherlands* (1985) 8 EHRR 1, ECtHR; Application 16922/90: *Fischer v Austria* (1995) 20 EHRR 349, ECtHR, at para 40; *Capital Bank AD v Bulgaria* (2007) 44 EHRR 48, ECtHR, at para 88; Application 6232/73: *König v Germany* (1978) 2 EHRR 170, ECtHR; Application 18160/91: *Diennet v France* (1995) 21 EHRR 554, ECtHR.

²²⁶ Applications 5100/71, 5101/71, 5102/71: *Engel v Netherlands* (1976) 1 EHRR 647, at para 82; Application 9912/82: *Lutz v Germany* (1998) 10 EHRR 182, at para 55; Application 18996/91: *Garyfallou Aebe v Greece* (1999) 28 EHRR 344, at para 33.

First the Court reviews the nature of the offense under domestic law. If it is classified as criminal then it will be decisive for the purpose of article 6 and entail the application of the right to a fair trial. If it is not classified as criminal because it is a civil or an administrative penalty then the Court resorts to the two other criteria. The Court will examine the decision itself, having a concrete approach: is there a punitive element?²²⁷ Does it require the finding of guilt?²²⁸ The severity of the penalty will often be decisive and substantial financial penalties have been found to fall under this heading.²²⁹

In this respect the financial penalties regulatory authorities can impose will most certainly be deemed criminal for the purpose of article 6.

In conclusion, it follows from this analysis that in English and French administrative law, as well as for the purpose of article 6 ECHR, administrative penalties imposed by regulatory authorities (whether when they suspend or revoke a licence or when they inflict a financial penalty for a breach of a licence condition) attract the protections of domestic administrative law (procedural fairness) and the right to a fair trial.

We will now turn to the analysis of the most peculiar kind of decision regulatory authorities take: dispute resolution determination. It has been seen how English and French laws have a difficulty in finding that they are truly administrative determinations. Why?

²²⁷ Application 8544/79: *Öztürk v Germany* (1984) 6 EHRR 409, at para 53; Application 9912/82: *Lutz v Germany* (1987) 10 EHRR 182; Application 12547/86: *Bendenoun v France* (1994) 18 EHRR 54, at para 47; Application 39652/98: *Maaouia v France* (2001) 33 EHRR 42; Application 38184/03: *Matyjek v Poland*, Decision of 30 May 2006, ECtHR, admissibility, at para 56.

²²⁸ Application 19380/92: *Benham v United Kingdom* (1996) 22 EHRR 293, at para 56; *Aerts v Belgium* (1998) 29 EHRR 50; Application 31283/04.

²²⁹ Application 12547/86: *Bendenoun v France* (1994) 18 EHRR 54; Application 21351/93: *JJ v Netherlands* (1999) 28 EHRR 168; Application 34619/97: *Janosevic v Sweden*, Judgment of 23 July 2002, ECtHR, at paras 64-71; Application 73053/01: *Jussila v Finland*, Judgment of 23 November 2006, ECtHR, at paras 29-36

4.3 THE DEFINITION AND SCOPE OF ACCESS DISPUTE RESOLUTION

Defining the dispute resolution function may not seem at first glance an easy task even though it amounts simply to the systematization of positive law (English and French statutes and EU directives) and of the jurisprudence.

Why defining these decisions? It may at first glance be a useless work, especially from an English eye. It has to be noted that, contrary to what has happened in the United Kingdom, the administration in France has never been involved in solving private disputes. Therefore Land Tribunals, Employment Tribunal, the Financial Ombudsman that can even award damages to a private party are institutions that are completely foreign to a French eye. All these institutions are in France exclusively within the remit of private courts. Employment issues are dealt with by the “Conseil des Prud’hommes”, a first instance tribunal under the authority of the “Cour de cassation” and the Financial Ombudsman does not exist, its work would be done by the normal civil courts in a suit for damages.

Therefore the institution is completely new. But in England also this institution has some elements of newness. When it first appeared in BT’s licence at the beginning of the 1980s and now as it works out within all utility regulators in England, it is the only administrative function to resolve disputes on questions of access to an essential facility (a network). It is also all the more important when compared with countries like New Zealand that relied entirely on competition law remedies to open their utilities markets. It did not work. It therefore shows the importance of this new function for the success of competition.

It is not the only justification for its study.

It reveals the very essence of the novelty of the regulatory function we will define and shows the problems regulation has to solve for the notion of access is at the very heart of this new function. The notion of access reveals that what is at stake and what was the problem with utilities is that property and contract law have anticompetitive effects that dispute resolution tries to erase. The problem with network utilities and why competition did not work in the 19th century and the 20th century was because of the natural working of property and contract and not because of ideologies. When one possesses a network, one can always exclude competitors, it is the basic idea of property law.

Dispute resolution before utility agencies can be defined as the regulatory function aimed at solving a dispute on a question of access. Three elements are therefore necessary: a dispute (1), a question of access (2) and a regulatory action that often takes the form of an order (3).

1. The existence of a dispute

The existence of a dispute is a requisite in all the directives and the statutes. It is incumbent on the undertaking referring a dispute to a regulator to prove that negotiations have failed. This shows that the dispute resolution function has been thought of as being a subsidiary function. Priority should be given to commercial negotiations and it is only insofar as these fail that the regulator can be asked to intervene.

The primacy of commercial negotiation is contained in the directives and legislations in both countries. Directive 97/33/EC on telecommunications provided that “organizations authorized

... should be free to negotiate interconnection agreements on a commercial basis in accordance with Community law, subject to supervision and, if necessary, intervention by national regulatory authorities ... it is necessary to ensure adequate interconnection within the Community of certain networks”.²³⁰

On this basis the ECJ has confirmed that freedom of contract was to be given primacy and that dispute resolution should only be resorted to when negotiations fail. The ECJ in fact commented that “As stated in recital 5, the directive relies for the attainment of its objectives primarily on commercial negotiations between the operators providing telecommunications services.”²³¹ It further added that the purpose of the directives was to “establish a freedom for undertakings to negotiate and to conclude agreements. That freedom forms part of the objective of the Access Directive, defined in Article 1(1) thereof, namely to establish 'a regulatory framework... that will result in sustainable competition, interoperability of electronic communications services and consumer benefits'.”²³²

The primacy of the freedom of contract is therefore protected by EC law.

The dispute comes from the conflict between this freedom of contract and the right of access granted by EC and domestic laws. The conflict between the freedom and the subjective right granted by the law creates is the cause of the dispute.

The right of access is materialized by an obligation of negotiation. Article 4 of the access directives provides for this obligation of negotiation: “Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings”.

According to the ECJ this obligation entails an obligation to negotiate and not to conclude an agreement: “In any event, it must be held that that obligation to negotiate is independent of whether the undertaking concerned has significant market power, and does not entail the obligation to conclude an interconnection agreement, but merely an obligation to negotiate such an agreement.”²³³ It follows that such an obligation being an exception “must therefore be interpreted strictly”.²³⁴

But according to the ECJ “the Access Directive states that undertakings which receive requests for access or interconnection should, in principle, conclude such agreements on a commercial basis and negotiate in good faith”.²³⁵ The obligation to negotiate in good faith

²³⁰ Directive 97/33/EC, Recital 5.

²³¹ Case C-79/00 Telefónica de España SA v Administración General del Estado [2001] ECR I-10075, at § 27.

²³² Case C-192/08 TeliaSonera Finland Oyj [2009] ECR I-10717, at § 39.

²³³ Case C-192/08 TeliaSonera Finland Oyj [2009] ECR I-10717, at § 36.

²³⁴ Case C-192/08 TeliaSonera Finland Oyj [2009] ECR I-10717, at § 40.

²³⁵ Case C-192/08 TeliaSonera Finland Oyj [2009] ECR I-10717, at § 51.

also exists in gas²³⁶ and electricity²³⁷. The obligation to negotiate in good faith does not exist in English contract law²³⁸ and not at this stage in French contract law.²³⁹

The cause of the dispute is therefore to be found in the conflict between the freedom of contract and the subjective right of access conferred by the directives and domestic laws. But how does the dispute materialize? How do regulators accept to see a dispute? The notion of dispute should be construed in the light of the purpose of the directives that is to promote access and competition. Thus, a dispute will arise whenever there is a failure of contractual negotiations. The parties will need to prove that negotiations have taken place and that they have failed because of an actual disagreement. As the Competition Appeal Tribunal puts it: “In legal terms, a dispute normally concerns entitlement, a conflict of claims or rights, where A contends that B is obliged to do something, which B denies”.²⁴⁰ A blunt refusal, sometimes a silence may constitute such a failure of commercial negotiations.

The notion of dispute is essential to define the jurisdiction of the regulatory authority. The second element that defines the dispute resolution function is the notion of access.

2. A question of access

In his book “The age of access”, Jeremy Rifkin argues that “the role of property is changing radically. The implications for society are enormous and far-reaching. For the whole of the Modern Age, property and markets have been synonymous. Indeed, the capitalist economy is founded on the very idea that of exchanging property in markets ... In the new era markets are making way for networks, and ownership is steadily being replaced by access”.²⁴¹

Today the notion of access to a market is at the centre of public policies at international level (with the WTO and EU law and it is an encroachment on sovereignty) and at domestic level with competition law and regulation (and it is a breach on the principle of exclusivity at the heart of ownership). It reveals what other writers before us have already highlighted: the close link between sovereignty and property. How many writers in the 18th and 19th century have describe the owner, property in terms of sovereignty.

Competition, as we will show in chapter 5, has replaced freedom as the standard of the legal order.

²³⁶ Directive 2009/73/EC, article 32(3).

²³⁷ Directive 96/92/EC, article 20(2). Such an obligation has disappeared in subsequent directives on electricity.

²³⁸ In *Walford v Miles* Lord Ackner considered such an obligation to be « unworkable in practice ». See Chitty on Contracts 30th Ed., n° 1-029.

²³⁹ Code civil, article 1134, al. 3 simply provides that contracts should be executed in good faith and not negotiated in good faith.

²⁴⁰ *British Telecommunications Plc v Office of Communications (Partial Private Circuits)*, [2010] CAT 15, at §91.

²⁴¹ J. Rifkin, *The age of access : the new culture of hypercapitalism*, where all of life is a paid-for experience, New York, Jeremy P. Tarcher, Putnam, 2000, at pp. 3-4.

In order to understand this notion, its novelty, one has to show how access was traditionally repudiated in private property law. It was indeed a notion attached to public law and public properties.

It seems obvious that access and property are two notions that contradict one another. Ownership in English and French property law is mainly characterized by the right to exclude. Exclusivity is the main element of property so that, if one does not want to give access to its property, it is free to do so. It was famously affirmed as sacred in *Entick v Carrington* “Our law hold the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave”. The basis of this right to exclude has been held to reside in the rule of law.²⁴² In England this rule has been a little bit tempered by the rule of reasonable access in order to regulate the privatization of the public sphere, where quasi-public properties are concerned.²⁴³

In France also, exclusivity was thought to be attached to the absolute character of property law. The 1789 Declaration also hold property as a sacred right of the human being, as the “aim of all political association”. It is protected also by a special action before the civil judge where a public authorities trespasses on a private property.

That’s why the notion of access was traditionally confined to public or quasi-public properties. In England access is a notion attached either to highways, streets, commons or what Lord Hale famously called properties “affected with a public interest”, inaugurated in the *Allnutt v Inglis* case²⁴⁴. The famous case law on common carriers, that had a particularly rich offspring in the United States shows that access was confined in the common law world to special properties affected with a public interest.²⁴⁵ These are the way, as Paul Craig puts it, “the common law developed a regime for controlling various aspects of such proprietary power”.²⁴⁶

The same rule exist in France although in a different manner and it will not be a source of astonishment to know that rule concerning open access were developed by administrative courts. In this way the notion of public service, when it is used by the judge for a commercial activity (such as ports if one wants to establish a parallel with *Allnutt v Inglis*), as the same effect that the notion of common carrier. And it is defined the same way as a “property

²⁴² *Harrison v Carswell* (1976) 62 DLR (3d) 68, spéc. p. 83 per Justice Dickson.

²⁴³ K. Gray, S. Francis Gray, *Elements of land law*, at n° 10.6.6; K. Gray, S. Francis Gray, *Private Property and Public Propriety*, in *Property and the Constitution*, Janet Mclean (ed.), Oxford, Hart, 1999.

²⁴⁴ Sir Matthew Hale, *De Portibus Maris*, in *A Collection of Tracts Relative to The Law of England* 79 (Francis Hargrave ed., 1787).

²⁴⁵ L. Gorton, *The Concept of the common carrier in Anglo-American law*, Elanders boktryckeri aktiebolag, 1971, p. 27; Bailhache J. in *Belfast Ropework Co Ltd v Bushell* [1918] 1 K.B. 210: « to make a man a common carrier he must carry as a public employment; he must carry for all indifferently; he must hold himself out as ready to carry for hire as a business and not as a casual occupation pro hac vice [i.e. on this occasion]. He is sometimes described as a person who undertakes for reward to carry the goods of such as choose to employ him from place to place. To this I think it would be safe to add the words ‘at a reasonable rate’ ». V. aussi Halsbury, vol. 5(1), §502: “A common carrier is one who exercises the public profession of carrying the goods of all persons wishing to use his services or of carrying passengers whoever they might be”. See Graham McBain, *Time to abolish the common carrier*, *Journal of Business Law*, 2005, Sept., pp. 545-596; G. H. Robinson, *The Public Utility Concept in American Law*, *Harvard Law Review*, Vol. 41, No. 3 (Jan., 1928), pp. 277-308.

²⁴⁶ P. Craig, *Constitutions, Property and Regulation*, P.L. 1991, 538-554.

affected with a public interest”. Apart from public service properties, access is also present in what French administrative law has called the public domain (that was formerly crown property, the notion of crown authorising to distinguish the property from the King himself who could not alienate these properties). Streets, parks, the sea are areas where access is for all and should also be free.

Concerning private properties the notion of access is therefore contemporaneous as Jeremy Rifkin says. Two bases have been found in the law to justify access: human rights and competition law.

The rise of access corresponds to the diminishing impact of exclusivity in the definition of property. As have been said English courts are not far from recognizing an obligation of reasonable access to quasi-public properties such as malls.²⁴⁷ And the ECt HR has also held that “Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights”.²⁴⁸

But it is also on the ground of competition law that access has been given a firm basis, through the notion of essential facility. Whenever an undertaking owns an essential facility to the effect that it can prevent competition, a right of access may be granted because the refusal can amount to an abuse of a dominant position. In the utilities the law grants a right of access in order to foster competition because the traditional principle of property law would bar competition.

In conclusion, dispute resolution can be defined by resorting to the notion of dispute and access. Finally it has to be noted that it is a regulatory action.

3. A regulatory action

Saying it is a regulatory action seems obvious. However, there is a tendency in both legal systems to construe this function as that of a civil judge or an arbitrator. English judges are clearer on this point than French scholars or judges.

Two judgements are of relevance. Mr Justice Moses held that concerning the Office of the Rail Regulator “having regard to his role as guardian of the public interest, the Regulator is not constrained in the directions he may make by the wishes of the parties. The directions he gives may be different from those which an applicant for the directions sought. He may have

²⁴⁷ Sedley said: “I am prepared to accept that the answer may no longer be a cursory “Of course”. Both because London Electricity is a statutory undertaker providing a service essential to most people’s lives and because its shop premises, when open, constitute an invitation to the public to enter and remain there for proper purposes, it is arguable that it cannot arbitrarily or improperly exclude or expel members of the public. The valuable article “Civil rights, civil wrongs and quasi-public space” by K. and S.F. Gray [1999] EHRLR 46 demonstrates that there may be more to be said in the future on the topic than was said by this court in *C.I.N. Properties v. Rawlins* [1995] EGLR 130. The control by the courts of the unreasonable exercise not only of public powers but of private powers donated by the state or possessing monopoly characteristics has a long history which, at least across the Atlantic, is far from spent: see P.P. Craig, “Constitutions, property and regulation” [1991] PL 538. One aspect of the argument is that the common law has historically limited certain private powers in the public interest” (*Porter v Commissioner of Police of the Metropolis*, Court of Appeal (Civil Division), 20 October 1999, (1999) All ER D 11129).

²⁴⁸ *Appleby and Others v. The United Kingdom*, n° 44306/98.

a separate agenda. He is not a judge or arbitrator but performs a broader role than that required of a judicial or quasi judicial decision maker. In those circumstances he is not constrained by the wishes of the parties”.²⁴⁹

Similarly the CAT said that “Ofcom’s submission, summarised in paragraph 95 above, that it is constrained by the information presented during the negotiations would appear to us to be inconsistent with these statutory provisions. In our judgment an error of law would have arisen if OFCOM approached its consideration and determination of the dispute and the information which it sought in accordance with section 191 within such narrow confines. OFCOM’s approach would be open to similar criticism if it excluded material provided to it pursuant to its request under section 191, which may otherwise be relevant, on the basis that it was not material provided during the negotiations”. It further emphasized that “OFCOM carries out its dispute resolution function as a regulator and not as a third party arbitrator. The Tribunal did not mean by this that nothing in OFCOM’s role in dispute resolution should be regarded as akin to the role of a commercial arbitrator, simply that that was not OFCOM’s only role. The fact that, as we have held, part of OFCOM’s role is to determine a rate which is fair and reasonable as between the parties does not mean that OFCOM is transformed into a commercial arbitrator; this factor is combined with a requirement that it determine a rate which also accords with its regulatory objectives”.²⁵⁰

In making an order the regulators are pursuing the public interest they are not merely arbitrators. In this sense it is a regulatory function. They are regulating the terms of the contracts between private parties so that these terms conform to the general interest. They may even force them to enter into a contract on such conditions as they think fit to foster their regulatory goals.

What is the scope of this regulatory power? In this sense it should just be noted that French civil courts have curtailed the power of the regulators. Whereas it is clear from the readings of the Communications Act 2003 that Ofcom can “give a direction imposing an obligation ... to enter into a transaction between themselves on the terms and conditions fixed by OFCOM”, French civil courts have held that regulators cannot force private parties to enter into a contract, they can only force one party to make an offer, because the principle of the freedom of contract was to be preserved²⁵¹. This distinction is subtle and the doctrine has said that it amounts to the same thing for once the offer is accepted it becomes a contract however it has been a severe blow to the regulator’s power.

4. Is article 6 ECHR applicable

In France, the Courts have assumed article 6 to be applicable without explaining why and which limb of article 6 was concerned.²⁵²

²⁴⁹ The Queen On the application of London and Continental Stations and Property Limited v The Rail Regulator [2003] EWHC 2607 (Admin), at § 28.

²⁵⁰ T-Mobile (UK) Ltd v British Telecommunications Plc [2008] CAT 12 (20 May 2008), at §181.

²⁵¹ Cour d’appel de Paris, 1ère ch. H, 25 janvier 2005, Cerestar c. RTE.

²⁵² J.-P. Kovar, La soumission des autorités de régulation aux garanties du procès équitable, *Revue de Droit bancaire et financier* n° 3, Mai 2010, dossier 19, n°11; Cass. com., 14 décembre 2010, n° 09-67371, SFR c. Sté France Télécom.

Two grounds of application can be found. First, dispute resolution between private parties is the core of what private litigation is about. The ECt HR has in this respect held that private litigation is the core of what a determination of civil rights and obligations is about. This application would be therefore traditional. It is only too legitimate that dispute between private parties should be resolved after a fair trial. As a writer summarizes it: “the rights and obligations of private persons in their relations as between themselves are always civil rights and obligations. Areas where civil rights or obligations have been found include the law of tort, family law, employment law and the law of real property”.²⁵³

But the analysis could be further to understand which civil rights and obligations are at stake here and to what extent does this function breach them. The dispute resolution decision has a direct consequence on property rights that are protected by the convention. It involves a limitation on the prerogatives of the owner who is not free to set the price at which it would consent to give access. And the right to protection of property is a fundamental civil right for the purpose of article 6.²⁵⁴

The breach of property rights as well as the fact that dispute resolution is about regulating the relations of private entities can explain why French courts have considered that article 6 was applicable. English judges, however, have not been led to answer this question that was never asked.

In conclusion to this chapter, it should be noted that regulators enjoys broad enforcement powers that are under the protections of administrative law principles and international instrument especially article 6 ECHR.

The purpose of this part has been first to define the scope of administrative penalties and dispute resolution (of course regulators enjoy also more diverse powers such as the power to give enforcement notices and orders).

The work of definition has led us to understand and compare the notions of administrative decisions in England and France, and of administrative penalties. Comparison was the main aim of the analysis. Using a functionalist approach it became easier to understand what is an administrative decision and an administrative penalty in English administrative law in order to compare this institution with its French equivalent.

Concerning administrative decisions the source of the distinction between the two countries lies in the criteria used. Whereas England uses a functionalist approach (public law function, public law duties) focusing on the aim of the mission, France uses first an institutional criteria based on the nature of the body and only uses a functional approach as a secondary criteria.

Concerning administrative penalties it seems obvious that the law on procedural fairness in English administrative law is primarily about administrative penalties although the criteria used seem broader and able to encompass more adverse decisions than pure penalties or disciplinary actions. Here also the impact of the ECHR in defining what is an administrative penalty was important for it attracts the protection of the criminal side of article 6.

Concerning dispute resolution comparison has helped understanding the changing nature of property in two countries where ownership was thought to be sacred. Competition and the

²⁵³ Lester, Pannick & Herberg: Human Rights Law and Practice/Chapter 4 The European Convention on Human Rights, at n° 4.6.9.

²⁵⁴ Application n° 54596/00 *Époux Goletto v France*, at § 12.

notion of access has changed radically the notion of property and amounts to a serious breach in the element of exclusivity that was at the basis of property law in England and France up to now.

This shows that regulation in network industries pursues a specific goal: eliminating anticompetitive effects of property and contract law. This leads us naturally to trying to define what is regulation.

CHAPTER 5: THE COMMON GOAL OF THE ENFORCEMENT PROCESS: DEFINING REGULATION

Although the term regulation is used in a chaotic way, definitions and explanations have to be provided, especially because the definition we want to arrive at will serve our purpose.

The semantic chaos is partially due to the influence of economic thinking that uses this word to designate in effect all forms of States' intervention. The influence of economics thinking also obscures the task of the lawyer, which is to observe and explain legal developments and not borrow some explanation from economic theories. That's why, contrary to what is so often done we will not, in our literature review, speak about what is commonly called private and public interest theories of regulation. First we have already talked about capture theory. Secondly, we have also seen how private interest theory of regulation does not describe or explain at all what happened with the opening up to competition of utilities sector. Contrary to what these theories claim, the opening up was primarily done by the regulators themselves in the United States, and incumbents did not favour this solution at all. Thirdly, both theories are old and do not therefore describe anything new in the law, whereas contemporaneous theories of regulation try to show that something new happened in the law. That regulation pursues a public interest should not be a source of wonder. Any form of State intervention should be done in the public interest, it cannot therefore be called a theory, and this is actually what regulators are doing. Finally the economic point of view on law is not a description, it serves a purpose, and very often a political one that obscures the debate. Our aim is to clarify and explain why it is so hard to define regulation and how regulation can adequately describe something new in the law.

This leads to the second difficulty that lies in the comparison and the ambiguity of the term regulation in English that can be translated in two ways in French. Either regulation is used to mean a legal rule governing behaviour or practice and it will be translated in French using the word "réglementation" or, borrowed from science, it describes the process whereby any system keeps in equilibrium, and then the word "régulation" can be used. But the closeness of the two words regulation and "régulation" does not help clarifying the meaning of either term. Moreover the vagueness of the word is sometimes so convenient that it is used to designate many different phenomena.

We would like in this part to show the various legal theories of regulation trying to classify them in order to show what the legal academia tries to understand when it uses this term (5.1). Secondly we will explain why it is so difficult to find what regulation actually is. The two reasons will be the two first definitions we will give of regulation. It is hard to know what regulation because it is nowadays the way we think about the State (5.2). Throughout history there has always been a word embodying what the State is: justice was the term used for the King in England and France, the word police then became a new way to understand the term, followed by the night watchman expression. Finally it seems that the word that best described the myth of the State before regulation took over was the term "public service". This last vision may seem French centred, but we want to show the even though the expression was not used as a legal notion in the case law nor as an explanation in the legal doctrine does not deprive this notion of all explanatory potential. It is because lawyers (and it is also the case in

France) are too much court centred that one cannot see how many statutes use the word, to what extent the word was used by MPs in order to justify public intervention. The debates surrounding the creation of the BBC in the 20s are in this respect very revealing.

The second reason it is hard to understand what regulation is lies in the fact that the function of the law today has changed. The new myth of the State, of State's intervention inaugurates a change in the function of the law. Whereas it was obvious that public policies pursued a social function they now pursue an economic function. Today the law is used to serve an economic purpose, which changes all the legal notions we were used to. Universal service replaces public service, and social benefits should be aimed at making people more efficient and making them go back to work whereas they were originally designed to ensure that everyone could survive and live. Regulation is the triumph of the economic function of law and that why it has become so difficult to understand it (5.3).

However, for the purpose for our research, these two definitions are not workable. They do not help us understanding our object. How are we going to proceed to define regulation? Starting from an analysis of the French and English case law we will show that, up to now, the limit and the purpose of State's intervention was the notion of freedom or liberties. That freedoms of the citizens were actually a limit of the State's intervention is not controversial. However we will show that it is how Courts used to review this intervention, using this standard. That the purpose of State's intervention was also freedom is not obvious at first. That's however what we will demonstrate. Seeing the intervention of the State as only a limit is seeing only one face of the coin. Is there any doubt that social security or education foster the freedom of the have-nots?

Regulation materializes a change. Freedom, liberties are neither the sole limit nor the only purpose of State's intervention today. Regulation can therefore be defined as the institutionalization of a market based on competition. That liberty and competition are not the same thing will be an element of the demonstration. The first clue being that one purpose of regulation is to limit the anticompetitive effects of freedoms such as the right of property or the freedom of contract. This definition helps us understanding what happened in the utilities and the purpose of regulatory enforcement action: the notion of access is at the centre of dispute resolution and is aimed at developing competition. Sanctions, on the other hand, ensure the credibility of regulatory action in the creation and opening to competition of markets (5.4).

5.1 OVERVIEW OF THE DOCTRINAL DEFINITIONS OF REGULATION IN ENGLAND AND FRANCE

There is one difficulty in exposing the definitions of regulation used in France and in the United Kingdom: they serve different purpose. The English legal doctrine tend to use regulation in a political way, to say how regulation could be improved or what should be done; whereas the French is much more descriptive. That's why the categories we used to classify the different definitions available may not give their full meaning to each attempt at defining.

Despite this precision, it seems that two levels of definitions can be used. Regulation has been used to describe new forms of normativity (5.1.1), new forms of State's intervention (5.1.2) or in relation to the market (5.1.3).

5.1.1 REGULATION AND NORMATIVITY

Gérard Timsit has provided the most thorough definition of regulation as a new form of normativity.²⁵⁵ He shows that traditionally and still today two models of normativity are classically opposed: one based on the model of the market and one on the model of the State. They both aim at coordinating conduct but in a different way. In the market model the coordination is spontaneous, whereas in the State model the coordination is coerced by the use of legal rule. However, to Gérard Timsit, these two models share some common features: they are external to the people they try to coordinate (prices and rules are both external to individuals), they both have their own rationality (the bureaucratic rationality theorized by Weber for the State and, for the market, the rationality of the *homo oeconomicus*). These are, according to the writer, the “two extreme versions of the traditional normative approach”, and the two ideal-types vision of reality.

Market and State deficiencies lead to a redefinition of the normativity around the redefinition of the State: “This is the function of a normative approach based on dialogue — reinventing the State today means trying to respond forcefully to this twofold exigency: to substitute or further elaborate both the spontaneous actions of the market and the imposed actions of the State, notably with a view to remedying their insufficiencies”. Regulation is defined in this respect as a “normative approach based on dialogue”.

This dialogue means that the State has to be remodelled. First it was downsized and independent agencies were created in order to carry out some important functions. In order to engage in a dialogue the State also needs new partners, hence the development of new forms of representation of civil society. Parliament has no longer the monopoly of representing citizens.

This dialogue also needs new forms of legal expression. It cannot be adequately performed through traditional imperative rules. That’s why the new modes of intervention favour “participatory procedures, recommendations, incentives, persuasion”. Regulation uses persuasion, incentives are main tools to engage in a dialogue. Regulation embodies and can be defined as this new normativity based on dialogue.

This theory helps explaining new forms of legal intervention through means that do not have the same legal effects as traditional rules. Other writers in the French legal doctrine have endorsed an approach that studies regulation in relation with new forms of legal acts that are not enforced or cannot be enforced the same way: the use of soft-law and the participation of the act’s addressees to its elaboration for Martin Collet²⁵⁶; the apparition of “inviting act” (“actes invitatifs”) for Laurent Calendri.²⁵⁷

²⁵⁵ G. Timsit, “Braibant Lecture 2007: Reinventing the State — to be continued”, *International Review of Administrative Sciences*, June 2008; vol. 74, 2: pp. 165-175.

²⁵⁶ M. Collet, “La régulation fiscale”, *Droit fiscal* n° 12, 20 Mars 2008, 220, at n°4; M. Collet, “Valeur(s) de la regulation”, in *Mélanges en l’honneur de Jacqueline Morand-Deville*, Montchrestien, 2007, at. p. 247.

²⁵⁷ L. Calendri, *Recherche sur la notion de régulation en droit administratif français*, at pp. 258.

Viewing regulation as participation or dialog is not far from the stakeholder theory of regulation that was developed in the United Kingdom.²⁵⁸

For Alain Supiot regulation is a mark of the rise of a new kind of norm, technical norms that treat human beings as machines.²⁵⁹

But most definitions do not focus on normativity; they rather try to explain new forms of State's intervention or State's forms.

²⁵⁸ D. Souter, "A Stakeholder Approach to Regulation" in D. Corry, D. Souter and M. Waterson, *Regulating Our Utilities* (London, Institute for Public Policy Research, 1994), at pp. 35. See T. Prosser, "Theorising Utility Regulation", at pp. 206.

²⁵⁹ A. Supiot, *Critique du droit du travail*, P.U.F., Coll. Quadrige Essais, débats, 2007, préface p. XI.

5.1.2 REGULATION AND THE STATE

Regulation is often used today to designate the new forms of State's intervention. It is now most of the time only a label, used as a synonym of intervention.

Regulation can either be used to show the changing forms of the State's intervention (1), or to illustrate its new role (2) or its new function (3).

1. Regulation and the changing forms of the State's intervention

Regulation has been envisaged in the doctrine (and the two approaches are not necessarily separated and can be combined) as the changing of the traditional institutional form of the State's intervention, in other words the use of a new kind of institution, or /and as a change of the technical legal means of its action.

The institutional approach stresses the change that has occurred with the development of independent regulatory authorities. The notion of independent agencies changes the institutional architecture of the State. Very often regulation is used to designate the action of these authorities and studies of regulation in fact amount to the study of independent agencies, either in France or in the common law world.²⁶⁰

Regulation is also envisaged as the use of new tools of public action such as the use participatory procedures to achieve a given goal. Participation is seen as an important change in public policy, the State cannot impose its norms and its vision of the general interest, it has to consult stakeholder, it has to engage in a dialogue.²⁶¹ The involvement of civil society in public action is seen as a major change of paradigm of action.

2. Regulation and the new role of the State

A major current of the regulatory doctrine thinks about regulation or the "regulatory State" in opposition with the welfare State. A new current tries to think regulation outside the State.

²⁶⁰ J. Chevallier, "Régulation et polycentrisme dans l'administration française", *Revue administrative*, 1998, n°301, p. 43; L. Calendri, *Recherche sur la notion de régulation en droit administratif français*, p. 88; F. Gazier, Y. Cannac, *Étude sur les autorités administratives indépendantes*, E.D.C.E. 1983-1984, n° 35, passim.; J. Chevallier, "Réflexion sur l'institution des autorités administratives indépendantes", *JCP éd. G.*, 1986.I.3254; *Regulation and public law*, R. Baldwin, C. McCrudden, Weidenfeld and Nicolson, 1987; C. McCrudden *Regulation and deregulation : policy and practice in the utilities and financial services industries*, Oxford, Clarendon, 1999, pp. 4-5; G. Majone, "The Rise of the Regulatory State in Europe", *West European Politics*, vol. 17, n° 3, pp. 77-101, pp. 83; A. Young *The Politics of Regulation: Privatized Utilities in Britain*, Palgrave Macmillan, 2001; T. Prosser, "Theorising Utility Regulation", *The Modern Law Review*, 1999, vol. 62, n°2, pp. 196 at p. 199; C. Harlow, R. Rawlings, *Law and Administration*, chap. 7.

²⁶¹ S. Braconnier, *Droit des services publics*, P.U.F., Coll. Thémis Droit public, 2007, pp. 572. A.-J. Arnaud, "De la régulation par le droit à l'heure de la globalisation. Quelques observations critiques", *Droit et Société*, 1997, n°35, pp. 11-35; G. Dellis, "Régulation et droit public "continental" Essai d'une approche synthétique", *Revue du droit public et de la science politique*, 2010, n°4, pp. 957, esp. p. 960; J.-L. Autin, "Le devenir des autorités administratives indépendantes", at p. 877.

The regulatory State appears for some as a shift from the welfare State. The State is no longer a direct actor in the economy, a provider of public service rather it is seen as an arbitrator. It is limited to a role of supervision and no longer to a direct role of provision.²⁶² In the common law world the theme of the regulatory State or new regulatory State is also used in opposition to the welfare State, where the State was a direct provider of services. The State is now thought of as being a regulator, a producer of norms to supervise the economic mechanisms.²⁶³

In this respect regulation embodies a new role of the State. But some studies go further and argue that regulation should be seen at a function beyond the State.

It is in this respect that some writers have predicted a post-regulatory State.²⁶⁴ In the common law world some thinkers such as Julia Black have tried to separate regulation from the State, taking a decentred approach to regulation.²⁶⁵ Julia Black uses Teubner's thinking on autopoietic systems as well as Foucault ideas on power in order to show that traditional regulation, being exterior to the objects regulated can only trigger unpredictable outcomes, because systems are closed and cannot affect one another. Also, Julia Black shows the interdependencies of different actors. The consequence of this analysis is that regulation is not actually produced by the State; it is the result of all these interdependencies, of all these actions. Following Black's path, the doctrine today thinks more and more the phenomenon of regulation in a decentred way. Rules and regulations are not the only means of regulation. Regulation should use many other means and choose the best to achieve its goal.²⁶⁶

²⁶² J. Chevallier, *L'État post-moderne*, L.G.D.J., Coll. Droit et société, Série politique, tome 35, 2008, at p. 62; J. Chevallier, "La régulation juridique en question", *Droit et Société*, 2001, n°49, pp. 827-846, at p. 829, n°2; J. Chevallier, "Le statut des autorités administratives indépendantes : harmonisation ou diversification", *R.F.D.A.* sept.-oct. 2010, p. 900; J. Chevallier, "Régulation et polycentrisme dans l'administration française", *Revue administrative*, 1998, n°301, at pp. 43; M.-A. Frison-Roche, "Le droit de la regulation", *Recueil Dalloz*, 2001, pp. 610 suiv.; S. Nicinski, *Droit public des affaires*, préc., p. 20, n°42.

²⁶³ G. Majone, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance", *Journal of Public Policy*, vol. 17, n°2, pp. 139-167; G. Majone, "The Rise of the Regulatory State in Europe", *West European Politics*, vol. 17, n° 3, pp. 77-101; J. Braithwaite, "The New Regulatory State and the Transformation of Criminology", *British Journal of Criminology*, 2000, vol. 40, n°2, pp. 222-238; C. Scott, "Regulation in the Age of Governance: the Rise of the Post-Regulatory State", at p. 148; Cass R. Sunstein, "Paradoxes of the Regulatory State", *University of Chicago Law Review*, vol. 57, 1990, pp. 407-442; R. H. Pildes, C. R. Sunstein, "Reinventing the Regulatory State", *University of Chicago Law Review*, vol. 62, 1995, pp. 1-130; J. Braithwaite, "The Regulatory State", in *The Oxford Handbook of Political Institutions*, R.A.W. Rhodes, S. A. Binder, B. A. Rockman (ed.), Oxford, Oxford University Press, 2008, at p. 406; M. Lodge, "Regulation, the Regulatory State and European Politics", *West European Politics*, vol. 31, n°1-2, pp. 280-301; K. Yeung, "The Regulatory State", in *The Oxford Handbook of Regulation*, M. Cave, R. Baldwin, M. Lodge (ed.), Oxford University Press, Coll. Oxford Handbooks in Business and Management, 2010, at pp. 80-81; M. Moran, *The British regulatory state: high modernism and hyper-innovation*, Oxford, New York, Oxford University Press, 2003, at p. 12 ("it is a new kind of state, which differs from predecessor forms in turning away from hierarchy, command, and large-scale interventionist ambitions"). D. Levi-Faur, "Regulation & Regulatory Governance", *Jerusalem Papers in Regulation & Governance*, Working Paper No. 1, February 2010, p. 19.

²⁶⁴ C. Scott, "Regulation in the age of governance: the rise of the post-regulatory state", at p. 145.

²⁶⁵ J. Black, "Critical Reflections on Regulation", *Australian journal of legal philosophy*, 27 1-35. This has allowed to take private law into account when speaking of regulation: C. Scott, "Regulatory Governance and the Challenges of Constitutionalism"; F. Cafaggi, "Private Law-Making and European Integration: Where Do They Meet, When Do They Conflict?", in *The Regulatory State*.

²⁶⁶ Robert Baldwin, Martin Cave, Martin Lodge, "Introduction: Regulation-The Field and Developing Agenda", in *The Oxford Handbook of Regulation*, Robert Baldwin, Martin Cave, Martin Lodge (ed.), Oxford University

But regulation can also be seen using another lens: the functions of the State.

3. *Regulation and the functions of the State*

In continental law, it is usual to divide administrative functions in two: either the administration provides a service (it is usually called the public service function) or it regulates an activity (it is usually called the police power). This division is common in France, Spain and Germany.²⁶⁷ There is however a disagreement as to the existence of a third category, State aids. Some writers contend they should be treated separately whereas some writers argue they belong to the public service activity. There is however an agreement at least on dividing administrative functions into provision and “regulation” (the last term being use as rule-making).

A first current of thinking identifies regulation with the changing nature of public service provision. Regulation has become the new way to arrange for the provision of public service. The State is not directly involved in the provision. It is involved in the control of these public services. Regulation would be the new institutional form the provision of public services has taken.²⁶⁸

A second current sees regulation as a new form of the police power (i.e. the rule-making activity of the administration). It is true that regulation uses the same tools as the police power: legal rules to limit private actions.²⁶⁹ In other words, there would be nothing new. The same legal norms are used. Regulation adds nothing to the police power.

Press, 2010, at p. 6; C. Scott, “Regulation in the age of governance: the rise of the post-regulatory state”, in *The politics of regulation: institutions and regulatory reforms for the age of governance*, J. Jordana, D. Levi-Faur (ed.), Cheltenham, UK, Northampton, MA, USA, E. Elgar, 2004, at pp. 145-146.

²⁶⁷ “The notion of public service was introduced and systematically processed in Spain alongside a specifically dogmatic construction, according to which all administrative action could be materially classified within three broad categories subject to somewhat different legal regimes. The first category was the administrative activity of limitation, which could be identified with the French *activité de police* and the German *Eingriffsverwaltung*. The second category refers precisely to the activity of providing and organising public services, which is conceptually narrower than that defined under *Leistungsverwaltung*. The third category, which in Spain was referred to as the administrative activity of fomento, could be translated as ‘promotion or direction activity’ (in German *Lenkungsverwaltung*, perhaps), and its main instrument is state aids” (Spanish Administrative Law under European Influence, L. Ortega, L. Arroyo, C. Plaza (ed.), Europa Law Publishing, European Administrative Law Series, May 2010, spéc. p. 147).

²⁶⁸ P. Coppens, « Marché, Etat et Institutions », *Revue internationale de droit économique* 3/2007 (t. XXI, 3), p. 293-316.

²⁶⁹ J.-D. Dreyfus, “Pourquoi des autorités administratives indépendantes (ou AAI) ? Approche phénoménologique”, in *Autorités de régulation et vie des affaires*, B. Bouloc (dir.), Dalloz, Coll. *Thèmes & commentaires*, Actes, 2006, at p. 11; F. Lafarge, “Les catégories du droit de la police administrative”, in *L’influence du droit européen sur les catégories du droit public*, J.-B. Auby (dir.), Dalloz, 2010, pp.718-719; P. Delvolvé, *Droit public de l’économie*, Paris, Dalloz, Coll. *Précis Dalloz. Droit public, science politique*, 1998, at p. 561; C. Isidoro, *L’ouverture du marché de l’électricité à la concurrence communautaire : et sa mise en œuvre* (Allemagne, France, Italie, Royaume-Uni), Coll. *Bibliothèque de droit public*, tome 242, at pp. 419; F. Jongen, *La police de l’audiovisuel, Analyse comparée de la régulation de la radio et de la télévision en Europe*, Bruxelles, Paris, Bruylant, L.G.D.J., 1994; *Les autorités administratives indépendantes de régulation de l’audiovisuel en Europe*, *Annales de Droit de Louvain* (Bruxelles), mai 1994, n° 2, pp. 143-166 at p. 144.

A last trend in the legal doctrine identifies a new administrative function in the function of regulation: it would be a function of conciliation. From a comparative law perspective Gérard Marcou defines regulation as the administrative function aiming at striking a balance between economic and non-economic objectives, within a competitive market.²⁷⁰

Similarly Tony Prosser envisages regulation as an enterprise of conciliation, although he starts his analysis from a different perspective and tries to encompass many aspects of regulation we previously studied. He wants to go beyond the alternative visions of regulation seen either as an infringement on private autonomy or as a collaborative project. He sees regulation an enterprise. This enterprise has specific goals. In this sense, regulators “have responsibility for both economic and social or distributive goals”. In addition regulation is, for Tony Prosser, not original because of its institutional characters, independence that is “not the key principle of institutional design, because regulation is a collaborative enterprise between regulatory agencies and other government bodies”. Thirdly, the legitimacy of the regulators comes from government delegation. He also sees regulation as the participation of stakeholder to the deliberations of the regulator as a major feature of the regulatory enterprise.²⁷¹

In conclusion, Prosser view is very broad and encompasses major development in regulatory practice and theory. However, he also sees regulation as a function of conciliation of diverging objectives.

Regulation has also been analysed in relation with the market.

²⁷⁰ G. Marcou, “La notion juridique de regulation”, A.J.D.A., 2006, pp. 347 suiv., spéc. p. 349. G. Marcou, “Régulation et service public Les enseignements du droit compare”, in Droit de la régulation, service public et intégration régionale, tome 1, Comparaisons et commentaires, G. Marcou, F. Moderne (dir.), L’Harmattan, Coll. Logiques juridiques, 2005, at p. 30.

²⁷¹ T. Prosser, *The regulatory enterprise : government, regulation, and legitimacy*, Oxford, Oxford University Press, 2010, at pp. 5 and 6.

5.1.3 REGULATION AND MARKET

Regulation is either seen as stemming from market failure or as the function aiming at organizing a market.

This is mainly a vision coming from economics. Regulation is seen as the legal solution for market failures. Where the market fails to achieve the requisite standard of service or the aim a public policy is pursuing, and then regulation should be resorted to. For Anthony Ogus “we can see regulation as the necessary exercise of collective power through government to cure ‘market failures’ to protect the public from such evils as Monopoly behaviour, ‘destructive’ competition, the abuse of private economic power, or the effects of externalities”.²⁷²

Finally, some writers define regulation as the organization of markets, the optimal functioning of markets.²⁷³ The constitutive vision of regulation sees regulation this way: “In contrast, for the constitutive conception regulation is very clearly a productive enterprise. It does not simply restrain a market ‘it is what constitutes the market’. (...). Its power lies in its productive capacity”.²⁷⁴

After having exposed the different definitions of regulation we want to engage in forging our own. The enterprise needs first some clarification, for it is not one but three different definitions that we want to give. The first one will help understanding from a historical point of view why there is such a semantic chaos surrounding this term. The second one wants to explain the difficulty in separating a new function of regulation. This difficulty stems from the fact that law has today been given a new role. Whereas Duguit famously said that a social function was now given to the law, it seems obvious today that law plays an economic function.

Finally, we will give our final definition. Starting from an analysis of French and English legal orders we want to show that regulation embodies a change in this legal order: from a legal order aimed at institutionalizing freedom we have gone to a legal order whose goal is to institutionalize markets based on competition.

²⁷² A. Ogus, *Regulation : Legal Form and Economic Theory*, Oxford, Hart Publishing, 2004; R. Baldwin, M. Cave, *Understanding regulation: theory, strategy, and practice*, Oxford, Oxford University Press, 1999, at pp. 9-16; C. Scott, “Regulation in the age of governance: the rise of the post-regulatory State”, *The politics of regulation: institutions and regulatory reforms for the age of governance*, J. Jordana, David Levi-Faur (ed.), Cheltenham, UK, Northampton, MA, USA, E. Elgar, 2004, at p. 146. See also J.-B. Auby, “Régulations et droit administrative”, *Mélanges offerts à Gérard Timsit*, Bruylant, 2005, p. 209, at p. 212; P. Coppens, “Théorie de la norme et regulation”, in *Annales de la Régulation*, Bibliothèque de l’Institut André Tunc, Paris, LGDJ, vol. 1, 2006, pp. 79-110, at p. 99, n°7.

²⁷³ D. Truchet, *Droit administratif*, P.U.F., Coll. Thémis Droit, 2e éd., 2009, at p. 364.

²⁷⁴ C. Shearing, ‘A Constitutive Conception of Regulation’ in P. Grabosky and J. Braithwaite (eds), *Business Regulation and Australia’s Future* (Canberra: Australian Institute of Criminology, 1993).

5.2 REGULATION DEFINED FROM A HISTORICAL POINT OF VIEW: THE NEW MYTH OF THE STATE

Throughout history, and this is visible in both France and England, the State has been defined in a certain way that represents the myth surrounding it. That's why regulation is given so many different meaning. Regulation is the new myth of the State that embodies everything the way we want the State to act.

One of the first myths defined the State, or more precisely the King, as the fountain of justice. Justice was the first myth kings used to justify their power and their action. It is a common place in France. In Britain Blackstone used to describe the King as the fountain of justice. For the eminent common lawyer: "Another capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice, the law does not mean the author or original, but only the distributor. Justice is not derived from the king, as from his free gift; but he is the steward of the public to dispense it to whom it is due".²⁷⁵

In 18th century France, the notion was replaced by the notion of police. Nicolas Delamare attached its name to it. Certainly this notion is not received to the same extent in England. However we can find some analysis of it by Blackstone and Adam Smith. In his commentaries Blackstone described the public wrongs and chapter XII develops the wrongs against "Of offences against the public health, and the public police or oeconomy". He explains that: "By the public police and œconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners".²⁷⁶

Adam Smith used also the word saying that it was borrowed from the French: "Police, the word, has been borrowed by the English immediately from the French, though it is originally derived from the Greek πολιτεία signifying policy, politicks, or the regulation of a government in general. It is now however generally confined to the regulation of the inferior parts of it. It comprehends in general three things: the attention paid by the public to the cleanliness of the roads, streets, etc; 2d, security; and thirdly, cheapness or plenty, which is the constant source of it ». ²⁷⁷ Maitland traced also the history of the word and tried to define it saying: "The word police did not, I think, become common until late in the last century. Johnson just admits it, but only as a French word used in England; for him police is "the regulation and government of a city or country so far as regards the inhabitants". The group of words, police, policy, polity, politics, politic, political, politician, is a good example of delicate distinctions. I hardly dare venture a definition of police, but will suggest, "such part of social organization as is concerned immediately with the maintenance of good order, or the

²⁷⁵ W. Blackstone, Commentaries on the laws of England: in four books: Volume 1, J.B.Lippincott & co., 1832, "Of persons", at p. 199.

²⁷⁶ W. Blackstone, The commentaries of Sir William Blackstone, Knt. on the laws and constitution of England, London, W. Clarke and Son, Portugal-Street, Lincoln's-Inn, 1796, at Chapter XII.

²⁷⁷ A. Smith, Lectures on Jurisprudence, Monday March 28, 1763, in Glasgow Edition of the Works and Correspondence, Vol. 5.

prevention or detection of offences. The Police as an equivalent for the police force, the body of police constables, is very modern”.²⁷⁸

Following Foucault work British historians and criminal law jurists have endeavoured to show the importance of the term in 18th century England.²⁷⁹

The notion of police changes in France in the 19th century with the rolling back of the State that the French revolution entailed. The police became confined to the notion of public order and to security. The French “État-gendarme”, the English “Night Watchman State” were synonymous with a minimal State.

The notion that took over was the notion of public service. Although it seems controversial as far as England is concerned, we believe that because the notion did not have the same legal consequences (the jurisdiction of the administrative court and a special law) is not enough to prove that the notion does not exist. It simply shows that in England as well as in France, the law and lawyers are court centred. Let’s just say first on this point that public service was not for Duguit what it became as a legal notion, it was the limit of State’s intervention, and it was a way to limit the State through the use of law.

Secondly, not seeing that there is a notion of public service in England it looking away from statutory law that uses the term a lot. In the 1920s the Crawford report on broadcasting said: “That the broadcasting service should be conducted by a public corporation acting as Trustee for the national interest, and that its status and duties should correspond with those of a public service”.²⁸⁰ In the Communications Act, in the Railways Act references to public service are constant. Witnessing such an increase Tony Prosser wrote in 2000: “In this article, however, I hope to suggest a paradox. The United Kingdom has experienced a new growth of public service law in relation to the privatized utilities. This has resulted in a convergence of the tradition of the United Kingdom and that of nations such as France and Italy, where public service has played a central role in public law, due in part to a unique rhetoric of public service in the Continental tradition”.²⁸¹ But the notion was also present in statutes very long ago.

Thirdly, there were some doctrinal recognitions of the notion. Laski wrote, “The state, for instance, to its members is essentially a great public service corporation”.²⁸²

²⁷⁸ F. W. Maitland, *Justice and Police*, London, Macmillan and Co, 1885, p. 105). See also J. Bentham, *An introduction to the principles of morals and legislation*, in *The works of Jeremy Bentham*. Volume 1. Edinburgh, 1843, at p. 102.

²⁷⁹ M. Valverde, “Police science, British style: pub licensing and knowledges of urban disorder”, *Economy and Society*, 2003, vol. 32, n°2, pp. 234-252; *Regulation and Criminal Justice*, H. Quirk, T. Seddon, G. Smith (ed.), at pp. 12; M. D. Dubber, *The police power: patriarchy and the foundations of American government*, Columbia University Press, 2005, at p. 47.

²⁸⁰ Report of the Broadcasting Committee (Broadcasting) présidé par D. A. E. Linsay, comte de Crawford, 1926, Cmd. 2599, at p. 14.

²⁸¹ T. Prosser, “Public Service Law: Privatization’s Unexpected Offspring”, *Law and Contemporary Problems*, Vol. 63, No. 4, *Public Perspectives on Privatization*, Autumn, 2000, pp. 63-82.

²⁸² H. J. Laski, *Authority in the Modern State*, Batoche Books, 1919, at p. 10

Finally regulation, whose main doctrinal recognition came from the common law world, is the ultimate myth of the State. It seems to summarize its action, its modes of operation, the way it thinks itself.

We want to pass now at another explanation of the confusion: regulation as a new function of the law.

5.3 REGULATION DEFINED FROM A FUNCTIONAL POINT OF VIEW: A NEW FUNCTION OF THE LAW, AN ECONOMIC FUNCTION

Duguit famously contended that the evolution of the law since the civil code was characterized by the emergence of a social function. Contract, property increasingly played a social role. According to Mirrow “The social-function norm influenced ideas of property around the world since its formulation in the early twentieth century. It was to have profound importance in European and Latin American constitutional thought. In the United States, the idea has experienced a recent rebirth as an alternative discourse to a long tradition of absolute property rights”.²⁸³

But Alexander showed that even in the United States the idea property law changed to endorse a social function long ago.²⁸⁴ He showed that at the beginning at the 20th century scholars began criticizing the blackstonian conception of property. Progressivism developed this critic of property and emphasized the social role it played. The writers that most represent this school are, to Alexander: Richard T. Ely, Wesley Newcomb Hohfeld, Robert Hale, John R. Commons, Morris R. Cohen, Thurman Arnold, A. A. Berle, Gardiner C. Means, Myres McDougal, and David Haber. These writers “in one way or another, contributed to a powerful critique of the classical liberal conception of property, which depicted the sole function of private property as securing freedom and autonomy for individuals. All of them were influential participants in an ongoing scholarly conversation about the meaning and functions of property in American law and society that continued roughly from 1913 to 1950. That conversation shaped the dominant legal understanding of property by the middle of the twentieth century. It clearly framed in American legal discourse the dialectic between two understandings of the role of property in society, one economic and private, the other political and social”.²⁸⁵

Whatever the debates, that law began to be used as an instrument to foster social ends (solidarity, social elevation) is undeniable. The New Deal, the post WW2 reforms in France and the United Kingdom show that contract and property had to be framed and understood as social construct and not natural individualistic legal instrument.

This purpose has changed. We do not want to say that law does not go on pursuing these ends but a new one is superimposing and now the law increasingly pursues not a social but an economic end. Contracts, property are reinterpreted not to foster solidarity but economic efficiency. Public policies tend to use these vehicles also in an economic way.

Economic efficiency reframes all these legal instruments and that’s why it seems so difficult today to define what regulation really is.

²⁸³ M. C. Mirrow, “The Social-Obligation Norm of Property: Duguit, Hayem, and Others”, *Florida Journal of International Law*, Vol. 22, pp. 191, at p. 226; C. A. Reich, “The New Property”, 73 *Yale Law Journal* 733 (1964): “Property is not a right, but a deliberate construction of society” (at p. 771).

²⁸⁴ G. S. Alexander, *Commodity and propriety: competing visions of property in American legal thought, 1776-1970*, Chicago, Ill., University of Chicago Press, 1997, at pp. 311.

²⁸⁵ G. S. Alexander, *Commodity and propriety: competing visions of property in American legal thought*, at p. 313.

5.4 – REGULATION DEFINED FROM A LEGAL POINT OF VIEW: REGULATION AS THE INSTITUTIONALIZATION OF A MARKET ORDER BASED ON COMPETITION

How are we to proceed? We have previously mentioned that administrative functions are commonly classified in two or three as a function of provision (public service) or rule making (police). Even if the notions are not received in the United Kingdom if one defines public service as a function of provision and police as a function of rule making, there is no doubt that the English State shares the same functions. The State can either provide a service or regulate it.

The starting point of the analysis will be to analyse the way these intervention were reviewed by the judge. Both in France and in the United Kingdom judges reviewed State's activity according to the principle of liberty. The freedom of trade was the limit and also the goal of State's activity. Liberalism tended to think the functions of the State only as a limit to people's liberties and freedoms.

Neoliberalism introduced a change in the legal order, change that we can see in the cases. The authorities show that the legal order has changed from one based on freedom to one based on economic efficiency. Regulation, within this ideology, institutionalizes economic efficiency against the State and against private enterprises.

We will see that there is actually a change of legal order from freedom to economic efficiency (1). Afterwards we will see that this change inaugurates a new administrative function, the function of regulation (2).

1. The change of legal order: from freedom to economic efficiency

Traditionally the English and French State were limited by the notion of freedom. Neoliberalism, as Foucault showed, changed this basis of the legal order from liberty (a) to economic efficiency (b). Whereas liberalism was a doctrine of non-intervention, neoliberalism is a doctrine of intervention to institutionalize economic efficiency.

a. State's functions and freedom

Judges on both sides of the Channel have reviewed the intervention of the State using the principle of freedom and especially the principle of freedom of trade.

This is uncontroversial and very well studied in France. When regulation or rule making is concerned the State's Council has held that a Mayor could not, without statutory delegation, make a rule providing that photographs in the streets should be in possession of a licence. This rule was against the freedom of trade and only Parliament could pass a legislation effectively prohibiting a trade and subordinating its exercise to the detention of a licence.²⁸⁶ The Government Commissioner in this case said decisively "where no statute has been passed the principle should stay and be the common law of economic activity in France" that the administration has to respect the freedom of trade. Now this liberty is protected by the Constitutional Council even against Parliament. Even if statutes limiting the freedom of trade

²⁸⁶ Conseil d'État, Ass., 22 juin 1951, Daudignac, Rec. 362, D. 1951.589, concl. Gazier, note J.C..

are numerous, the principle stays and is still at the basis of the legal order concerning economic activity in France.

The same rule has been applied, although in a different manner concerning activities of provision. When a city decides to create a public service, entering thus in competition with private companies. The States' Council, in 1901, first said that municipalities could only create public services and provide themselves a service when exceptional circumstances exist. Then the case *Chambre syndicale du commerce de détail de Nevers*²⁸⁷ still held that in principle cities and administrations should refrain from engaging in private activities. However, the Council admitted that intervention could be lawful where a public interest justifies it and where particular circumstances of time and place exist. The city of Nevers had created a service of food supply in order to remedy price increases.

The legal order is completely framed by the principle of freedom of trade and even though State's intervention has increased considerably; it is still the basis of our law.

Is the legal situation different in the common law? It is doubtful. However it is to be noted that Dicey does not say a word about the freedom of trade or the freedom of contract in his study of the English constitution.²⁸⁸

Concerning rules limiting economic activities, the authorities are clear. The regulations (bylaws, rules, orders, etc.) limiting the freedom of trade are illegal. Lord Mansfield said most clearly "For, a bye-law "to exclude," without a custom to support it, would be void, as an illegal restraint upon the common right of the subject".²⁸⁹ For, "By common law, any person may carry on any trade in any place, unless there be a custom to the contrary, and if there be such a custom, then a by-law in restraint of trade warranted by such custom will be good".²⁹⁰

The basis of the principle can already be found in the famous Case of Monopolies of 1623.²⁹¹ The common law strongly opposed any intervention of the executive in the freedom of trade. More recently the case *R. v Coventry City Council Ex p. Phoenix Aviation*, reaffirmed the same rule²⁹².

²⁸⁷ V. Conseil d'État, Sect., 30 mai 1930, *Chambre syndicale du commerce de détail de Nevers*, Rec. Lebon p. 583, concl. Josse et note R. Alibert S. 1931.III.73. V. aussi Les grands arrêts de la jurisprudence administrative, préc., 17^e éd., n°43.

²⁸⁸ V. A. V. Dicey, *Introduction to the study of the law of the Constitution*, préc..

²⁸⁹ V. *Hesketh v Braddock*, 11 February 1766, 97 E.R. 1130, at p. 1856.

²⁹⁰ V. *Clark, Esq., Chamberlain of the City of London v Le Cren*, 24 January 1829, (1829) 9 Barnewall and Cresswell 52, 109 E.R. 20, at p. 58. See "Local Government", Halsbury's Laws of England, vol. 69, 2009, 5th ed., n° 565.

²⁹¹ V. *Case of Monopolies*, 77 Eng. Rep. 1260 (1378-1865). The only power to institute a monopoly that the Crown kept was the law concerning patents : *Fizer Corporation v Ministry of Health* [1965] 2 W.L.R. 387, at p. 560). See T. B. Nachbar, « Monopoly, Mercantilism, and the Politics of Regulation », vol. 91, n°6, octobre 2005, pp. 1313.

²⁹² V. *R. v Coventry Airport Ex p. Phoenix Aviation*, [1995] 3 All E.R. 37. Il fut jugé que « les autorités publiques ayant la responsabilité d'administrer les ports et aéroports victimes des perturbations causées par des manifestations pour les droits des animaux ne jouissaient d'aucune compétence générale dans leurs textes institutifs pour faire des discriminations entre commerces légaux. Il n'y avait aucune urgence et par conséquent aucune justification pour ne pas respecter leur devoir d'accepter tout commerce légal (...). L'état de droit n'autorise pas les autorités publiques à répondre à des manifestations illégales et à capituler devant la menace de

However, concerning activities of provision we have been unable to find any similar principle of abstention, a principle deriving from the freedom of trade providing that private activities should be reserved to private companies. George Laurence Gomme said that “It is not within the province of local government to enter into competition with the private trader”.²⁹³ But we have not found any authority confirming this statement.

This is due to English local government law. Whereas French cities have a general power to rule for the well being of their population and enjoy wide powers to rule or create public services in the general interest, English local government activities were governed by private bills. Therefore the way the activities was reviewed by the Court was to see if the corporation was not exceeding its powers by creating these activities. Local government in France have never been considered as corporations but as a part of the State, they thus enjoyed broader powers.

This means that *a contrario* the rule of abstention was even stronger in England than in France because without statutory basis there was no possibility to create any public service that was not in the remit of the bill. In this sense freedom of trade is even stronger because municipalities could intervene on their own motion when a public interest justified it.

This analysis shows that State’s intervention in both countries was reviewed according to the principle of freedom. Trade was reserved to private companies and was not to be impeded by administrative rules. Freedom was and is the principle; any restriction was and is the exception.

However this is not today the only means of controlling State’s power and it shows that the legal order has changed because of the pressures of neoliberalism.

b. State’s functions, neoliberalism and the foundation of a new legal order: market based on competition

It is sometimes contended that liberalism and neoliberalism are the same, the latter being only an extreme version of the former. We will demonstrate that it is actually the opposite. Neoliberalism started as a criticism of liberalism and is fundamentally a doctrine of intervention (i). The purpose of the State’s intervention is to control private power (ii). American neoliberalism took over the work started in the 1930s by ordoliberals to reform the market whose basis is no longer freedom but economic efficiency (iii).

i) Neoliberalism: from the criticism of liberalism to the foundation of a new doctrine of intervention

At the root of neoliberalism is a criticism of liberalism. For ordoliberals, the problem of liberalism is that it leads inevitably to the State’s intervention the 1930s witnessed. German

groupes de pression mais les oblige, au contraire, à coopérer avec la police pour permettre aux individus de poursuivre leur activité commerciale légale ». On voit bien ici dans ce raisonnement, similaire à celui mis en œuvre par le Conseil d’État dans l’arrêt Benjamin, que la liberté du commerce bénéficie du même régime de protection que l’ensemble des libertés publiques. L’interdiction pure et simple d’une activité légale devant la menace de manifestations est disproportionnée, l’autorité publique doit prendre les mesures nécessaires pour protéger la liberté en question en empêchant les débordements qui menaceraient l’ordre public.

²⁹³ V. G. L. Gomme, *Lectures on the principles of local government*: delivered at the London School of Economics, Westminster, A. Constable, 1897, p. 145.

ordoliberalism²⁹⁴ crystalized the criticisms against liberalism and tried to find a new basis for the intervention of the State.

Michel Foucault studied thoroughly this movement and showed to what extent it was new. Foucault shows that ordoliberals it was liberalism that was to blame for the New Deal, the Beveridge plan, Nazism or Stalinism. All these movements reveal to ordoliberals the existence of the same “economic-political invariant”²⁹⁵ whose origin has to be found in liberalism itself.

But ordoliberals do not content themselves with a criticism. State’s intervention has to be accepted, it is a given. In order to be acceptable, this intervention has to change paradigms: “Since it turns out that the state is the bearer of intrinsic defects, and there is no proof that the market economy has these defects, let’s ask the market economy itself to be the principle, not of the state’s limitation, but of its internal regulation from start to finish of its existence and action. In other words, instead of accepting a free market defined by the state and kept as it were under state supervision—which was, in a way, the initial formula of liberalism: let us establish a space of economic freedom and let us circumscribe it by a state that will supervise it—the ordoliberals say we should completely turn the formula around and adopt the free market as organizing and regulating principle of the state, from the start of its existence up to the last form of its interventions. In other words: a state under the supervision of the market rather than a market supervised by the state.”²⁹⁶

This is precisely why Foucault further adds that we should not confuse liberalism and neoliberalism: “And what is important and decisive in current neo-liberalism can, I think, be situated here. For we should not be under any illusion that today’s neo-liberalism is, as is too often said, the resurgence or recurrence of old forms of liberal economics which were formulated in the eighteenth and nineteenth centuries and are now being reactivated In actual fact, something much more important is at stake in modern neo-liberalism, ... What is at issue is whether a market economy can in fact serve as the principle, form, and model for a state which, because of its defects, is mistrusted by everyone on both the right and the left, for one reason or another. ... Can the market really have the power of formalization for both the state and society? This is the important, crucial problem of present-day liberalism and to that extent it represents an absolutely important mutation with regard to traditional liberal projects, those that were born in the eighteenth century. It is not just a question of freeing the economy. It is a question of knowing how far the market economy’s powers of political and social information extend”.²⁹⁷

²⁹⁴ The ordoliberal movement, also called the Freiburg School was built around economists such as Walter Eucken (1891-1950), lawyers like Franz Böhm (1895-1977). The manifesto of the school was published in 1936/37 under the title “Die Ordnung der Wirtschaft” (the economic order). The starting point of the movement was the Walter Lippmann conference of 1939 where Wilhelm Röpke, Alexander Rüstow, Friedrich Hayek, Ludwig von Mises were (See H. Rieter, M. Schmolz, « The ideas of German Ordoliberalism 1938-45: pointing the way to a new economic order », *European Journal of the History of Economic Thought*, Autumn 93, Vol. 1, Issue 1, pp. 87-114; F. Bilger, *La pensée économique libérale dans l’Allemagne contemporaine*, Paris, L.G.D.J., Coll. Bibl. d’économie politique, tome 5, 1964; D. J. Gerber, *Law and competition in twentieth century Europe: protecting Prometheus*, Clarendon Press, Oxford University Press, 1998).

²⁹⁵ M. Foucault, *The birth of biopolitics : lectures at the Collège de France, 1978-79*, M. Senellart (ed); translated by Graham Burchell, Houndmills, Basingstoke, Hampshire, New York, Palgrave Macmillan, 2008, at p. 111.

²⁹⁶ M. Foucault, *The birth of biopolitics*, at p. 116.

²⁹⁷ M. Foucault, *The birth of biopolitics*, at p. 117-118.

The first shift is that they do not focus any longer, as the liberals did on exchange but on competition. Exchange is no longer the principle at the basis of the functioning of the market, competition is. But Foucault shows that in this respect ordoliberals do not innovate and are following an evolution that occurred in the 19th century when the stress became more and more on competition.

But where ordoliberals innovate is by saying that competition is not a natural product. To them it is constructed, built by the State itself that organize competition. That's why for ordoliberalism competition is a principle of intervention, whereas it was a principle of abstention for liberals because the competitive process did not need any form of State intervention, on the contrary. From a natural process, competition becomes a construct. From Mandeville's Fable of the Bees to the invisible hand of Adam Smith competition was seen as something natural that did not require any intervention.

On the contrary for ordoliberals competition needs intervention. In this same neoliberalism is diametrically opposed to liberalism.

ii) A new role for the market: the notion of an economic constitution

What ordoliberals showed is the close link between law and economy. Economies are framed by legal rules. The market is not a natural construct; it is a product of legal instrument. That's why ordoliberals introduce principle of law into economic thinking and especially introduce the concept of an economic constitution into economy.

Exactly as the rule of law, constitutions were used to limit the power of the State; the economic Constitution will limit private power. Throughout the 19th century, with the complete change that capitalism went through, the problem of private power became of central one, with trusts, combinations, mergers. Public power was not the problem. It was private power, which is something that traditional liberalism that focused entirely on limiting the State was not interested in. The market became a way to control private power, through the economic constitution.

The market is given a new role. It was to be given a new foundation in American economics and the School of Chicago.

iii) A new basis for the market: from liberty to economic efficiency

If ordoliberalism changed the role of the market within the legal order, the School of Chicago changed its basis. The change in the conception of competition also marks the victory of the Chicago over the Harvard School.²⁹⁸

In this respect freedom of trade does not amount to competition. In a famous article Amartya Sen showed to what extent the pursuit of a pareto-optimal solution could lead to anti-liberal outcomes.²⁹⁹ He even writes: "What is the moral? It is that in a very basic sense liberal values conflict with the Pareto principle. If someone takes the Pareto principle seriously, as economist seem to do, then he has to face problems of consistency in cherishing liberal values,

²⁹⁸ C. Le Berre, *Le raisonnement économique en droit de la concurrence*, Thèse dactyl., Université Paris Ouest Nanterre La Défense, 2006, tome 2, pp. 566; R. Van Horn, "Chicago's Shifting Attitude Toward Concentrations of Business Power (1934–1962)", *Seattle University Law Review*, 2011, vol. 34, pp. 1527.

²⁹⁹ V. Amartya Sen, "The Impossibility of a Paretian Liberal", *The Journal of Political Economy*, Vol. 78, No. 1 (Jan. - Feb., 1970), pp. 152-157.

even very mild ones. Or, to look at it in another way, if someone does have certain liberal values, then he may have to eschew his adherence to Pareto optimality. While the Pareto criterion has been thought to be an expression of individual liberty it appears that in choices involving more than two alternatives it can have consequences that are, in fact, deeply illiberal”.

We will see how the paradigm of competition changed the case law and the way judges control State’s intervention in the economy and changed public policies.

Concerning the case law, the shift is very much visible in the jurisprudence of the Supreme Court of the United States.³⁰⁰ The Supreme Court cases in competition law were at first based on the idea that the primary goal was to preserve undertakings’ freedom of action, and more specifically their freedom of contract and the freedom of trade. The change occurred with the case *Continental T.V. Inc. v GTE Sylvania*.³⁰¹ This decision by shifting the focus from the freedom of trade to economic efficiency concerning vertical restraints changes the paradigm of competition law. That’s why Posner writes: “the emphasis of antitrust policy [has] shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency”.³⁰²

This evolution is also visible in Europe with the more economic approach advocated progressively by antitrust institutions. This point has been thoroughly studied.³⁰³ Drexl contends that the so-called “more economic approach” entailed a “fundamental reorientation of European competition policy”. The new policy started in 1999 with the Guidelines on Vertical Agreements where the Commission stated: “In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market; vertical agreements have to be analysed in their legal and economic context.” For Drexl the guidelines show “a real shift in paradigms”, because “according to this new approach, lawyers can no longer judge the lawfulness of a given agreement by simply relying on its wording; now they also have to consider the specific effects on the relevant market. This means that a given agreement might be illegal in situation ‘X’ but could be legal in situation ‘Y’”.³⁰⁴

³⁰⁰ J. May, “Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918”, *Ohio St. L.J.* 305 (1989); G. Amato, *Antitrust and the bounds of power: the dilemma of liberal democracy in the history of the market*, Hart Publishing, 1997, at pp. 27; F. Maier-Rigaud, « On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete », *Max Planck Institute for Research on Collective Goods, Bonn, Germany*, forthcoming in the *ASCOLA Competition Law series* by Edward Elgar; V. C. Le Berre, *Le raisonnement économique en droit de la concurrence*, at p. 569; I. Lianos, *La transformation du droit de la concurrence par le recours à l’analyse économique*, Bruylant, 2007, at p. 39.

³⁰¹ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

³⁰² *Olympia Equipment Leasing Co. v. Western Union Telegraph Co* 797 F.2d 370 (7th Cir. 1986).

³⁰³ J. Drexl, “Competition Law as Part of the European Constitution”, in *Principles of European constitutional law*, A. von Bogdandy, J. Bast (ed.), Oxford, Portland, Or., Hart, 2009; A. Pera, “Changing Views of Competition, Economic Analysis and EC Antitrust Law” (2008) 4 *European Competition Journal* 127 ; W. Kerber, U. Schwalbe, “Economic Principles of Competition Law” in F-J Säcker et al (eds), *Competition Law: European Community Practice & Procedure* (2007) Part 1 G..

³⁰⁴ J. Drexl, “Competition Law as Part of the European Constitution”, at p. 670.

What is the evolution in English and French legal orders? Here a difference has to be highlighted. In the United Kingdom competition law and its efficiency focus is mainly enforced through specific provisions of specific acts and fostered by public policies. In France, competition law has changed the basis of the legal order in the sense that the State's Council has erected the breach of competition law as a ground for review in judicial review proceedings. Similarly in private law, competition law has been integrated.

In French administrative law, competition has been erected as a ground for review in the “Millions et Marais” case.³⁰⁵ The case was concerned by a public service contract signed between the funeral association of local authorities of the Paris suburbs and a company. The contract granted this company the exclusive right to provide funeral services on the area. Companies excluded challenged the decision to award the contract on the ground that it granted an exclusive right and amounted to an abuse of a dominant position.

The State's Council had been hesitant to accept such a ground and quash a decision on the ground that it was contrary to competition law. This case reversed its position, but clearly indicated how it would adapt its review to administrative acts: “Assuming that the contested agreement contributed, because of the exclusive right which it grants, to giving Société des Pompes Funèbres Générales a dominant position in a substantial part of the Common Market and that it may affect trade between Member States, its stipulations would be incompatible with Article 86 of the Treaty only if the undertaking were led, by exercising the exclusive right in the conditions under which it was granted, to abuse its dominant position”.

In other words, the administrative contract would be illegal not because it itself amounted to an abuse of a dominant position but because it would put the company in a position where it would be led to automatically abuse its dominant position. The judge reviewed the provisions of the contract and concluded that there were no such distortions of competition.

The case law was subsequently extended to local authorities exercise of rule-making power and to the management of public properties. Summarizing the authorities the State's Council held that the way in which a public body acts on the market must not distort free competition because of the privileged situation that it enjoys.³⁰⁶ Any activity undertaken by a public body is now reviewed according to two principles: freedom of trade and competition law. The first principle is concerned with knowing if the public body can legally act on the market (it must pursue a public interest) and the second is concerned about the ways in which it intervenes on the market, it must not distort competition.

English administrative law has not followed the same path. Judicial review has not integrated competition law as a separate and autonomous ground of review. However, like in France public activities can be controlled by the OFT.³⁰⁷ There has however been a development in Ireland. But a decision of the Irish Supreme Court is awaited to clarify the legal situation for, as summarized by Philip Andrews “In Hemat³⁰⁸, regulation with “economic consequences” is

³⁰⁵ Re Societe Intermarbres [1999] E.C.C. 254.

³⁰⁶ V. Conseil d'État, Ass., 31 mai 2006, « Ordre des avocats au barreau de Paris », n°275531.

³⁰⁷ R. Whish, Competition Law, at 328-331; Office of fair trading, The Competition Act 1998 and public bodies, August 2004, Policy note 1/2004; Competition Commission Appeal Tribunal (CCAT), BetterCare Group Limited v Director General of Fair Trading (Case 1006/2/1/01).

³⁰⁸ Hemat v Medical Council [2006] IEHC 187 (HC (Irl)).

not an economic activity, so competition rules do not apply. But in *Panda Waste*³⁰⁹, regulation “aimed at directly affecting the market” is such an activity, so competition rules do apply. As a direct result, in one case (*Hemat*) competition law has a relatively rare application to regulation, while in another (*Panda Waste*) competition law attains almost constitutional stature”.³¹⁰ The conflict between regulation and competition law is not yet settled here, whereas it has received a coherent approach and is now a consistent ground of review before the administrative judge.

In England State’s regulatory activities are not reviewed according to competition law. However they are review when the State is providing an economic activity.

All these developments show that the paradigm of the law has indeed changed. In England it is particularly significant in the field of public policies. England has been at the forefront of the development of public policies integrating competition. Julian Le Grand explains this shift very well and the title of one of his books is very eloquent: *The other invisible hand: delivering public services through choice and competition*.³¹¹ The notion of quasi-market that he develops is very interesting in this respect. He explains that “All these reforms had a fundamental similarity: the introduction of what might be termed ‘quasi-markets’ into the delivery of welfare services. In each case, the intention is for the state to stop being both the funder and the provider of services. Instead it is to become primarily a funder, purchasing services from a variety of private, voluntary and public providers, all operating in competition with one another. The method of funding is also to change. Resources are no longer to be allocated directly to providers through a bureaucratic machinery. In some cases the state continues to act as the principal purchaser, but resources are allocated through a bidding process. In other cases, an earmarked budget or ‘voucher’ is given directly to potential users, or to agents acting on their behalf, who can then allocate the budget as they choose between the competing providers”.³¹²

It is indubitable that France has not gone as far in theorizing the use of market-based instruments in order to deliver public services. However, these theories and their implementation show the extent to which State’s activities are now driven by market oriented policies and principles of competition.

2. Regulation: using markets based on competition to police private activities

This definition of regulation helps us understanding the specificity of utility regulators. They are creating a market and competition in order to police the incumbents. Competition replaces regulation as a tool to control private behaviour and to establish the private rule of law that

³⁰⁹ *Nurendale Ltd (t/a Panda Waste Services) v Dublin City Council* [2009] IEHC 588 (HC (Irl)).

³¹⁰ P. Andrews, “Post-modern judgments of Ireland's Competition Court: from Appalachian Coal to Socony Vacuum (and back again)”, *European Competition Law Review*, 2011, 32(1), 17-26 ; P. Andrews, P. K. Gorecki, “The Use by Irish Courts of EU Jurisprudence to Resolve Conflicts Between National Competition Law and Regulation: *Panda Waste*”, *European Competition Journal*, December 2010, pp. 541.

³¹¹ J. Le Grand, *The other invisible hand: delivering public services through choice and competition*, Princeton, Oxford, Princeton University Press, 2007. J. Dixon, J. Le Grand, P. Smith, *Can market forces be used for good?*, London, Kings Fund, 2003; “Quasi-Markets and Social Policy”, *The Economic Journal*, Vol. 101, No. 408 (Sep., 1991), pp. 1256-1267.

³¹² J. Le Grand, “Quasi-Markets and Social Policy”, at p. 1257.

ordoliberals theorized. Competition law and utility regulation pursue the same goal, developing competition in order to police private relations.

As we showed earlier dispute resolution on access to networks and competition law also are necessary in order to neutralize the anticompetitive effects of private law (contract and property law). This is exactly what ordoliberals showed. State's intervention in network utilities was not imposed because of ideological purposes but because private law has anticompetitive effects or because the outcome of private initiative (in broadcasting) was thought to be undesirable. When there is a network the traditional working of private law prevents competition. Competition law limits these effects and utility regulation pursues the same goal. This objective justifies ultimately our research object: the field of utilities.

Regulation in this respect is a new function because its object is not freedom but efficient competition.

CHAPTER 6: REGULATORY PROCEEDINGS: DIFFERENT AND DIVERGING MODELS

What are the principles, procedural and substantive, governing regulatory enforcement proceedings?

The legal doctrine in Europe and especially in France has announced, because of the driving forces of EU and ECHR law, the birth of a common law of fair trial that would encompass both court and administrative proceedings. It is indeed true that procedure is increasingly placed under the protection of fundamental rights.³¹³ For Giacinto della Cananea:

“Until quite recently, administrative law was seen as an enclave of the State. Things have changed, due to European integration. Both the Council of Europe and the European Convention on Human Rights have a growing influence on national administrative procedures and rules. The influence of the European Community is still greater, it limits national procedural autonomy”.³¹⁴ The diagnosis is indeed true.

But this is not what we are witnessing where comparing regulatory proceedings in the United Kingdom and France. Administrative, and especially regulatory proceedings in England and France are diverging because of these fundamental rights.

But this is not the main critic we could address to those who predict the emergence of a universal law of the process. This theory, maybe true as far as criminal and civil law are concerned, does not take into account the fact that in France and the United Kingdom, administrative procedure was inspired by common principles that seemed very alike. In *Ridge v Baldwin*, Lord Reid said that the administration was bound to observe the principles of natural justice by informing the appellant of the charges made against him and giving him an opportunity of being heard.³¹⁵ In 1944, the State’s Council held that “Since, in consideration of the significance that the revocation of the permit carried in these circumstances, and of the gravity of that penalty, such a measure could not be taken legally without the Widow Trompier-Gravier’s having been given an opportunity to be heard”.³¹⁶

These two cases show that administrative procedure, especially when it is essentially judge-made as it is in the United Kingdom and France, shared a common inspiration in what the English call by the most beautiful notion, natural justice (whereas the French would use the more technical defence rights term). The common law existed and instead of creating further

³¹³ See S. Guinchard, et alii, *Droit processuel*, Dalloz, Coll. Précis, 5e éd., 2009 ; S. Guinchard, *Vers une démocratie procédurale*, Justices, 1999, nouvelle série, p. 91 ; *Les métamorphoses de la procédure à l’aube du IIIe millénaire*, in *Clefs pour le siècle*, Paris 2, Dalloz, 2000.

³¹⁴ See G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, *European Public Law*, 2003, vol. 9, n°4, pp. 563–578.

³¹⁵ *Ridge v Baldwin* [1963] 2 W.L.R. 935.

³¹⁶ *Conseil d’État, Sect., 5 mai 1944, Dame Veuve Trompier-Gravier*, *Recueil Lebon* p. 133. Translated by Bernard Schwartz, *French administrative law and the common-law world*, New York University Press, 1954, at p. 342.

harmonization the ECHR created a divergence. French administrative procedure has been profoundly influenced by the ECHR and the country finds itself isolated in this respect from other countries of Europe.

We will show that only national tradition of administrative law, coupled with some changed of the French legal system can account for this change. As Jürgen Schwarze puts it: “it can be expected that national administrative law will lose neither its national particularities nor its predominant role with regard to the regulation of internal processes in the EU Member States”.³¹⁷ This is also the John Bell’s conclusion: “Administrative law is traditionally more nationally specific than private law. (...). Institutions of government are very divergent... As has been stated, procedures for judicial review are also very different. These differences set a framework within which any changes have to fit. Thus even if there is commonness of values and a willingness to change, the form in which change will take place is likely to vary from country to country. Even if there is agreement on the policy outcome, there will not be uniformity in application. Cross-fertilisation will involve careful selection and adaptation of ideas from other legal systems to develop indigenous concepts and rules which can fit into the domestic tradition. On the whole, administrative law, linked as it is to political processes, will remain stronger ground for cross-fertilisation than for transplants”.³¹⁸

In order to show this divergence we would like first to assess and show the paradox. There was every legal reason to believe that uniformity would win: the two countries share common principles of administrative procedure (that are furthermore judge made), and the two countries face the same influence, especially as far as utility regulation is concerned because of EU and ECHR law principles. There are indeed strong harmonization forces (6.1). We will show that, despite this forces, the models of regulatory enforcement proceedings are diverging: the United Kingdom adopted a managerial model, whereas France went towards a judicial model (6.2). It will be important to understand the factors that account for this divergence (6.3).

³¹⁷ See J. Schwarze, *The Convergence of the Administrative Laws of the EU Member States*, in *The europeanisation of law : the legal effects of European integration*, F. Snyder (ed.), Oxford, Portland, Or., Hart Pub., 2000, chap. 9, at p. 180.

³¹⁸ See J. Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe*, at p. 167, in *New directions in European public law*, J. Beatson, T. Tridimas. (ed.), Oxford, Hart Pub., 1998.

6.1 - HARMONIZATION FORCES

Despite common principles of administrative procedure and common international law principles (EC law and ECHR law), both countries tended towards two different models.

We will analyse to what extent did France and the United Kingdom shared common principles of administrative procedure as far as enforcement is concerned (6.1.1). Then we will study the extent of external harmonization forces through EU and ECHR law (6.2.2). The study of the ECHR will be of particular relevance as litigants and Courts used this source in order to challenge regulatory enforcement.

6.1.1 THE COMMON PRINCIPLES OF ADMINISTRATIVE ENFORCEMENT PROCEDURES

France and the United Kingdom share two common elements: administrative procedure, and among it, administrative punitive procedure, is primarily judge made; administrative procedure was fashioned by the Courts according to common principles, the rules of natural justice in the United Kingdom, that French administrative lawyers classify among the general principles of the law. Also, protections inspired from criminal law played an important role.

The two countries left the regulation of administrative procedure in the hands of the judge. Judges in both countries established minimum standards of procedure and substance in order to protect citizens or regulated undertakings from arbitrary conduct, especially when administrative action can have very detrimental effects.

The difficulty of the analysis is trying to find what were the protections afforded by the common law and administrative law in France prior to the influence of article 6 ECHR or EU law. In order to compare and establish that there were indeed a common understanding of the protections citizens should be entitled, we will only use cases decided without any reference to outside sources such as the ECHR. This will enable to prove our case: prior to the influence of the ECHR, French and English administrative law had a common understanding of the necessary protections citizens should have when the administration is taking a punitive action against them.

When repression, punitive action is concerned, one thinks immediately of procedural protection (1). However, there are also substantive principles at stake when penalties are concerned: how are the principles of legality, proportionality, of the individual nature of penalties, of non-retroactivity applied when administrative penalties are concerned? (2)

1. The minimum procedural guarantees

Two protections can be linked to the rights of the defence: the right to be informed (a), the right to be heard (b) and the right to know the reasons for the decision (c). Citizens are also entitled in both countries to an unbiased tribunal (d). Finally we will study the secrecy of the procedure, its absence of transparency, in order to contrast it later with the present situation in regulatory adjudication (e).

The adversarial nature of the procedure means that citizens should be entitled to be informed of a procedure against them and should be able to be heard before a detrimental decision is taken against them.

a. The right to be informed in English and French administrative law

The right to be informed is protected very carefully by common law judges. In *Ridge v Baldwin*, the APA of English administrative procedure, Lord Morris said that “It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet.” Similarly Lord Diplock in *O'Reilly v Mackman* considered that “the requirement that a person who is charged with having done something which, if proved to the

satisfaction of a statutory tribunal, has consequences that will, or may, affect him adversely, should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.”³¹⁹

However, concerning the precise requirements that the right to be informed comprise, judges tend to have a pragmatic approach. The right to be informed comprises everything that one can reasonably expect or need in order to prepare usefully his/her defence. Judges tend to adopt a purposive approach: the right must be interpreted so as to comprise all the elements that one needs to defend oneself effectively. The information must be given at a reasonable time in order to give the person the possibility to prepare his/her defence.³²⁰ The information must be sufficient so that the person can effectively defend him/herself.³²¹ The purposive approach is apparent in many cases.³²²

The Council of State also imposes this fundamental principle of a civilized legal system. The right to be informed in due time, to know the particulars necessary to defend one's case, is a general principle of the law, applicable even without a text (a statute or a regulation).³²³ However, like its English counterpart, the French administrative judge is aware of the necessity not to impede effective administrative action. That's why a purposive approach is also adopted. The principle comprises in effect everything that would render the right actually ineffective. Delays, level of details are all decided on a case-by-case basis in order to balance effectiveness and rights protection.

The right to be informed (in due time, and of all the particulars necessary to prepare effectively one's defence) is a principle that is common to France and the United Kingdom. Judges on both sides of the Channel chose to adopt a purposive approach to the principle and to check, in each case, if the person was actually put in a situation where s/he could effectively defend him/herself. The importance of balancing effectiveness of administrative action and rights of the citizens affected by an adverse decision is common to both countries.

The right to be heard is another protection Courts have imposed.

b. The right to be heard in English and French administrative law

The right to be heard in English administrative law does not comprise the right to an actual hearing. However it imposes, at minimum, that the person accused can answer the accusation

³¹⁹ [1982] 3 W.L.R. 1096.

³²⁰ *Lee v Department of Education and Science* (1967) 111 S.J. 756.

³²¹ *Ex p. Daisy Hopkins* (1891) 61 L.J.Q.B. 240; *McDonald v Lanarkshire Fire Brigade Joint Committee* 1959 S.C. 141.

³²² *Stevenson v United Road Transport Union* Court of Appeal [1977] 2 All E.R. 941. See also *Stevenson v United Road Transport Union* [1977] I.C.R. 893: “That, since the plaintiff had not known the nature of all the charges he had to meet before the meeting of the executive committee, he was deprived of the opportunity to prepare his case and, in the absence of a sufficiently specific statement of the charges before the meeting or being granted a sufficient adjournment to prepare his defence, the opportunity given to him to put his case was not a sufficient compliance with the rules of natural justice”.

³²³ Conseil d'État, Ass., 7 mars 1958, *Époux Speter*, Rec., p. 152, A.J.D.A., 1958.II. 178, concl. Long ; 29 juillet 1943, Solus, Recueil Lebon p. 211 ; 2 juin 1950, *Hans*, Recueil Lebon p. 336.

in a written form. Only where a statute provides for a “hearing” or an “opportunity to be heard”, judges will impose a hearing.³²⁴ Only if fairness is compromised a hearing will be required.³²⁵ In this respect also Courts use a purposive approach. Lord Woolf summarizes thus the way the administration must conduct itself: « To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken ».³²⁶

In France also the purposive approach is used. The right to be heard does not necessarily mean that one has a right to a hearing. However, it gives a right to present one’s arguments in the most “appropriate manner possible” so that one can explain him/herself effectively.³²⁷

The rights to be informed, to be heard, are essential in both legal systems. However, judges are aware of the necessity not to burden and impede administrative action too much. They both try to set the right balance in each case between the general principles of “natural justice” and the effectiveness of administration repression. The important element in the reasoning of the judges is that the procedures adopted do not compromise irrevocably the rights afforded or do not render them useless. Furthermore, these rights should not be only interpreted as a protection, they are also important for good administrative decision-making. A punitive decision should only be taken after careful consideration and after hearing both sides. They are also principles of good administrative.

So is the need to give reasons for the decision.

c. The duty to give reasons in English and French administrative law

This principle is important for the person affected so that s/he knows the reasons for the penalty imposed and also for the Courts so that they can effectively review the motives of the decision.³²⁸

³²⁴ S. de Smith, H. K. Woolf, J. Jowell, A. Le Sueur, *De Smith’s judicial review*, London, Sweet & Maxwell, 2007, 6e ed., at pp. 385-386, n° 7-053 and at p. 396, n° 7-062. Paul Craig seems more cautious: “While hearings will normally be oral, there is no fixed rule that this must be so. An oral hearing will however be required where this is necessary for the applicant to be able to present his case effectively to the tribunal or body making the decision, more especially when a liberty interest is at stake” (*Administrative Law*, at p. 398, n°12-030).

³²⁵ “One is entitled to an oral hearing where fairness requires that there should be such a hearing, but fairness does not require that there should be an oral hearing in every case” (*v. R. (on the application of Ewing) v Department for Constitutional Affairs [2007] A.C.D. 20; R. (on the application of West) v Parole Board [2005] UKHL 1*).

³²⁶ *Regina v North and East Devon Health Authority [2001] Q.B. 213*; M. Fordham, *Judicial Review Handbook*, préc., n° 60.5.1. See also *Levy v Solicitors Regulation Authority [2011] EWHC 740 (Admin)*: “It was imperative that the tribunal did not proceed to sanction before having announced the basis of its findings on the substantive allegations ... and then allow representations to be made on behalf of the solicitor about the sanction to be imposed.”

³²⁷ R. Chapus, *Droit administratif général*, tome 1, at p. 1118, n° 1312. See *Conseil d’État*, 16 avril 1975, *Association La Comédie de Bourges*, p. 231.

³²⁸ For an analysis of all the advantages of the giving of reasons: P. Craig, *Administrative Law*, at p. 401, n°12-033.

In English law there is no general principle for the giving of reasons.³²⁹ However, an obligation has been imposed indirectly through several means, as Paul Craig showed: where the absence of reasons makes judicial review impossible³³⁰, where the absence of reasons renders the decisions arbitrary³³¹, or where judges examine if the relevant facts could justify the decision.³³²

A firmer ground, but still indirect, has been found to justify the giving of reasons: through legitimate expectations and fairness. When the administration changes a policy and legitimate expectations existed, the change must be justified. Fairness is more important for our study because this basis established a link between administrative penalties and the right to reasons. In *Murray*, Lord Chief Justice Bingham explained the link between the two: “Where a statute conferred on any body the power to make decisions affecting individuals, the court not only required the procedure prescribed by statute to be followed, but would imply just such additional procedural standards as would ensure the attainment of fairness”. That’s why Lord Bingham further stated that “in the absence of a requirement to give reasons, the person seeking to argue that they should have been given had to show that the procedure adopted of not giving reasons was unfair”.³³³

The situation was, in fact, the same in France when the duty to give reasons was not imposed by statute. The administrative judge was reluctant to impose a general duty to give reasons. Why? The administrative judge only imposed reasons where administrative courts were concerned. In England and in France there is an intellectual link between procedure and Courts. Whereas Courts have always been constrained by detailed procedural requirements, administrative action was informal. Hence the “duty to act judicially” one can find in English administrative law and the creation of administrative Courts by the State’s Council in order to impose the procedural protections.

It is a fact that the administrative judge never established a general duty to give reasons. That’s why Parliament intervened in 1979 in order to provide for the duty to give reasons in two kinds of adjudications and especially for unfavourable administrative adjudications

³²⁹ P. Craig, *Administrative Law*, at p. 402; C. Harlow, R. Rawlings, *Law and Administration*, at p. 630. See *Minister of National Revenue v Wrights Canadian Ropes* [1947] A.C. 109; *Stefan v General Medical Council* [1999] 1 WLR 1293, 1300G (“the established position of the common law [is] that there is no general duty, universally imposed on all decision-makers”); *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 564E-F; *Rey v Government of Switzerland* [1999] 1 AC 54, 66B-C (Lord Steyn); *R v Kensington and Chelsea Royal London Borough Council. ex p Grillo* (1996) 28 HLR 94, 105. See M. Fordham, *Judicial review handbook*, at n° 62.1.1.

³³⁰ *Minister of National Revenue v Wrights Canadian Ropes* [1947] A.C. 109: “There is nothing in the language of the Income War Tax Act or in the general law to compel the Minister to state his reason for taking action under s. 6, sub-s. 2 - and he gave no reason for his decision in this case-but that does not necessarily mean that by keeping silence he can defeat the taxpayer’s appeal”; *Norton Tool Co Ltd v Tewson* [1973] 1 W.L.R. 45 ; *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] I.C.R. 120.

³³¹ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997. However, a later decision seems to have reduced the scope of that exception: *R. v Secretary of State for Trade and Industry Ex p. Lonrho Plc* [1989] 1 W.L.R. 525: “The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision” (post, pp. 539H–540A)).

³³² *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014.

³³³ *R. v Ministry of Defence Ex p. Murray* [1998] C.O.D. 134.

(decisions that restrict the use of public liberties, sanctions, decisions to revoke ab initio or for the future a decision that created rights,...). This obligation has been extended through time and can be balanced with business secrets or urgency for example. The giving of reasons is now of general application in France and means that the decision must contain all the relevant elements of law and facts.³³⁴

As a conclusion, the approach of judge is very similar from one country to another. Sensitive to the need to protect individual, they are also aware of the necessity to preserve administrative effectiveness. The basis of their reasoning in the intellectual link they establish between procedure and courts. Only courts can be imposed procedural principles. That's why without parliamentary intervention in 1979 the duty to give reasons would probably be at the same stage as it is in the United Kingdom: still not a principle but progressively advancing on a case-by-case basis.

In addition to the rights to be informed and heard, citizens are entitled to an unbiased decision.

d. The right to an unbiased decision in English and French administrative law

In France, the State's Council has, according to Guy Isaac ensured the impartiality of administrative decision-making in multiple ways: by quashing decisions manifestly motivated by an improper purpose, otherwise called misuse of power ("détournement de pouvoir") and also by ensuring the neutrality and the respect for the principle of equality in public services. It has also erected impartiality as a general principle of the law.³³⁵

According to Guy Isaac, the principle imposes an obligation of abstention from people who have an interest in the proceedings (a personal interest or who have expressed a view on the case). Bias can be both subjective (because of personal interest) and objective (because they have expressed themselves in such a way that a person can have the impression that the case is already decided).

As the big issue before regulatory authorities in France is the combination of functions (prosecution, investigation and adjudication), the question is: does the State's Council traditionally censure such a combination? The analysis of the case law shows that when the judge does it is because the combination shows a bias: for example the State's Council believed that it was unwise for the chairman of a sanctioning committee to take such a function, having previously reported the case to the criminal judge for the same facts. But what the judge really sanctioned is the fact that this person expressed his opinion publicly on

³³⁴ Loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public (J.O.R.F., 12 juillet 1979, p. 1711). See R. Chapus, *Droit administratif général*, tome 1, at n° 1318, n° 1320; P.-L. Frier, J. Petit, *Précis de droit administratif*, at pp. 300-301. See new statutes extending the obligation: Loi n°86-76 du 17 janvier 1986 portant diverses dispositions d'ordre social (J.O.R.F., 18 janvier 1986, p. 888), article 28, quoted in Y. Gaudemet, *Droit administratif*, at p. 148.

³³⁵ See G. Isaac, *La procédure administrative non contentieuse*, at p. 421-422; Conseil d'État, 26 décembre 1925, Rodière, R.D.P. 1926, p. 35, concl. Cahen Salvador; Conseil d'État, 4 mars 1949, Trèbes S. 1950.III.21; Conseil d'État, 29 avril 1949, Bourdeaux, S. 1950.III.68; Conseil d'État, 27 octobre 1999, Fédération française de football, JCP 2000, n° 10376, note Piastra; Conseil d'État, 28 avril 2005, Karsenty, *Droit administratif*, 2005, n° 105, note M. Lombard.

the case.³³⁶ Other than that, the administration does not, in itself, condemn the combination of functions.

In English administrative law, impartiality belongs to the principles of natural justice, according to which “Justice must not only be done; it must also be seen to be done”³³⁷. Ironically, as we will see, this principle, the theory of appearances, will have dramatic consequences for regulatory proceedings in France.

First, the principle stands against any person taking part in a decision where s/he has an interest in it. A financial interest, however small it is, suffices to disqualify the decision maker.³³⁸ Other kinds of interests must pass a test: either they must raise a reasonable doubt or create a real danger of bias.

Second, the English case law shows that judges are also aware of the problems of institutional bias. Opinions that could lead the accused to think that his/her case is decided constitute a breach of the principle of impartiality. Also, concerning the combination of functions, judges have held that someone participating in the prosecution and the adjudication on the case cannot afterwards participate in an appeal against the first decision. The standard of impartiality is also more stringent when appeals are concerned than at first instance.³³⁹ For, English judges consider traditionally, in line with the ECt HR jurisprudence, that an appeal can cure the deficiencies of the procedure at first instance.³⁴⁰

Given that judicial review is wider in its scope than French *ultra vires* review (that is only concerned with administrative decisions) it is difficult to conclude whether the standard of impartiality is stronger in English administrative law. Judicial review comprises the review of many courts and not just administrative tribunals. It is therefore difficult to assess the real ambit of the principle in English law in order to compare it to the French case law.

The last element we would like to study, in order to compare it later with the transparency that now prevails in England is the right to transparency.

e. Transparency or Secrecy: Secrecy as a traditional English and French administrative adjudication

A last feature has to be studied in order to contrast it with the present situation. We want to argue that the English model of regulatory adjudication tends towards a managerial model whose main characteristic is transparency. This evolution has to be contrasted with a tradition of secrecy in English and French administrative procedure and, above all, in enforcement

³³⁶ Conseil d'État, 30 novembre 1994, M. Bonnet, req. n° 136539. V. M. Degoffe, *Droit de la sanction non pénale*, p. 115, n° 191.

³³⁷ Lord Hewart C.J., *The King v Sussex Justices* [1924] 1 K.B. 256.

³³⁸ *William Dimes v The Proprietors of the Grand Junction Canal* (1852) III House of Lords Cases 759.

³³⁹ *In Re p (A Barrister)* [2005] 1 W.L.R. 3019.

³⁴⁰ *Ferd Dawson Calvin v John Henry Brownlow Carr* [1979] 2 W.L.R. 755: “notwithstanding that a decision of an administrative or domestic tribunal which had been reached in breach of the rules of natural justice might for certain purposes be void it was nevertheless susceptible of appeal and that therefore, assuming (without deciding) that there had been a failure of natural justice in the stewards’ inquiry the Jockey Club committee had had jurisdiction to entertain the plaintiff’s appeal from the stewards’ decision to disqualify him” (at pp. 589G — 590B, E-F, 591E-H).

procedures where third parties were excluded. Bureaucratic secrecy is a common feature of the Westminster model of administration and of the French model of adjudication.³⁴¹

It derives from this analysis that procedural protection were existent but limited in both countries. Courts tried to balance the need for effectiveness with the rights of the accused. The only real difference lies in the duty to give reasons. Whereas the State's Council was reluctant to create a general principle Parliament gave a right to reasons for decisions that affect people adversely. The culture of secrecy is also a common feature of English and French administrative law.

In addition to procedural principle, Courts were poised to impose substantial principles.

2. The limited substantive protections

Two principles will be studied here: the principle of proportionality in English and French administrative law, prior to the influence of the ECHR or the EU (a), the principle that penalties should be specific to the offender (b) and finally the problem of the retrospective application of penalties (c).

a. The principle of proportionality in English and French administrative law

We will first study the French conception of the principle of proportionality (i) before examining its English reception (ii). We will see that, in both countries, the conception of the principle is similar.

i) The principle of proportionality in French administrative law

The principle of proportionality was traditionally used in French administrative law to regulate the interference of the administration with public liberties. However, as far as penalties are concerned the French State's Council used to limit its standard of review to the manifest error of appreciation up until 1991 where the review increased.

Traditionally proportionality review is the domain of public liberties. In 1933, the Benjamin case solemnly established the need this standard. "Mr Benjamin wanted to hold a conference on 'Two comic authors: Courteline and Sacha Guitry'. Troubles were expected to occur during the conference because Benjamin was known for his strong position against the state school system. The mayor, responsible for keeping public order, banned the conference. The Conseil d'État took the view that the mayor could have achieved the same aim (that is the keeping of public order) by other means. For example, he could have called in the police forces in larger

³⁴¹ See for England: P. Craig, *Administrative Law*, at p. 733; De Smith's *Judicial Review*, préc., p. 389, n° 7-056; P. Craig, *Public law and democracy in the United Kingdom and the United States of America*, Oxford, Clarendon, 1990, at pp. 160-161; J. Houghton, R. Baldwin, "Circular arguments: the status and legitimacy of administrative rules", *Public Law* ; 1986, spéc. pp. 278-279. For France: G. Isaac, *La procédure administrative non contentieuse*, p. 372; O. Gohin, "La contradiction hors de l'influence de l'article 6 § 1 de la Convention européenne des droits de l'homme - La contradiction avant l'article 6 § 1", *RFDA* 2001 p. 2.

numbers, which would, then, have avoided any kind of disorder without threatening the existence of the freedom in question.”³⁴²

Indeed whereas a Mayor had a duty to take all necessary measures to prevent any disruption to the public order, it had to balance this legitimate purpose with the rights and freedoms of every citizen, in that case the freedom of assembly. In this instance, for fear of disruptions to the public order the Mayor simply forbade the assembly. The Council of State held that the likelihood of the disruptions alleged was not of such a scale that the Mayor could not have taken other measures in order to prevent the disruptions while allowing the assembly. Interdiction, in the field of freedoms, is a disproportionate measure.³⁴³

However, as far as penalties are concerned the State’s Council was traditionally reluctant to review the proportionality of the penalty. It is indeed a lacuna of French repressive administrative law.³⁴⁴ The administrative judge did not want to review the adequacy of the penalty with the fact. In the Lebon case in 1978, it decided that the standard of review would be the “manifest error of appreciation”. Thus, it would quash only disproportionate penalties.³⁴⁵ It is only in 1991 that the State’s Council finally decided to raise its standard of review to a “normal review” that would comprise a full review of the proportionality of the decision.³⁴⁶ Now the review of penalties is a full jurisdiction appeal: not only has the administrative judge the power to review the proportionality of the penalty but if it finds that it is disproportionate it can vary the amount, it is not limited to quashing the decision.

Another question that arise when studying proportionality is the non bis in idem principle. It is true that a penalty should be proportionate, but what about if the same facts are punished by a tribunal, the criminal judge, the European Commission even. Is there a principle prohibiting multiple prosecutions?

In French administrative law, no such principle existed. That is to say the non bis in idem principle only applies in one legal order. In other words there was no principle forbidding the combination of prosecutions in the criminal and administrative orders³⁴⁷; however, within one legal order, multiple prosecutions are forbidden. The State’s Council explicitly forbids multiple prosecutions for the same facts within the administrative sphere.³⁴⁸ Nevertheless, if a statute provides otherwise multiple prosecutions can take place.

How is the principle of proportionality interpreted in English administrative law?

³⁴² See S. Boyron, Proportionality in English Administrative Law: A Faulty Translation?, *Oxford Journal of Legal Studies*, Vol. 12, No. 2 (Summer, 1992), pp. 237-264. See also L. Neville Brown, J. S. Bell, *French administrative law*, at p. 221.

³⁴³ Conseil d’État., 19 mai 1933, Benjamin, *Recueil Lebon* p. 541.

³⁴⁴ See G. Dellis, *Droit pénal et droit administratif : l’influence des principes du droit pénal sur le droit administratif répressif*, L.G.D.J., Coll. Bibl. de droit public, tome 184, 1997, spéc. p. 255, n° 355.

³⁴⁵ Conseil d’État, Sect., 9 juin 1978, Lebon, *Recueil Lebon* p. 245.

³⁴⁶ Conseil d’État, Assemblée, 1er mars 1991, M. Le Cun, *RFDA*, 1991, p. 612.

³⁴⁷ Conseil d’État, 12 janvier 1917, Létrillard, *Lebon* p. 33; Conseil d’État, Sect., 16 juin 1944, Hervé, *Lebon* p. 173; Conseil d’État, Sect., 9 mars 1951, Hay, *Lebon* p. 150; Conseil d’État, Sect., 13 juin 1964, Guégan, *Lebon* p. 334; Conseil d’État, 17 novembre 1965, Agrelli, *Lebon* p. 621.

³⁴⁸ Conseil d’État, 21 juillet 1950, Pinquet, *Recueil Lebon* p. 450.

ii) The principle of proportionality in English administrative law

Much ink has been spilt on the subject.³⁴⁹ The study of the case law shows that there is not much difference between the two legal systems. A difference must be established between orders that breach a freedom and the review of penalties.

The case *R. v Coventry City Council Ex p. Phoenix Aviation* shows to what extent Courts enforce the primacy of public liberties.³⁵⁰ In this case the authority banned the trade in the export of live animals in response to unlawful protest by animal rights protesters. But banning is not the right and lawful response to threat of disruptions when a public liberty is at stake. As the judge said “it is one thing to respond to unlawful threat’s, quite another to submit to them—the difference, although perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour—this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role”.

This case raises the same question as in the *Benjamin* case: what is the lawful response a public authority can make when there is a fear of disruptions and a public liberty (freedom of trade or freedom of assembly) to reconcile. The lawful and proportionate response is to contain the disruption so that public liberties can be preserved and not submit to the threats.

Similarly, judges have also quashed a penalty on the ground that it was too severe in *R. v Barnsley MBC Ex p. Hook*.³⁵¹ In this case Lord Denning said about disproportionate penalties: “there is one further matter; and that is that the punishment was too severe... there are old cases which show that the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion... So in this case if Mr Hook did misbehave, I should have thought the right thing would have been to take him before the justices under the bye-laws, when some small fine might have been inflicted. It is quite wrong that the corporation should inflict on him the grave penalty of depriving him of his livelihood. That is a far more serious penalty than anything the justices could inflict. He is a man of good

³⁴⁹ See P. Craig, *Administrative Law*, préc., at chap. 19, p. 622; C. Harlow, R. Rawlings, *Law and Administration*, at p. 120; H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 305; De Smith’s *Judicial Review*, at p. 584; R. Thomas, *Legitimate expectations and proportionality in administrative law*, Oxford, Hart, 2000 ; E. Ellis (ed.), *The principle of proportionality in the laws of Europe*, Oxford, Hart, 1999 ; A. Duffy, *La protection des droits et libertés au Royaume-Uni : recherche sur le Human Rights Act 1998 et les mutations du droit constitutionnel britannique face aux exigences de la Convention européenne des droits de l’homme*, Fondation Varenne, diff. L.G.D.J., Collection des Thèses, n° 8, 2007, at 156; J. Jowell, A. Lester, “Beyond *Wednesbury*: Substantive Principles of Administrative Law”, 1987, *Public Law*, p. 368 ; G. de Burca, “Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on UK Law”, in M. Andenas (ed.), *English Public Law and the Common Law of Europe* (Key Haven, 1998), Ch.4 ; G. Gerapetritis, *Proportionality in Administrative Law* (Sakkoulas, 1997) ; M. Elliou, “The Human Rights Act and the Standard of Substantive Review” 2001, *Cambridge Law Journal* 301 ; T. Hickman, “Proportionality: Comparative Law Lessons”, 2007, *Judicial Review*, p. 31 ; R. Clayton, K. Ghaly, “Shifting Standards of Review”, 2007, *Judicial Review*, p. 210 ; J. Rivers, “Proportionality and the Variable Intensity of Review”, 2006, *C.L.J.*, p. 174 ; P. Craig, “Proportionality, Rationality and Review”, 2010, *New Zealand Law Review*, p. 265 ; M. Elliott, “Proportionality and Deference: The Importance of a Structured Approach”, in *Effective Judicial Review A Cornerstone of Good Governance*, C. Forsyth, M. Elliott, S. Jhaveri, M. Ramsden, A. S. Hill (eds.), O.U.P., 2010.

³⁵⁰ [1995] C.L.C. 757.

³⁵¹ [1976] 1 W.L.R. 1052.

character, and ought not to be penalised thus. On that ground alone, apart from the others, the decision of the corporation cannot stand”.

These two cases show that judges, in England and France, traditionally interfered against disproportionate decisions: whether because public liberties must stand first or because too harsh punishments offend what we can expect from a public authority. As far as public liberties are concerned the *Laporte* case³⁵² systematised the approach to be taken in cases where a breach of the peace may happen. The House of Lords held that “Where a reasonable apprehension of an imminent breach of the peace existed then the preventive action taken must be reasonable or proportionate. The police must take no more intrusive action than appeared necessary to prevent the breach of the peace. Even if any preventive action had been justified against anyone on the coaches, the action taken was unreasonable and disproportionate. X should have explored other options when he realised that the coach passengers did not pose an imminent threat to the peace. The police had failed to discharge the burden of establishing that the actions they took were proportionate and constituted the least restriction necessary to the rights of freedom of speech and freedom of peaceful assembly.”

It is exactly the same approach the State’s Council has. There must actually be a breach of the peace and public authorities must prove it. Even though such a breach is about to happen, the action must still be reasonable, proportionate and necessary: the public authority must choose the action that would be the less intrusive in public freedoms. That’s why judges say that the public authorities should have explored other options. Just like in *Benjamin or Phoenix Aviation*, public authorities must try to prevent the breach of the peace or the disruptions in order to leave freedoms untouched. And if they have to restrict the freedoms, they have to do so in least intrusive manner. What the *Laporte* decision shows also is that the burden of proof rests on the administration, they have to prove that they took the most appropriate action in the circumstances in order to avoid a disproportionate breach of public liberties.

Today, with the entry into force of the Human Rights Act the existence of proportionality as a ground for review is not to be doubted. But this standard of review existed before. In France and in the United Kingdom as in every legal system based on liberties, freedoms must stand first and administrative action must protect it and not prevent its exercise.

Is there a regulation of the combination of prosecutions in English law? Just like in France, when prosecution are done in different legal orders (criminal and disciplinary prosecutions for example) the law does not prevent it. As Lord Diplock explains it, the disciplinary proceedings pursue another purpose: “There are two main reasons why the double jeopardy rule should not apply to tribunals even where they apply the criminal standard of proof. In the first place, it must be recognised that the character and purpose of the proceedings is entirely different (...). Secondly, however, and no less importantly, the material before the tribunal is likely to be different, in part because different rules of evidence are likely to apply and in part because judicial discretions may well be differently exercised—generally, less strictly in the disciplinary context where at least the accused’s liberty is not at stake. It may also be that on occasions, as Mr Freeland suggests, witnesses will be readier to give evidence at disciplinary hearings held in private than in the full glare of open court proceedings”.³⁵³ Different

³⁵² *Laporte v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105. See also *Moos & Anor, R (on the application of) v Police of the Metropolis* [2011] EWHC 957 (Admin) (14 April 2011).

³⁵³ *Peter Ziderman v General Dental Council* [1976] 1 W.L.R. 330 ; *Regina (Redgrave) v Commissioner of Police of the Metropolis* [2003] EWCA Civ 4, at §38.

purposes and different rules allow for prosecutions in different legal orders. That's why it has been said that "what is sometimes called the double jeopardy rule has no application as such a strict rule".³⁵⁴

Only in very limited circumstances will judges interfere to prevent the combination of prosecutions. A real prejudice must be shown on the part of the accused as well as a danger of a miscarriage of justice.³⁵⁵

However, the same tribunal cannot prosecute twice a person for the same facts. The same rule applies in France and in the United Kingdom but basis of the result is different. In France, the judge uses the *non bis in idem* principle. In the United Kingdom the judge will use the *res judicata* doctrine to prevent multiple prosecution. A recent judgement shows how judges arrive to this result.³⁵⁶ The Supreme Court explains that *res judicata* applies to civil proceedings and therefore cause of action estoppel, one of the two limbs of *res judicata*, should also apply to proceedings before a disciplinary tribunal established under bye-laws, as long as all the constituent elements were met.³⁵⁷ The first decision had been final and on the merits. For that reason, the principle of *res judicata* required that the second complaint be dismissed because it alleged the same breach of the same byelaw as the first complaint. The case applies the statement of Lord Bridge in *Thrasivoulou v Secretary of State for the Environment* that the *res judicata* doctrine "in principle must apply... to adjudications in the field of public law".³⁵⁸

The result of the case seems fair, preventing multiple prosecutions and double jeopardy, and amounting to the same result as the *non bis in idem* principle.

In both countries judges tended to develop the same principle to control breaches of freedoms and the review of penalties. Judges are also concerned with the prevention of multiple prosecutions. How is the principle of specificity of penalties applied?

³⁵⁴ Phillips, R (on the application of) v General Medical Council [2004] EWHC 1858 (Admin) (02 July 2004), at § 37: « There is no rule of law which prevents a disciplinary tribunal, (...), from investigating conduct which has been the subject matter of a trial and which has resulted in the acquittal at trial of, for example, a doctor of a criminal offence. (...) what is sometimes called the double jeopardy rule has no application as such a strict rule » (Mr Justice Newman). See also Bhatt v General Medical Council [2011] EWHC 783 (Admin) (01 April 2011), at § 33.

³⁵⁵ Regina v British Broadcasting Corporation [1983] 1 W.L.R. 23: "That where an employee was charged with a criminal offence and applied for an adjournment of disciplinary proceedings before a domestic tribunal, the domestic tribunal should consider whether the employee would suffer prejudice and, unless there was good reason to the contrary, the tribunal should adjourn the proceedings if it was satisfied that the employee would suffer real prejudice; but that the court would only intervene and reverse a tribunal's decision to continue with the proceedings in circumstances where the employee could show that there was a real danger of a miscarriage of justice in the criminal proceedings and, since it had not been proved that there would be a miscarriage of justice at the trial if the domestic appeal was heard, the application failed" (at pp. 36A–B, 39B, H). See also Archer v South West Thames Regional Health Authority; A v Tayside Fire Board 2000 S.C. 232; R v Solicitors' Disciplinary Tribunal, ex parte Gallagher (unreported), 30 september 1991. B. Harris, A. Carnes, Disciplinary and Regulatory Proceedings, Jordan Publishing, 4th ed, n°7.27.

³⁵⁶ R. (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1.

³⁵⁷ See paras 25-29, 34.

³⁵⁸ [1990] 2 A.C. 273 HL at 289.

b. The specificity of penalties

In French administrative law, one can be held responsible only for its own acts. The principle derives from two sources according to Jacques Mourgeon: first the administration is under an obligation to examine each case according to its own merits and to give reasons for its decisions according to the particulars of the case; secondly, the principle of specificity applies to administrative penalties and prevent a disciplinary tribunal to punish someone who is not the author of the offence.³⁵⁹ Despite the importance of this principle French repressive administrative law knows of cases where the liability for the acts of others is used. For example, the administrative judge has accepted the liability of the principal for the acts of the agent.³⁶⁰

In English administrative law, the principle has not been recognised in itself and law reports show many instances of liability for the acts of others.³⁶¹ In the field of disciplinary proceedings judges tend to adopt a very strict approach as to the possibility to punish someone for the acts of others: the chief executive of a NHS trust was punished for not having taken the necessary steps to correct the high rate of infant mortality following cardiac surgery at a Bristol hospital³⁶². However, Courts have found that for example a “that the conduct of a company with which a doctor was associated, which might enure to the doctor's own professional advantage or financial benefit, was relevant but not conclusive as to whether the association rendered him guilty of infamous conduct”³⁶³.

The proportionality and specificity principles are very much relevant to the comparison of English and French administrative law as to the way public bodies can punish citizens. One last element to the study is the link between time and punishment.

c. Time and punishment

The main element to be studied is the rule of the non-retroactivity of penalties.

What does retroactivity mean? In French law, retroactivity has been defined as the immediate application of a rule to settled legal situation.

Retroactivity is forbidden in French criminal³⁶⁴, civil³⁶⁵ and administrative law³⁶⁶. The State's Council has made this principle a general principle of the law so that the administrative can only rule for the future. This means in administrative law that administrative decisions cannot

³⁵⁹ J. Mourgeon, *La répression administrative*, at p. 332, n° 231; M. Delmas-Marty, C. Teitgen-Colly, *Punir sans juger ? De la répression administrative au droit administratif pénal*, at p. 71; M. Deguerge, *Sanctions administratives et responsabilité*, AJDA 2001 p. 81

³⁶⁰ J. Mourgeon, *La répression administrative*, at p. 336, footnote 81; Conseil d'État, 29 février 1952, ministre de la Santé, Recueil Lebon p. 142.

³⁶¹ B. Harris, *Disciplinary and Regulatory Proceedings*, préc., n°1.19-1.20

³⁶² *Roylance v General Medical Council (No.2)* [2000] 1 A.C. 311.

³⁶³ *Parviz Faridian v General Medical Council* [1970] 3 W.L.R. 1065.

³⁶⁴ Code pénal, article 112-1.

³⁶⁵ Code civil, article 2, « La loi ne dispose que pour l'avenir ; elle n'a point d'effet rétroactif ».

³⁶⁶ Conseil d'État, Ass., 25 juin 1948, Société du journal « L'Aurore », Recueil Lebon p. 289.

enter into force before their publication of their notification. But the principle does not oppose the decision having an immediate effect to legal situation that are ongoing and are not settled.

In repressive administrative law it means that the law applicable is not one in force at the time of the offence. It is however uncertain if the State's Council accepted the rule of retroactivity *in mitius*, which is now anyway a constitutional rule.

What is the rule now in English administrative law? The problem has not received much attention among lawyers. The definition given is: "The effect of an enactment is said to be retrospective when (1) it changes the relevant law with effect from a time earlier than the enactment's commencement; or (2) it otherwise alters the legal incidents of a transaction or other conduct effected before its commencement; or (3) it confers on any person a power to act with retrospective effect. An enactment is not retrospective, however, merely because a part of the requisites for its action is drawn from a time before it was passed. Where an enactment is intended to be retrospective it applies to pending actions"³⁶⁷.

According to Wade and Forsyth without statutory authorization an administrative rule cannot have retrospective effects.³⁶⁸ Judges will interpret statutes so as not to give them such effects, especially in criminal law.³⁶⁹

Some cases show the case concern as in France, when the administration punishes someone for an offence committed before his/her entry into the institution. Lord Goddard held in this respect that "in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past. Accordingly, in our opinion, the committee had jurisdiction to make the order complained of and the appeal fails".³⁷⁰

³⁶⁷ Halsbury's Laws of England, Statutes, vol. 44(1), n° 1284.

³⁶⁸ H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 747; Paul Craig analyses the problem in relation to legitimate expectations: P. Craig, *Administrative Law*, préc., p. 648.

³⁶⁹ *Blyth v Blyth* [1966] 2 W.L.R. 634; *Waddington v Miah* (otherwise *Ullah*) [1974] 1 W.L.R. 683. For example of statutes with retrospective effect see the analysis of: D. A. Thomas, « Incorporating the European Convention on Human Rights; It's Impact on Sentencing », in *The Human Rights Act and the criminal justice and regulatory process*, J. Beatson, C. Forsyth, I. Hare (dir.), Oxford, Portland, Or., Hart Pub., 1999, at spp. 86-87. See A. P. Le Sueur, J. W. Herberg, *English, Principles of public law*, Routledge, 1999, spéc. chap. 22., spéc. pp. 431 suiv.. See also this case *L'Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd* (The *Boucraa*) [1994] 1 A.C. 486 ; *Yew Bon Tew v Kenderaan Bas Maria* [1983] 1 A.C. 553: "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past".

³⁷⁰ *In re A Solicitor's Clerk* [1957] 1 W.L.R. 1219. See also *R. (on the application of L) v Prosthetists and Orthotists Board* [2001] EWCA Civ 837: "Held, dismissing the appeal, that the disciplinary committee was entitled to investigate pre registration conduct. Such consideration did not amount to giving the legislation retrospective effect but rather amounted to a consideration of past conduct as impacting upon the continuance of

The same reasoning applies. The penalty is not retrospective; the past conduct was of such a nature that it puts into question the fitness of the person to belong to the institution (either the civil service or any other professional institution).

After having considered to what extent English and French administrative law were close in the way they reviewed and controlled administrative punishment, it is now necessary to consider the extent of external pressures for harmonization: EU and ECHR law.

future registration. It was clear that the committee was entitled to consider past conduct that had occurred prior to registration but which had resulted in a criminal conviction post registration”.

6.1.2 THE HARMONIZATION FORCES OF THE EU AND THE ECHR

EU and ECHR law play a different role in harmonizing the administrative process in France and the United Kingdom.

EU law plays an ambiguous part in this respect for, on the one hand it provides for the effectiveness of EU law and especially the effectiveness of sanctions and, on the other hand, ensures that proper protections are provided to individuals affected by actions taken in the enforcement of EU law.

ECHR law will be studied in so far as it gives protection to individuals against administrative punishments.

It will be seen that both sources of law give Member States a broad discretion in the way they want to implement the protections they afford. This discretion leaves room for each State to implement the model it chooses. That's why, as far as France is concerned the judicialization cannot be accounted only with reference to the ECHR even though Courts used this source to impose more stringent, court-like protections. We will show that the ECHR is neutral in this respect.

1. The ambiguous part of EU law: between effectiveness and protection

The regime of sanction for the enforcement of EU law tries to balance two imperative principles: the effectiveness of EU law and the procedural autonomy of Member States. That's why the principles established by the ECJ for the enforcement of EU law are designed to meet these two differing objectives.

The sanctions provided for the enforcement of EU law should meet two requirements; they should be adequate and equivalent to that afforded for the protection of domestic laws.

The requirement of adequacy carries with it three elements: sanctions should be effective, dissuasive and proportionate. Sectoral directives in electronic communications and energy mention these requirements³⁷¹ but do not make them more intelligible. In his opinion, Mr Advocate General Ruiz-Jarabo Colomer speaks of the "undefined legal concept of an 'effective, proportionate and dissuasive penalty'".³⁷²

³⁷¹ Directive 2002/21/EC, article 21a ("Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive"); Directive 2009/72/EC, article 17§4 ("Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraphs 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers: (d) to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency"); Directive 2009/73/EC, article 41(4)(d).

³⁷² Case C-176/03, Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 26 May 2005 [2005] ECR I-7879: "The notion in question, when looked at in the abstract, appears not to be precisely delineated, but, as with all such notions, is amenable to definition when applied to actual situations, most particularly if one bears in mind its intended purpose".

The case law justifies this statement. The ECJ uses the expression without precisely defining each concept, its scope and its content.

The notion of effectiveness seems to have two effects: it means that the penalty “must be capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of Community law”.³⁷³ The measure should be capable of being applied in fact and should ensure the effective application of EC law. But this requirement has not effect on the nature of the penalty under domestic law, for it is up to Member States to define the most appropriate in the specific case. Member States are responsible for the choice of the means to achieve the goal of the legislation. However the means must be appropriate. For example, if “the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed”, the measures adopted in domestic law must be tailored in order to “guarantee real and effective judicial protection and have a real deterrent effect on the employer”. That’s why “in the event of discriminatory dismissal contrary to Article 5 (1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained”³⁷⁴. In this case the effectiveness requires either reinstating or compensation.

The requirement that the sanction be sufficiently deterrent or dissuasive may have a consequence on the amount of the penalty. It means that the amount must be sufficiently high to be actually deterrent. For example, in the case of a fine imposed to enforce Council Directive 86/609/EEC of 24 November regarding the protection of animals used for experimental and other scientific purposes, Mr Advocate General Geelhoed said that a fine that was enacted 150 years ago in Ireland without being raised is inadequate: “the level of the fines which can be imposed in Ireland is inadequate. 150 years ago the maximum fines may well have had a deterrent effect but, in the light of subsequent inflation, they have taken on a symbolic character. This is all the more so because animal experiments are also carried out on an industrial scale.”³⁷⁵

The element of proportionality derives from the general principle of EC law.³⁷⁶ When penalties are concerned the principle requires that “the administrative or punitive measures must not go beyond what is necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the EC Treaty”³⁷⁷

The requirement of adequacy leaves some discretion to Member States to chose the most appropriate measures while giving some criteria to the ECJ to review the national measures chosen.

³⁷³ Case C-378/07, Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis [2009] ECR I-3071.

³⁷⁴ Case C-271/91, M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR I-4367.

³⁷⁵ Case C-354/99 Opinion of Mr Advocate General Geelhoed delivered on 5 April 2001 [2001] ECR I-7657, at § 27.

³⁷⁶ See for example cases 68/88; C-210/91; C-36/94.

³⁷⁷ Case C-430/05, Ntioni Anonymi Etaireia Emporias H/Y, Logismikou kai Paroxis Ypiresion Michanografisis and Ioannis Michail Pikoulas v Epitropi Kefalaiagoras [2007] ECR I-5835, at § 54.

In addition to the requirement of adequacy, the ECJ impose a requirement of equivalence. This requirement has been specified by the ECJ that held that “infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance...; furthermore, the national authorities must proceed with respect to infringements of Community law with the same diligence as that which they bring to bear in implementing corresponding national laws”.³⁷⁸ The condition of equivalent should therefore be interpreted in terms of procedure and substance but also in terms of diligence. Member States should show the same eagerness to sanction breaches of EC law as they do to enforce their domestic law and the measures chosen to enforce EC law should follow similar principles of procedure and substance as those of domestic law.

But EC law does not only provide requirements concerning the intensity and the appropriateness of the penalty. It also provides for protections. The ECJ has indeed shown the importance of certain general principles that are applicable to the enforcement of EU law: legal professional privilege³⁷⁹, the principle that penal provisions may not have retroactive effect³⁸⁰ and its corollary the principle of retroactive application of a more lenient penalty (or retroactivity *in mitius*)³⁸¹, the principle of legality (“a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis”³⁸²), the principle preventing double jeopardy or *ne bis in idem*³⁸³.

As far as procedural safeguards are concerned the ECJ has constantly considered that the rights of the defence are a fundamental principle of the EC legal order.³⁸⁴ It implies a right of access to the file, the right to be heard before an unbiased tribunal and the presumption of innocence.³⁸⁵

However it appears that EC law does not go beyond these traditional principles of procedural protection. The principle of transparency or of consultation of stakeholders is not enshrined principles of EC law. They may be used in practice but they would not be imposed on

³⁷⁸ Case 68/88 Commission v Greece [1989] ECR 2965, § 24 and 25; Case C-176/03 Commission of the European Communities v Council of the European Union [2005] ECR I-7879.

³⁷⁹ Case C-550/07 Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd c. Commission européenne [2010] ECR 00. See M. J. Frese, “The development of general principles for EU competition law enforcement — the protection of legal professional privilege”, European Competition Law Review, 2011, 32(4), pp. 196-205.

³⁸⁰ Case 63/83 Regina v Kent Kirk [1984] ECR 2689.

³⁸¹ Case C-387/02 Criminal proceedings against Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and Others (C-403/02) [2005] ECR I-3565.

³⁸² Case C-172/89, Vandemoortele NV v Commission of the European Communities [1990] ECR I-4677.

³⁸³ Case C-204/00, Aalborg Portland A/S and others v Commission of the European Communities [2004] ECR I-123: “As regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset” (at § 338).

³⁸⁴ Case 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities [1979] ECR 461.

³⁸⁵ W. P. J. Wils, “EU antitrust enforcement powers and procedural rights and guarantees: The interplay between EU law, national law, the Charter of fundamental rights of the EU and the European Convention on human rights”, Concurrences N° 2-2011, at pp. 41.

Member States when they are enforcing EC law. In this respect, EC principles of administrative procedure remain very traditional.³⁸⁶

In addition to these principles, utility regulators should take into account the principles enshrined in the European Convention on Human Rights.

2. The discretion afforded by ECHR law

What is important to assess at this stage is not give a detail of all the protections afforded by the Convention. Article 6 and article 13 provide for detailed protections both procedural and substantive. As far as the substantive protections are concerned it is important to notice that the European Court has provided for stricter safeguards against double jeopardy than that afforded in domestic laws. The Zolotukhin case clearly forbids the combination of punishments based on the same facts.³⁸⁷

However, the important point at this stage is to show that the interpretation of the Court leaves a choice to the States. The “Le Compte” case that is still the law in this respect says that “the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (art. 6–1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (art. 6–1)”.³⁸⁸

The case-law of the ECt HR leaves a choice: either you give individuals a first instance tribunal that complies completely with the requirements of article 6, or the body must be reviewed by a Court that has full jurisdiction and that complies with article 6. We will see that the French choice amounts to the two: French Courts have in fact judicialized the proceedings before regulatory authorities and provided for a full jurisdiction appeal that also complies with article 6.

In conclusion, EU and ECHR laws leave some discretion to European Member State to adjust their proceedings and the principles they want to apply. This conclusion will allow us to show that the model followed in each country is an answer to internal logics, pressures.

We will first assess to what extent the study of regulatory proceedings in England and France opposes two models and we will then give some explanations.

³⁸⁶ See P. Leino-Sandberg, “Minding the gap in European administrative law: on lacunae, fragmentation and the prospect of a brighter future”, Report for the European Parliament, Studies, May 2011; L. Azoulai, “Le principe de bonne administration”, at pp. 493 in *Droit administratif européen*, J.-B. Auby, J. Dutheil de la Rochère (dir.), Bruylant, 2007 ; J. Mendes, “Participation and participation rights in EU law governance”, at pp. 257 in *Legal challenges in EU administrative law: towards an integrated administration*; P. Craig, *EU Administrative Law*, Oxford, Oxford University Press, 2006, at pp. 134; A. Tomkins, “Transparency and the Emergence of a European Administrative Law”, (1999-2000) *Yearbook of European Law*, pp. 217-256. However some wrtiers contend that the word European Ombudsman gets to establish a code of good governance: M. Elisabeth de Leeuw, “The European Ombudsman’s Role as a Developer of Norms of Good Administration” (2011) 17 *European Public Law* pp. 349–368.

³⁸⁷ ECt HR, Grand Chamber, *Zolotukhin v Russia* (14939/03), 26 B.H.R.C. 485: “Protocol 7 art.4 was to be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same”.

³⁸⁸ Case of *Albert and Le Compte v. Belgium*, n° 7299/75; 7496/76.

6.2 - TWO DIFFERING MODELS OF REGULATORY ENFORCEMENT PROCEEDINGS

Although English and French administrative law share common principles of administrative procedure and although there would be a case for harmonization based on European laws, the two countries diverged in the way enforcement proceedings are run.

The comparison of regulatory enforcement proceedings in the field of utilities opposes two models: a managerial model and a judicial model. We will explain what these concept stand for.

6.2.1 THE UK: MANAGERIAL MODEL

In what way is the United Kingdom model of enforcement managerial? To what extent is this new?

The UK model of enforcement can be termed managerial in that it provides very few protections, it is still very informal and it is moreover based on transparency and participation. This is new as far as the second element is concerned. Usually, in administrative procedure everywhere in the western world, enforcement proceedings were secret. Modelled in judicial proceedings, it was thought to be only for the parties involved and not the outside world. In the APA for example participation is limited to rule making, adjudication remains behind closed doors. In this way the UK model stands apart and inaugurates some new principles of administrative adjudication by extending participation not only to rule-making but also and especially to adjudication and by using electronic means in order to ensure that all stakeholders participate in the process.

Of course, not all utility regulators have the same degree of transparency. Ofcom stands as a model in this case. Other regulators are less transparent. But, if you compare Ofcom with its French counterpart, the ARCEP, you can see how transparency is extended in fields where it was not previously wanted. The process of enforcement before the French electronic communications regulator is still very much secret. Only the decision is made public, which is not new in administrative adjudication.

That's why we will show first that Parliament and Courts have been cautious not to afford too many guarantees. The procedure remains entirely in the hand of the regulators and keeps very informal (1). Second, we will show to what extent is transparency extended to the enforcement process, the reasons for this evolution and the manners in which Ofcom especially handles this transparency (2).

1. The very limited protections

Limited protections can be accounted for by the fact that Parliament does not wish to juridify the process before regulatory authorities. It therefore provides for very limited protections so that the regulatory process remains very informal both procedurally (a) and substantially (b). We will finally try to assess to what extent are regulatory authorities original in the English administrative space for there has been a lot of litigation on article 6 (c).

a. A very informal procedure

The informality of the procedure is a characteristic feature of regulatory proceedings both as far as penalties and dispute resolution are concerned. It can be explained by the Parliament's will to leave them free to arrange their own procedure without being burdened by statutory requirements. We will see when study the French case that the specificity of a priori constitutional review in France makes this impossible. The French Parliament in indeed under a duty to use all its jurisdiction to protect liberties, that's why a statute has to provide for all the necessary protections of fundamental rights and liberties and not leave this to the administrative (this is what the French legal doctrine calls "negative incompetence" because Parliament does not go far enough).

Statutes in our sectors provide for limited protections and leave to the regulatory authority the responsibility for arranging its own procedure.³⁸⁹

The informality of the repressive procedure does not mean that no protections are provided before regulatory authorities. There are some provisions to ensure the impartiality of the decision-making process, to give some protections for the accused and to frame the forms of the decision.

Parliament does not give detailed provisions as to the impartiality of the decision-making process. However, there are some provisions of general application concerning the prevention of conflicts of interests, especially of a pecuniary nature. In this respect, it is to be doubted that Parliament goes further than what the case law requires. In fact, some regulators such as Ofcom have taken steps to ensure that penalties are taken in an unbiased way. For example it has established independent committees such as the Broadcasting Sanctions Committee that adjudicates on sanctions. However, it is difficult to see to what extent is this committee independent. It is staffed with people different from the ones who took the decision on the breach of the broadcasting code. As far as other regulators are concerned, it seems that there is no separation of functions inside the agency to ensure that there is no combination of function. In conclusion, concerning impartiality it seems that procedures and provisions do not go further than what Courts require.

As far as natural justice is concerned, the same conclusion has to be drawn. Statutes only provide for a right to be informed and to be heard.³⁹⁰ However, as no penalties can be pronounced before the issuing of an enforcement notice or an order, undertakings have a full opportunity to be heard and also to correct their behaviour to as to comply with the law. In effect no penalty will be pronounced if the undertaking complies with the order. The justification for this two-step process was expressed thus by the Minister in charge: “we propose the right for those subject to enforcement action to argue their side of the case before a definitive decision is taken, and that no penalty is to be posed against someone contravening a condition if they promptly take appropriate action to comply, and to remedy the consequences of the breach as soon it is brought to their attention”.³⁹¹

In addition the Fleurose case, in the financial sector shows that Courts are not willing to go further and to use article 6 to give more protections to individuals: “We accept for present purposes, as did the judge, that it was for the SFA to prove their case, that the SFA had to inform M Fleurose in good time of the nature of the charges, that he must have adequate time and facilities to prepare his defence, a proper opportunity to give and call evidence and

³⁸⁹ See for Ofcom: Office of Communications Act 2002 c. 11, schedule 1, §15(1): “OFCOM may make such other arrangements for regulating their own procedure, and such arrangements for regulating the procedure of the committees established by them, as they think fit”. Communications Act 2003, section 185(4): “A reference made under this section is to be made in such manner as OFCOM may require” and section 188(3) (“The procedure for the consideration and determination of the dispute is to be the procedure that OFCOM consider appropriate”). Gas Act 1986, section 27A(4): “The practice and procedure to be followed in connection with any such determination shall be such as the Director may consider appropriate”. Electricity Act 1989, section 44C.

³⁹⁰ See Communications Act 2003, section 94(3); Broadcasting Act 1990, section 41(3); Gas Act de 1986, section 30A(3); Electricity Act 1989, section 27A ; Postal Services Act 2011, Schedule 7(6)(b); Railways Act 1993, section 57C.

³⁹¹ Standing Committee on the Bill for this Act in the House of Commons the Minister for E-Commerce and Competitiveness (Mr. Stephen Timms).

question those witnesses called against him”.³⁹² The case shows that Courts will not be willing to intervene any further in the regulatory process.

However Parliament provided for the giving of reasons for in cases where penalties are imposed on undertakings.³⁹³

A fortiori, the procedure for enforcement orders and dispute resolution decisions is not constrained by statute. Parliament provided for very limited protections in these fields modelled from natural justice principles. It is mainly for regulators to decide the most appropriate procedure for the handling of disputes on access.

Furthermore the substantial principles applicable to regulatory enforcement are also very limited.

b. Limited substantial principles

The substantial principles should be applicable at the stage of the investigation, and also when the repressive or the dispute resolution procedures are concerned.

Parliament provided for limited protections during the investigation. Regulators can require information that must be relevant and proportionate.³⁹⁴ This power has however been litigated (in another area) on the ground that the power to require information would go against the privilege against self-incrimination. The House of Lords dismissed this argument. The case was about the control of pollution by local authorities and specifically about the control of clinical waste. The local authority served a company with notice to disclose information about unauthorised storage of waste. The company argued that this power would go against its privilege not to incriminate itself. The House of Lords held in this case that the power to require information “had been conferred not merely for the purpose of obtaining evidence against offenders but also for the broad public purpose of protecting public health and the environment” so that the purpose of the legislation “would be frustrated if those who knew most about a health or environmental hazard were entitled to refuse to provide urgently required information on the ground that they might incriminate themselves”. In other words, the privilege against self-incrimination cannot be relied on when the power to require information is concerned.³⁹⁵

This power to require information, to enter private or professional premises gives an inquisitorial nature to the process before regulatory authorities. Even where dispute resolution is concerned, regulators should use their power in the public interest and should not be assimilated to commercial arbitrators. That’s what Moses LJ very clearly explains when he says: “having regard to his role as guardian of the public interest, the Regulator is not constrained in the directions he may make by the wishes of the parties. The directions he gives may be different from those which an applicant for the directions sought. He may have a separate agenda. He is not a judge or arbitrator but performs a broader role than that

³⁹² R. (on the application of Fleurose) v Securities and Futures Authority Ltd [2001] EWCA Civ 2015.

³⁹³ See Communications Act 2003, section 95(4) and section 96(6)(a).

³⁹⁴ V. Railways Act 1993, section 58; Communications Act 2003, sections 135 and 191; Electricity Act 1989, section 28; Gas Act 1986, section 38; Postal Services Act 2011, Schedule 8, Part 1, § 1.

³⁹⁵ Regina v Hertfordshire County Council [2000] 2 W.L.R. 373.

required of a judicial or quasi judicial decision maker. In those circumstances he is not constrained by the wishes of the parties”.³⁹⁶

Parliament is also concerned to bestow some substantive protections at the repressive stage. The most important protection afforded by Parliament is perhaps the provision concerning the proportionality of the penalties. The enforcement process is first proportionate in the sense that it follows the prescriptions of the “enforcement pyramid” Ayres and Braithwaite recommended. First regulators should serve an enforcement notice on the undertaking. If the notice is not complied with, only then can they impose a penalty. At last resort they can revoke the licence.

Proportionality is therefore arranged statutorily through the different steps the regulators should follow. Moreover Parliament provides that the amount of the penalty should also be proportionate with the gravity of the offence and that, at any rate, the penalty cannot be superior to a specific percentage of the turnover of the company. Proportionality is ensured through the process and the amount that must related to the gravity of the breach and that is limited to a certain percentage.³⁹⁷

When fundamental rights are concerned such as the freedom of expression, Courts are very sensitive to ensure the proportionality of the infringement. The Gaunt case shows to what extent Courts are willing to review any measure that interferes with the freedom of expression of journalists.³⁹⁸ But, in this case, no sanction was imposed on the journalist and his use of his freedom of speech proved excessive with respect to the public interest.

As far as dispute resolution is concerned the substantive protection are very limited. The regulators should not be assimilated with commercial arbitrators or judges when they are exercising this power. Moses LJ and the CAT have emphasised the regulatory nature of this power that is not akin to judicial procedures.³⁹⁹

On the contrary the case law shows to what extent this power can be strong in interfering with the freedom of contract. The CAT has been called to answer a question on the retrospective effect of dispute resolution decisions and held that the power could be applicable to historical disputes and was therefore not constrained in time by the actual appearance of the dispute in order to take into account the moment when the operator began acting in breach of its obligations.⁴⁰⁰ The power to resolve a dispute has been contested on the ground that, the particular circumstances of the case, Ofcom had failed to abide by the legitimate expectations it had created. British Telecom contented that Ofcom had created a legitimate expectation that

³⁹⁶ V. The Queen On the application of London and Continental Stations and Property Limited v The Rail Regulator [2003] EWHC 2607 (Admin), at § 28. See also Winsor v Bloom [2002] EWCA Civ 955, at § 21.

³⁹⁷ See Communications Act 2003, section 97(1) (10% of the relevant turnover); Gas Act 1986, section 30A; Electricity Act 1989, section 27A; Postal Services Act 2011, Schedule 7, § 7 (1)(b); Railways Act 1993, section 57A (10 %).

³⁹⁸ Gaunt v OFCOM [2010] EWHC 1756 (QB) (13 July 2010); R. (on the application of Gaunt) v Office of Communications (OFCOM) [2011] EWCA Civ 692.

³⁹⁹ T-Mobile (UK) Limited, British Telecommunications Plc, Hutchison 3G UK Limited, Cable & Wireless UK & Ors, Vodafone Limited, Orange Personal Communications Services Limited v Office of Communications [2008] CAT 12, at § 93: “That provision (...) rather emphasises that dispute resolution is an autonomous regulatory process which forms part and parcel of the overall regulatory framework”.

⁴⁰⁰ British Telecommunications Plc v Office of Communications [2010] CAT 15.

a specific rule was to be interpreted by Ofcom in a certain way and that, in the dispute resolution process, Ofcom moved away from that interpretation, creating a breach. The Competition Appeal Tribunal did not follow BT because, in order to create a legitimate expectation as to the interpretation of a rule, the rule must be ambiguous, whereas, in this instance, the rule being clear BT could not have any legitimate expectation as to its interpretation. As the CAT says: there is no “room for any legitimate expectation that does not accord with the true construction” of the provision in question.⁴⁰¹

In conclusion, both procedural and substantive principles are limited. The enforcement process the utility regulators use is not constrained by court-like principles. In this respect, British utility regulators are in some way original within the administrative space in the United Kingdom.

c. The originality of regulatory enforcement proceedings in the English administrative space

The extent of the originality of utility regulators can be shown in two respects: if you compare their proceedings to the one applicable in competition law and in financial markets law, and if you compare it with other administrations. The enforcement process is indeed litigated in many other areas of administration on the ground of article 6.

As far as competition law is concerned, there are some authorities that criticize the combination of functions within the Office of Fair Trading without sanctioning it. The Competition Appeal Tribunal said in the course of a judgement that « As we have just indicated, we accept that both Article 6 (1) and (2) of the ECHR apply to proceedings potentially involving a penalty imposed for a breach of the Chapter I and Chapter II prohibitions. We also accept that there is force in the argument that the administrative procedure before the Director does not in itself comply with Article 6 (1), notably because the Director himself combines the roles of investigator, prosecutor and decision maker. However, as we have already indicated in paragraph 74 of our judgement of 8 August, that in itself involves no breach of Article 6 because the Director’s administrative Decision is subject to full judicial control on the merits by this Tribunal ».⁴⁰²

⁴⁰¹ British Telecommunications Plc v Office of Communications [2011] CAT 5.

⁴⁰² Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications [2002] CAT 1 (15 January 2002), at §137. See also Claymore Dairies Ltd and Arla Foods UK PLC v Office of Fair Trading [2003] CAT 18 (02 September 2003): “The second factor is that the OFT, under the system, combines, as we know, the role of prosecutor and the role of decision-maker. At a certain stage it is primarily a prosecutor and then, at the end of the administrative procedure, it is, as it were later on, a decision-maker, so there is that dual role. (...)”. Further on the Tribunal shows the combination of functions (§11) : « In the system as established by the Act it seems to us in general that there are probably three stages. At the first stage the OFT is investigating. Then it moves to a second stage at which it has to decide whether it is to issue a Rule 14 notice. At that point, in our view, its mode is primarily a prosecutorial mode; in other words, the OFT has primarily its prosecutorial hat on. It seems to us that the question the OFT must ask itself is the question similar to that which a prosecutor would ask in other contexts, "Am I satisfied that this evidence, if uncontested, would be sufficient to establish a Chapter I infringement?" The OFT, if it can answer that question in the affirmative, will then proceed to issue a Rule 14 notice. Then comes the third stage. The OFT, as decision maker, will hear arguments and will have to weigh up the evidence. The question for the OFT then at the end of that proceeding is still the question whether it is satisfied that the infringement is sufficiently proved, giving due weight to the presumption of innocence and any reasonable doubt there may be ».

In other words the CAT does not want to move away from an orthodox interpretation of article 6. There is indeed a combination of functions that offends traditional principles but it does not want to intervene.

The only agency that established a separation of functions, after an intense lobbying of the industry, is the Financial Services Authority. During the discussion on the bill in Parliament concerns arose precisely on the problem of the combination of functions. The Joint Committee on Financial Services and Markets reported that “The need for the FSA to be equipped with a range of disciplinary powers including fines was generally accepted by consultees. Instead the main focus of comment on the draft Bill has been on the disciplinary process. There has been a perception that the FSA internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and that the FSA will be able to act as “prosecutor, judge and jury””.⁴⁰³ Contrary to the utilities sectors the disciplinary procedure provisions of the statute “attracted considerable attention during the committee stages in Parliament as debate focused on their compatibility with the Human Rights Act 1998”.⁴⁰⁴

Contrary to what the CAT thought, the appeal tribunal set up to review the penalties imposed by the FSA said very clearly: “In our view the decision-making process at the time of the disputed decision had the defects identified in the enforcement process review, namely that before the case was referred to the Committee there was no dedicated legal function independent of the Enforcement Division to assist the Committee in its decision-making... Again, the decision-making process at the time of the disputed decision had the defect that there was no dedicated independent legal function to assist the Committee with legal advice and support”.⁴⁰⁵

The same issue does not entail the same problem in different settings. The financial industry has achieved to impose a fairer standard of procedure for the FSA. What is a problem in the financial sector is not for other industries. For example in the Gaunt litigation, concerning Ofcom’s enforcement process, the issue of the fair trial was not even mentioned, whereas there is very limited procedural protections before Ofcom and there is no appeal process whereas in the financial sector, there is one that cures the defects of the procedure.

It is not therefore true to say that procedural protections and guarantees are not a concern at all in the United Kingdom. It depends on the sector. It is also true that the litigation on article 6 in France began also in the financial sector but spread to all regulators. As far as the procedures before the European Commission, there is also a growing awareness of their inadequacy with the standards of the fair trial among the legal doctrine.⁴⁰⁶

⁴⁰³ Joint Committee on Financial Services and Markets - First Report, 27 April 1999, §147.

⁴⁰⁴ See I. MacNeil, *An introduction to the law on financial investment*, Oxford, Portland, Or., Hart, 2005, at pp. 83-84; *Regulating financial services and markets in the twenty first century*, E. Ferran, C. A. E. Goodhart (ed.), Oxford, Hart, 2001, at chap. 8 and 9.

⁴⁰⁵ Davidson & Tatham (Cost Decision) [2006] UKFSM FSM040 (11 October 2006) at § 63 and 69.

⁴⁰⁶ W. P. J. Wils, *Principles of European antitrust enforcement*, Oxford, Portland, Or., Hart, 2005, at pp. 166 suiv. (chap. 6); W. P. J. Wils, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function”, 27 *World Competition: L. & ECON. REV.* 202, 215 (2004); I. S. Forrester, “Due process in EC competition cases: a distinguished institution with flawed procedures”, *European Law Review*, 2009, pp. 817; Bo Vesterdorf, “Due Process Before the Commission of the European Union? Some Reflections Upon Reading the Commission Draft Paper on Best Practices in Antitrust Proceedings”, *The CPI Antitrust Journal*, April 2010 (1). On the influence of the future Treaty of Lisbon: W. Weiss, “Human Rights and EU antitrust enforcement: news from Lisbon”, *European Competition Law Review*, 2011, 32(4), pp. 186-195.

It is now requisite to study the managerial character of regulatory enforcement proceedings.

2. A managerial model

The British model can be seen as managerial from a double perspective: from a procedural perspective, the focus on transparency and participation in enforcement proceedings gives it its originality compared to France (a); also, on a more ideological perspective, the proceedings before utility regulators were very much influenced by the “responsive regulation” movement, that some prominent criminal lawyers have dubbed managerial (b).

a. Managerialism as a result of regulation theories: Transparency and participation in enforcement proceedings

To what extent is this new? The extension of transparency and participation to proceedings that were formerly closed shows the evolution of administrative procedures to new areas and shows that the usual dichotomy between regulation and adjudication, the former being open the latter being closed, is probably obsolete compared to the new ways in which proceedings are shaped by regulators. In Habermas’ terms, it would tend to show that the process of legitimization is extending not only to regulations but also to adjudication. Third parties begin able to participate in the process, the adjudication may seem legitimate to all stakeholders.⁴⁰⁷

What is the basis of this transparency? Two bases can be found. One is the “better regulation” movement and the other is the “stakeholder theory of regulation”.

i) Managerialism, the better regulation movement and enforcement proceedings

The first one lies in the principles of “better regulation” that became now the movement “better regulation”. The change in name does not seem that have greatly affected the content of the principles.⁴⁰⁸ How does this program influence the regulatory enforcement process for

⁴⁰⁷ J. Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992, at pp. 188.

⁴⁰⁸ See European Commission, *Smart Regulation in the European Union*, COM(2010)543 (8 October 2010); H. McColm, “Smart Regulation: The European Commission’s Updated Strategy”, *European Journal of Risk Regulation*, 1/2011, pp. 9-11; L. Allio, “On the Smartness of Smart Regulation – A Brief Comment on the Future Reform Agenda”, *European Journal of Risk Regulation*, n°1/2011, pp. 19-20 ; OECD, Conference, “Regulatory Policy at the Crossroads”, 28-29 October 2010, Paris, espec. “Part IV. Regulatory Governance: The New Frontier”; J. Hanebury, “Smart Regulation—Rhetoric or Reality?”, *Alberta Law Review*, vol. 44, n° 1 (July 2006), pp. 33-63 (to the writer the principles of smart regulation are not new); N. Gunningham, P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford University Press, Oxford, UK, 1998 (for the writers “Smart Regulation is that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors can and should be used to produce better regulation than single instrument or single party approaches”. Concretely, “Smart Regulation argues that policy-makers should take advantage of a number of largely unrecognised opportunities, strategies and techniques for achieving efficient and effective environmental policy, including: by designing complementary instrument mixes rather than relying on single instrument approaches; by preferring less interventionist measures to the extent that this is practicable; by escalating response up an instrument pyramid (utilising not only government but also business and third parties) so as to build in regulatory responsiveness and dependability of outcomes; by empowering third parties (both commercial and non-commercial) to act as surrogate regulators and by maximising opportunities for win-win outcomes (expanding the boundaries within which such opportunities are available and encouraging business to go ‘beyond compliance’ with existing legal requirements)” (N. Gunningham, “Environment Law, Regulation and Governance: Shifting Architectures”, *J Environmental Law*, 2009, Volume 21 Issue 2, pp. 179-212).

the program has far wider implications than enforcement? It is the Hampton and Macrory reports began to extend the principles of better regulation, that include transparency, to the enforcement process. The Better Regulation Commission identified key principles of good regulation that include transparency and that are: proportionality, accountability, consistency, transparency and targeting.

The Hampton report that focused on effective inspection and enforcement recommended “greater transparency and consistent procedural standards”.⁴⁰⁹ But most of all, it is the Macrory report that tried to foster a change of culture in the enforcement process. As the report itself says: “A long term goal should be to change the culture of many of these regulators who will need to operate with greater transparency and accountability than is often the case now”.⁴¹⁰ It is one of the main recommendations of the report, to improve transparency in the enforcement process.

Transparency and participation should therefore become key elements in the enforcement process according to better regulation principles. But there is another source to transparency, participation and involvement of stakeholders: the regulatory function.

ii) Managerialism, the stakeholder theory of regulation and enforcement proceedings

The Competition Appeal Tribunal explained that the need to consult all stakeholder during the dispute resolution process stemmed from the multiple statutory objectives Ofcom ad to conciliate: “The principal way in which OFCOM ensures that relevant interests are taken into account is by consultation and the publication of a draft determination. It will generally be important to invite and consider the views of undertakings other than the parties to the dispute. For example, OFCOM may consider that the desirability of encouraging investment and innovation in relevant markets requires it to invite the views of the wholesale customers of the parties to the dispute, given that they may be affected by the pass through of any price increase under consideration. It is essential therefore that the information published about the nature of the dispute and how OFCOM proposes to resolve it is sufficiently detailed to enable third parties to appreciate the significance of what is involved and how it might affect them. If this requires setting up a confidentiality ring within which commercially sensitive information can be disclosed then that is something which OFCOM should consider”.⁴¹¹

Consultation and participation are not only justified by the need to foster good regulation in the abstract, it is a way to take into account all the regulatory objectives regulators have to foster. How would they know how to protect the interests of consumers if Ofcom do not consult them on a decision that may affect them? Because the regulator is at the centre of a web of interests, has to resolve polycentric issues, it is obliged to consult all stakeholders. This is consistent with the stakeholder theory of regulation that argues that “rather than seeing regulation as a bilateral relationship between regulator and firm, regulation encompasses a network of relations involving the dominant firm, its competitors, its consumers and others such as employees and suppliers”.⁴¹² To that effect government “should pay explicit attention

⁴⁰⁹ The Hampton Review, Final Report, at § 4.117.

⁴¹⁰ The Macrory Review, Final Report, at p. 4.

⁴¹¹ T-Mobile (UK) Ltd v British Telecommunications Plc [2008] CAT 12 (20 May 2008), at §188.

⁴¹² V. T. Prosser, (1999), Theorising Utility Regulation, *The Modern Law Review*, 62: 196–217. See D. Souter, A Stakeholder Approach to Regulation, in D. Corry, D. Souter and M. Waterson, *Regulating Our Utilities* (London: Institute for Public Policy Research, 1995).

to the interests of different stakeholder groups and adjust their regulatory instruments to ensure that outcomes are not inconsistent with a desirable balance between them”.⁴¹³

How is the transparency and consultation promoted? It is a characteristic element of the enforcement process before Ofcom that the regulator uses extensively electronic means of communications.

The legal doctrine has emphasized two merits in the development of e-government: its potential to improve administrative efficiency and democratic participation in decision-making. This use of a digital dialogue is the tool Ofcom uses to consult and call for participants in the regulatory process.⁴¹⁴ When a dispute is referred Ofcom publishes an entry into its electronic bulletin that calls for all stakeholders to comment on the issue. When Ofcom has reached a preliminary conclusion on the case, it publishes a draft decision and invites all stakeholders to comment on it electronically. A case leader is appointed that receives all the comments.

Transparency and participation is now extended to administrative spheres where it was previously excluded. The better regulation movement can account for it but also, and above all, the specificity of the “regulatory enterprise” to use a term Tony Prosser has shaped. Because regulators have multiples tasks and multiples interests to pursue they must consult all stakeholders.

But the British model can be seen as managerial in another way. It is also modelled on the principles of responsive regulation.

b. Managerialism as a result of responsive regulation

All the statutes in the sectors under study follow the model of the enforcement pyramid Ayres and Braithwaite advocated. Regulators try to follow the principles of responsive regulation. This theory tried to reconcile the repressive and the persuasive conceptions of regulation in order to see enforcement as a scale: first regulators should use soft and persuasive means, then issue a notice, then an administrative penalty followed by a criminal penalty and a revocation of the licence if the undertaking is still not complying.⁴¹⁵

That’s why regulators needs a broad range of enforcement tools at their disposal in order to force compliance and to be credible in their threats. During the debates on the Communications Act the government explicitly explained this need: “They have been concerned that the system does not provide enough incentives to avoid breaches, or sanctions against repeating them; and that it is too slow and inflexible in its operation. As a result, the

⁴¹³ D. Souter, *A Stakeholder Approach to Regulation*, at p. 45.

⁴¹⁴ See C. Harlow, R. Rawlings, *Law and Administration*, at pp. 75 suiv.; L. Miller, A. Williamson, “Digital Dialogues Third Phase Report: August 2007 - August 2008”, Hansard Society, Ministry of Justice ; Cary Coglianese, “Federal Agency Use of Electronic Media in the Rulemaking Process”, University of Pennsylvania Law School, Public Law Research Paper n° 11-32.

⁴¹⁵ I. Ayres, J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992, chap. 2, “The Benign Big Gun” ; J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, 2001, chap. 2. J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, Albany, NY, State University of New York Press, 1985.

effective, competitive development of the industry, and its delivery of greater choice and lower prices, has been hampered”.⁴¹⁶

The problem is not the merit of the theory but, as Andrew Ashworth showed, its theoretical underpinnings, but rather the fact that it puts efficiency as the main goal of the repressive system: “For Braithwaite, the prevention of harm is a primary goal of social policy, and the criminal law is regarded as one among a number of mechanisms for bringing this about. It should therefore be used as and when it is efficient, and replaced by other mechanisms when it is not efficient and/or cost-effective. This view underlies the idea of responsive regulation, as a means of dealing with the varying contexts in which regulatory agencies have to operate”.⁴¹⁷

The basis of this movement is the normality of crime. Crime has to be managed as everything else: “A prominent feature of regulatory strategies is their acceptance of the normality of crime” that “tends towards a larger culture of ‘managing crime’ rather than responding to it as aberrant or to be suppressed”.⁴¹⁸

Managing crime and not suppressing it is the prominent feature of the British model of regulatory enforcement that has to be contrasted with the French choice: a judicialized model.

⁴¹⁶ Standing Committee on the Bill for this Act in the House of Commons the Minister for E-Commerce and Competitiveness (Mr. Stephen Timms), Hansard, Standing Committee E, 7th Sitting, December 19, 2002, col.021.

⁴¹⁷ A. Ashworth, “Is the criminal law a lost cause?”, *Law Quarterly Review*, 2000, 225, at pp. 249-250. A. Crawford, “Governing through anti-social behaviour: regulatory challenges to criminal justice”, *British Journal of Criminology*, 2009, 810.

⁴¹⁸ A. Ashworth, L. Zedner, “Defending the Criminal Law”, *Criminal Law and Philosophy*, 2008, vol. 2, pp. 21 suiv., at p. 39.

6.2.2 FRANCE: A JUDICIAL MODEL

There has been an alliance of judges, but especially the constitutional and the civil ones, to judicialize the process before regulatory authorities. The trend France has followed isolates the country in this respect.

What has to be explained here to the foreign reader, that will be explained latter, is that the review of regulatory authorities has mainly been given to the civil judge in France. In the utilities sector, only dispute resolution decisions are reviewed by the Paris Court of Appeal but anticompetitive practices and markets abuses are reviewed by the civil judge although these decisions are administrative in nature. As will be seen it is one of the main explanations of the judicialization process.

This process of judicialization has concerned mainly the repressive powers of regulatory authorities. That's why it will be our main concern here. But as some recent case law but the Civil Supreme Court shows, it is possible that in the future, dispute resolution will know the same fate.

This process was mainly the work of judges: constitutional, civil and to a lesser extent administrative judges were at the forefront of the battle to impose protections and court-like procedures in the regulatory process. Parliament only followed the trend the legal academia and judges started. We will study this process focusing first on the development of substantive principles in order to analyse the rise of procedural principles.

1. The development of substantive principles: the “criminalisation” of regulatory proceedings

The jurisprudence of the Courts progressively extended substantive criminal principles to regulatory proceedings, both at the stage of the investigation (a) and at the stage of the adjudication (b).

a. The investigation: between a constitutional duty and constitutional constraints

The investigation is both a constitutional duty and framed by constitutional constraints.

When assessing the fitness of holders radio/television broadcasting permits for the renewal of their permits, the Council held that the broadcasting authority had a duty to use all the means available to it that the candidates were in fact fit and proper to deserve such a renewal. The power of investigation must therefore be used in order to ensure that potential candidates are abiding by the statutory principles that apply to their profession.⁴¹⁹ When constitutional principles are at stake, such as pluralism or the freedom of communication, public bodies have a duty and not only a faculty to investigate possible breaches. This constitutional constraints plays mostly in the fields of broadcasting, but the principle of public service continuity is another constitutional rights that regulators in the fields of energy, telecommunications, mail and rail have to take into account.

⁴¹⁹ Case n°93-333 DC at §11 and 13.

As far as powers to enter professional or personal premises are concerned the legal regime depends on the will of the individual visited. If the person agrees to the investigation into his/her home or company then the protection are limited: the Constitutional Council held that their power is limited by the purpose of the legislation and that in no occasion could they proceed to any act of coercion against the persons visited.⁴²⁰ As the protection is limited, the power was litigated on the ground that it was a breach of article 8 that protects the right to the right to respect for one's home. And the ECt HR held that the protection of article 8 could extend to professional premises.⁴²¹ But the Supreme civil Court held that as the power was exercised without any form of coercion and with the consent of the persons visited the procedure did not infringe their article 8 rights.

The protections are completely different when the persons do not consent to the investigations and coercion is necessary. As private property is under the protection of the civil judge, any administrative body (tax authorities or regulatory ones) that want to enter a private property has to be authorized by the civil judge. In this case the interference with the right of property must be strictly proportionate. In addition the power of entry into professional premises must be limited by effective and appropriate guarantees that take into account the specificity and purpose of each procedure.⁴²² That's why the State's Council held that the power of the Data protection agency to enter into professional premises has to be authorized by the civil judge, guardian of private property, and that the agency has to inform individuals concerned of their right to refuse the entry. If the agency does not inform the people of their rights to refuse then the purpose of the protection would be defeated and the interference disproportionate.

b. The adjudication: a process under multiple constraints

The Courts have progressively imposed the respect of the principle of criminal law, though allowing, in some circumstances, some mitigation in the severity of their application. The principles of legality, non-retroactivity, proportionality and specificity will be studied one after the other.

The Constitutional Council has that "all penalties intended to serve as a punishment", in other words whose aim is to punish, whether they are of an administrative, civil or criminal nature, must abide by the principle of the legality of offences and punishments. The provision applies to all punishments and therefore also to the penalties imposed by regulatory authorities. As far as the legality of offenses is concerned the Council has authorized that the principle of legality, in a regulatory environment, be interpreted in a broad way: it means that the offence does not have to be defined in a statute nor in a regulation, it can be defined in the enforcement notice, but then the regulatory authority can punish only the breach of the notice. If the offence is defined clearly in the notice then the principle is respected. This principle has a consequence: that first offenses cannot be punished because only the breach of the notice can be. This is in fact an important limit to the repressive power of regulatory authorities and it is specific to utility regulators because financial markets and competition authorities punish offenses that are previously defined by statute.⁴²³ Concerning the principle of legality of

⁴²⁰ Case n°87-240 DC.

⁴²¹ Case n° 37971/97, at § 40-42.

⁴²² Conseil d'État, Sect., 6 novembre 2009, SARL Inter Confort, n° 304300, Recueil Lebon p. 449.

⁴²³ Case n° 2009-580 DC.

penalties, the State's Council has held that the principle is respected if the penalty is provided by a legal document, statute or regulation, but it does not have to be a statute in all cases.⁴²⁴

Penalties that serve as a punishment cannot be retrospective unless they are less severe. The 1789 Declaration providing that "the law shall provide for such punishments only as are strictly and obviously necessary", the principle of necessity imposes the retroactivity of less severe penalties. Moreover the State's Council held in 2009 that when it is reviewing a penalty it should be judging as a full jurisdiction judge, it can therefore apply the less severe penalty on its own motion and vary the penalty chosen by the administration.⁴²⁵

Another important condition on the imposition of penalties is that they must be proportionate. It derives also from the principle of necessity. The Constitutional Council has consistently held that penalties must be proportionate to the gravity of the offence.⁴²⁶ The States' Council will therefore review all the relevant facts in order to ensure that the penalty imposed is actually proportionate. The judge will take into account the gravity of the offence and also all the different kinds of advantages the offence gave the offender.⁴²⁷ The taking into account of all the particular circumstances ensures the proportionality and individualisation of the sanction that are constitutional conditions. That's why the Constitutional Council held that "If penalties were automatic the penalty might, in some cases, be disproportionate to the offence".⁴²⁸ The principle of proportionality also helps mitigating the combination of administrative and criminal penalties; for the Constitutional Council held that when such a combination happened the principle of proportionality required the total amount of the penalty could not be superior to the amount of the maximum penalty provided by law. Therefore, if the criminal court is trying someone for a market abuse crime who has previously been sanctioned by the financial markets authority, the judge has to discount to the amount of its penalty the amount of the penalty already imposed by the regulatory body.

Finally the last substantive protection afforded to regulated entities is the principle of personal criminal responsibility. The application does not raise any issue for individuals. However, it may prove unsuited to corporate entities which may disappear because of a merger or which make it difficult to punish the managers who may shield themselves behind this body corporate.

The application of this principle shows a conflict between the conception of the State's Council and of the Civil Supreme Court. The State's Council tries to balance this principle with the general interest that attaches to the strength and effectiveness of the repression whereas the Civil Supreme Court keeps to the traditional conception of the principle derived from the criminal law. Thus the State's Council held that in case where a company had disappeared because of a merger the new company could be inflicted a monetary penalty but not a reprimand because of the personal nature of this last sanction.⁴²⁹ However the Civil

⁴²⁴ Conseil d'État, 7 juillet 2004, ministre de l'Intérieur, de la Sécurité intérieure et des Libertés locales c. Benkerrou, n° 255136.

⁴²⁵ Conseil d'État, 16 février 2009, Société Atom, n° 274000.

⁴²⁶ Cases n° 86-215 DC; n° 89-260 DC.

⁴²⁷ Conseil d'État, 11 mars 1994, Société La Cinq; Conseil d'État, 29 juillet 2002, Association Radio deux couleurs, n° 221302.

⁴²⁸ Case n° 2000-433 DC.

⁴²⁹ Conseil d'État, Sect., 22 novembre 2000, Société Crédit Agricole Indosuez Cheuvreux, n° 207697.

supreme court is strongly opposed to inflicting any penalty to the new entity for the conduct of former merged companies. The civil court applies to administrative penalties the very strict conception of the criminal law. The only area where the civil courts accept to breach the principle is where they apply competition law because they are in effect applying EC law. The ECJ having an economic and not a legal conception of undertakings accepts to inflict a penalty on a new undertaking. The ECJ held indeed that “a change in the legal form and name of an undertaking does not create a new undertaking free of liability for the anti-competitive behaviour of its predecessor, when, from an economic point of view, the two are identical”.⁴³⁰

This is not the only difficulty corporate entities pose to administrative enforcement. The second question is: who can be held liable inside the corporate entity? The State’s Council held that financial services providers are responsible for the acts of their managers but also for the acts of their employees.⁴³¹

Arriving at the end of this study on substantial principles we can see to what extent the Courts have endeavoured to control administrative repression and to apply the principles of criminal law to it.

It is now requisite to study the rise of procedural principles. The case-law of the Civil Courts on this subject have been described as a tempest that changed completely regulatory proceedings making them looking more like courts or tribunals than administrative authorities.

2. The rise of procedural principles: the “tribunalization” of regulatory enforcement proceedings

The procedural principles apply at the stage of the investigation (a) and at the stage of the adjudication (b).

a. Investigations: adversariality and the problem of the application of principles of civil procedure

The State’s Council and the Supreme civil Courts have held that the investigation does not have to be adversarial. The rights of the defence begin to apply at the stage of the notification of the findings. The rights of the defence are a requirement of the instruction and not of the investigations.

However the Supreme civil court has applied a principle of loyalty, principle contained in the code of civil procedure. The principle would prevent the competition authority from relying on a recording made secretly and without the agreement and the knowledge of the firms concerned. In order to apply such a principle the Civil supreme court had to hold that the code of civil procedure would apply to the procedure of the regulatory authorities in the fields of financial markets and competition law, which it did.⁴³²

Exactly as the Supreme civil court did with the principle of personal responsibility, it applies its principles derived from criminal law and civil law to extend them to regulatory

⁴³⁰ Case 29/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities* [1984] ECR 1679.

⁴³¹ Conseil d’État, Sect., 6 juin 2008, *Société Tradition Securities and Futures*, n° 299203.

⁴³² V. Cass. com., 1er mars 2011, n° 09-71.252; Cass. com., 3 juin 2008, n° 07-17.147.

proceedings. It has not yet held that the principle of loyalty and the procedure of the code of civil procedure would apply to utility regulators, but nothing prevents it from doing it, all the more so than it would even be more suitable as they are concerned with contractual disputes.

But the consequences were far greater as far as the adjudication is concerned.

b. Adjudication: the emergence of a principle of independence of regulatory enforcement

The procedural requirements applying to regulatory enforcement are threefold: traditionally they require the respect of the rights of the defence (i) and of impartiality (ii).

i) The extension of the rights of the defence

The rights of the defence is protected constitutionally and by the ECHR. That's why this principle has to be observed at each stage of the enforcement process. The notification of the findings triggers the protections afforded by the principle. The individual has a right to know all of the findings and has a right to answer them all in writing⁴³³ or orally⁴³⁴. The State's Council checks that the future sanction only relies on the findings notified. If the regulatory body imposes a penalty taking into account a finding that was not notified, then the judge will reform the penalty and decrease its amount.⁴³⁵ Individuals should also have a complete access to the files and the findings of the investigations. In addition, they should be given enough time to prepare their defence, an equality of rights to have witnesses testified, and to a right to a free interpreter if needed.⁴³⁶

For the State's Council these additional rights are essential to preserve, from the beginning, of the proceedings, the fairness and adversarial nature of the process.

But more than the rights of the defence, it is the requirement of impartiality that had dramatic consequences in the functioning of the regulatory proceedings.

ii) From the requirement of impartiality to the independence of the adjudicatory function

We have already seen that impartiality has always been a general principle of the law. But article 6 ECHR, because of judicial activism reshaped the principle and the regulatory process completely.

It will be seen that the State's Council and the Civil supreme court have completely different understandings of the principle. It is nonetheless the interpretation of the civil courts that prevailed. The bone of contention concerns the reporting judge's participation in the deliberations of the adjudicatory body. The problem lies indeed in the combination of the prosecution, investigation and adjudication functions. The role of the reporting officer crystallised this problem for s/he is involved in every stage.

⁴³³ See in broadcasting: Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication, article 42-7.

⁴³⁴ See in energy, electronic communications and rail: Loi n° 2000-108 du 10 février 2000 modifiée, relative à la modernisation et au développement du service public de l'électricité, article 40-4°; Code des postes et des communications électroniques, article L. 36-11-2-b; Code des transports, article L2135-8.

⁴³⁵ Conseil d'État, 15 mars 2006, Zerbib, n° 276370, Recueil Lebon, tables p. 741

⁴³⁶ Conseil d'État, 27 octobre 2006, M. Éric Parent, n° 276069.

The State's Council keeps, to a certain extent, to an orthodox interpretation of article 6, holding that provided that a full jurisdiction appeal is provided the imperfections of the administrative process can be cured. The State's Council tries to keep to a traditional conception of the impartiality principles: it censures any announcement by the regulatory authority that could make the accused believe that s/he has already been judged⁴³⁷, it holds that a reporting officer that had previous links with one of the society accused cannot investigate the case⁴³⁸, or that a member of the sanctioning committee has to recuse himself if s/he had some links with one of the companies under investigation.⁴³⁹

Concerning the reporting officer, the State's Council considers that provided an appeal of full jurisdiction is provided the combination of functions in the role of the reporting judge does not raise any issue. However if the review is limited the State's Council held that the combination offends article 6 ECHR. The Council held very clearly that no general principle of the law nor any provisions of article 6 ECHR required the separation of the functions of prosecution, investigation and adjudication.⁴⁴⁰

Despite this correct and orthodox interpretation of article 6, the ECt HR seems to have taken another view concerning the Banking Commission and the combination of functions inside this Commission. The Dubus case seems clearly to contradict the State's Council view.

In this case, the "Court underlined the lack of precision of the texts governing proceedings before the Commission and noted the lack of any clear distinction between the functions of prosecution, investigation and adjudication in the exercise of its judicial power. While the combination of investigative and judicial functions was not, in itself, incompatible with the need for impartiality, this was subject to their being no "prejudgment" on the part of the Commission". The Court further argued that "the applicant company might reasonably have had the impression that it had been prosecuted and tried by the same people, and had doubts about the decision of the Commission, which, in its various capacities, had brought disciplinary proceedings against it, notified it of the offences and pronounced the penalty. The Court noted that the role of the Secretariat and Secretary General of the Commission had added to the confusion. The Secretariat had carried out administrative investigations on the instructions of the Commission, setting disciplinary proceedings in motion where necessary. It had then replied to the submissions of the respondent party, thereby intervening in the judicial process. Lastly, the investigation had been carried out on behalf of the Commission, which had subsequently pronounced the sanction".

The conclusion "accordingly found a violation of Article 6 § 1 in so far as the applicant company's doubts about the Commission's independence and impartiality were objectively justified because of the lack of any clear distinction between its different functions".⁴⁴¹

⁴³⁷ Conseil d'État, Sect., 20 octobre 2000, Société Habib Bank Ltd, n° 180122.

⁴³⁸ Conseil d'État, 26 juillet 2007, M. Patrick A, n° 293908.

⁴³⁹ Conseil d'État, 27 octobre 2006, Parent c. AMF, n° 276069.

⁴⁴⁰ Conseil d'État, Sect., 17 novembre 2006, Société CNP Assurances, n° 276926; Conseil d'État, 6 janvier 2006, société Lebanese Communication Group, n° 279596, Recueil Lebon p. 1; Conseil d'État, 25 juillet 2007, Société Dubus SA, n° 266735.

⁴⁴¹ Case of Dubus S.A. v. France (application no. 5242/04).

However, what is not said in this judgement what explains the solution lies in two elements: first that the French Banking Commission was not an administrative body but an administrative Court of law according to the statute. This nature has two consequences, each of which explain the censure: first the ECt HR is always more severe when courts and not administrations are concerned⁴⁴²; secondly, the review available against the Banking Commission, because it is an administrative court was a “recours en cassation” before the State’s Council. This review does not allow the State’s Council to review the facts of the case or the proportionality; it is limited to questions of law. Thus it can in no way amount to a full jurisdiction appeal, able to cure the defects of the first instance. These two elements explain the censure. That’s why the Banking Commission was abolished and reformed as an administrative body, but with a clear separation of functions.

Contrary to the position of the State’s Council, the Civil Supreme Court chose to apply article 6 much more stringently. In the Oury case the Court attacked the internal processes of the financial regulator on the ground that it allowed those involved in the investigation to participate in the decision leading to the imposition of the penalty.⁴⁴³ Most clearly, in the Campenon Bernard case concerning the competition authority, the Civil supreme Court held that the presence of the reporting officer during the deliberations leading to the decision of sanction, even without a voting right, but where the said officer took part in such inquiries as were required for the investigation of the case brought before the Council constitutes an infringement of the right to a fair trial. The same conclusion applies with respect to the presence of the Rapporteur-Général (General reporting officer) under whose supervision the reporting officer carried out his investigation.⁴⁴⁴ The Paris Court of Appeal even held that the financial regulator could not combine the functions of indictment, prosecution, investigation and adjudication.⁴⁴⁵ Following this judgement the financial regulator stayed all the procedures and it was completely reformed in order to separate all these functions.⁴⁴⁶

Whereas formerly the Civil Supreme Court based its judgements on article 6, now it only mentions the principles of the separation of the functions of prosecution and investigations and of the functions of investigations and judgement, which is a principles coming from French criminal law, where the separation of functions between prosecution, investigations and judgement is a fundamental principle. Far from applying article 6 ECHR, the Civil Supreme Court is in fact treating administrative agencies as though they were criminal courts.

Even though the French Civil Supreme Court does not review all regulatory authorities, its cases entailed a complete structural change and a separation between the functions by isolating the adjudicating function. Adjudication is either performed by a separate body or the reporting officer is excluded from the deliberations leading to the decision. The financial

⁴⁴² Case of De Cubber v. Belgium, n° 9186/80, at § 33; Case of Edwards v. The United Kingdom, n° 13071/87.

⁴⁴³ Cour de cassation, ass. plén., 5 février 1999, COB c/ Oury et a., n° 436.

⁴⁴⁴ Cour de cassation, com., 5 octobre 1999, SNC Campenon Bernard SGE c. Min. économie, n° 1681

⁴⁴⁵ Cour d’appel de Paris, 7 mars 2000, n° 1999/15862.

⁴⁴⁶ See D. Custos, Independent administrative authorities in France : structural and procedural change at the intersection of Americanization, Europeanization and Gallicization, in *Comparative Administrative Law*, S. Rose-Ackerman, P. L. Lindseth (ed.), Research Handbooks in Comparative Law Series, Edward Elgar Publishing, 2011, at chap. 17; T. A. G. Beazley, Holding the Balance-Effective Enforcement, Procedural Fairness and Human Rights, in *Regulating financial services and markets in the twenty first century*, E. Ferran, C. Albert, E. Goodhart (ed.), Hart Publishing, 2001, chap. 9.

regulator created a special and independent commission (the sanctioning commission) and the energy regulator also. When there was no institutional separation the different functions were clearly delineated in order to prevent any overlap and any combination of functions especially as far as the reporting judge is concerned.

As a conclusion it seems obvious that far from applying article 6 the civil courts are applying their own principles to the regulatory bodies they review: the principle of personal liability, the extension of the application of the code of civil procedure to the proceedings before regulatory authorities in order to impose a principle of loyalty at the investigation stage, the principle of the separation of functions. The combination of all this evidence shows that article 6 is used as a vehicle to judicialize regulatory authorities and to force them into acting as courts.

What is also interesting is the way the Oury case was used in the United Kingdom to justify more protection in the field of financial regulation. An article in *The Guardian* says: "A landmark human-rights judgement in France's supreme court threatens to blow a hole in the tough new financial enforcement regime planned by Britain's Financial Services Authority... George Staple QC, former director of the Serious Fraud Office and now with City solicitors Clifford Chance, warned yesterday that the so-called Oury judgement was likely to be followed in Britain when the convention is incorporated into law next year, with huge consequences for the FSA's proposed disciplinary regime". The *Guardian* explains the judgement but the British Government was confident that the regime for the FSA was article 6 compliant but expressed also some doubts: "Mr Davies said last week that the facts of the independent appeal tribunal, the non-criminal nature of the regime and the strict Chinese walls between investigators and decision-makers would keep the FSA system on the right side of the convention. But Mr Staple said the Oury judgement threw grave doubt on this, warning: 'It would be surprising if the English courts were to adopt a different approach.' He said Parliament ought to take Oury on board now, rather than let the courts apply it later".⁴⁴⁷

The Oury judgement had therefore an important echo in England, even if it is, according to our judgement, badly grounded. This shows how comparative law can be used to lobby the government. Why the same protections and the same debate did not occur in the field of utilities regulation or in the field of competition law?

This leads to study the explanations of such a movement: why a managerial model in the United Kingdom and why a judicial model in France.

⁴⁴⁷ Judges put FSA regime at risk, By Dan Atkinson, *The Guardian*, Tuesday 16 March 1999.

6.3 - EXPLANATIONS OF THE DIVERGENCE

Three elements will be used in order to explain the deep divergence that occurred between the two countries. The driving forces come from both countries, certainly as far as the managerial model is concerned, it can only be accounted for in British terms, but also the rejection of human rights principles can be explained by some deep characters of the British legal environment.

It seems that three differences may account for this difference: one comes from the divergences in the legal doctrine and the role of jurisprudence, judges (6.3.1); the second element lies in the change in the French legal order, its constitutionalization mainly and the rise of international law that explain the fall of statutory law that do not enjoy the prominent place it used to have (6.3.2); finally the relationships between law and administration can explain the difference we highlighted (6.3.3).

6.3.1 DOCTRINE AND JURISPRUDENCE

The doctrinal influence in the adoption of each model is central in the understanding of the differences (1). The role of the jurisprudence, and especially the activism of the civil courts in France and the deference of the British judges is another important factor (2).

1. Doctrinal differences: the prominent place of human rights in France, the prominent place of Law & Economics in the United Kingdom

The French doctrinal discourse was fiercely opposed to administrative penalties and it still is. Private and public French lawyers loathe the granting of a judicial function to regulatory authorities. They unleashed a “tempest” of criticism against this “butchering process” that was about to steal away from the Courts a role that naturally belonged to them only.

As the legal doctrine was powerless against this trend, the tendency was to conceptualise the repressive and dispute resolution powers as judicial or quasi-judicial functions, assimilating further their role with that of Courts. It began a process of thinking whereby these functions being thought of as judicial should naturally be judicialized. And the case law of the Civil Supreme Court that aligned the legal regime of the regulatory process to that of Courts gave them another argument. Even today some private lawyers are still not satisfied with the structural separation, calling for the definitive separation of the sanctioning function from the regulatory body.⁴⁴⁸

The influence of the legal doctrine can be seen in some parliamentary reports and especially the report of MP Gélard who calls for a judicialization. Should it be mentioned that MP Patrice Gélard is a former public law professor? The report was written largely by a private law professor, Anne-Marie Frison-Roche and another public law professor Jean-Marie Pontier. The influence of the legal academia on Parliament is obvious and explains the creation of a separate body to adjudicate on penalties and dispute resolution decision within the energy regulator.

By comparison the discourse of the English legal doctrine is completely different. It also shows the specificity of the English legal doctrine in the common law world for the opposition against administrative penalties in the US was also fierce with some judges comparing the SEC with the Star Chamber.⁴⁴⁹

The comparison leads to two conclusions. Even though they may be blunt, some lines appear. The English legal doctrine, compared to the French, is characterized by a suspicion against human right and the spirit of principles and systems and by a strong belief in Law & Economics.

Suspicion against human rights and principles is old in England and it seems obvious that Burke was more influential than Thomas Paine. Paul Craig analysed the rejection of human

⁴⁴⁸ J.-J. Daigre, “Éditorial – Faut-il scinder l’AMF ?”, Bulletin Joly Bourse, 1 juillet 2011, n° 7, p. 413, n° 203.

⁴⁴⁹ Jones v. SEC, 298 U.S. 1 (1936). See M. Tushnet, “Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory”, Duke Law Journal, vol. 60, p. 565, at p. 1608.

rights and constitutionalism in the United Kingdom.⁴⁵⁰ Griffith once even said: “it is misleading to speak of certain rights of the individual, as being fundamental in character and inherent in the person of the individual”.⁴⁵¹ Griffith’s rejection of human rights is also a rejection of principles that reminds also Dicey’s rejection of the rigidity of Constitution and its justified irony against the French Constitution that changed so many times. The critics of Human Rights and of the HRA are another example of this rejection.

The second feature of the English legal doctrine is the pre-eminence of Law & Economics. Isn’t it symptomatic that Macrory, a professor of law, does not mention once in his report the problem of compliance with human rights? The focus of the report is only effectiveness whereas the focus of the French reports is protections. The managerial form of regulatory enforcement can only be explained by the importance of the Law & Economics movement in the common law legal world.

The doctrinal landscape is therefore important to understand the differences between both ways to understand and think about regulatory enforcement.

The role of jurisprudence, of judge-made law is another important factor.

2. Jurisprudence in England and France: activism v. deference

Despite the key part played by courts to curtail the power of the Kings in England and France, the role of judge now is completely different in both countries.

Even though the Constitutional Council played an important part; the civil judge is the one who was at the forefront of the battle against regulatory enforcement. The reason is not to be found in the ECHR, it is due to the fact that they want to apply the principles of civil and criminal law (such as the principle of the separation of functions) to regulatory authorities.

This conclusion may also explain the difference with the United Kingdom, for in the United Kingdom the principle of the separation of function does not have the same meaning. Especially the separation of prosecution and investigation in the country is recent and fragile⁴⁵² whereas it is a fundamental principle of French criminal law.

But another movement explaining the reluctance of British judges to judicialize the regulatory function is their tradition deference towards the administration. This deference that we will study precisely further, can be explained by a fundamental change in the French legal order, change that Britain has not yet known to the same extent.

⁴⁵⁰ P. P. Craig, “Political Constitutionalism and Judicial Review”, in *Effective Judicial Review: A Cornerstone of Good Governance*, C. Forsyth, M. Elliott, S. Jhaveri, A. Scully-Hill, M. Ramsden, eds., Oxford University Press, Oxford Legal Studies Research Paper No. 58/2009.

⁴⁵¹ J. A. G. Griffith, “The Political Constitution”, *The Modern Law Review*, Vol. 42, n° 1 (Jan., 1979), pp. 1-21, at pp. 17 and 20.

⁴⁵² R. M. White, “Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the ‘Philips Principle’”, 2006, 69(2), *The Modern Law Review*, pp. 143-182; N. Garoupa, A. Ogus, A. Sanders, “The Investigation and Prosecution of Regulatory Offences: Is There An Economic Case For Integration?”, *Cambridge Law Journal*, 70(1), March 2011, pp. 229–259.

6.3.2 LEGAL PERSPECTIVE: THE LEGAL FORCE OF THE ECHR IN BOTH COUNTRIES AND THE CONSTITUTIONALIZATION OF THE FRENCH LEGAL SYSTEM.

The main change in the French legal order is twofold: first its constitutionalization and secondly the rise of international sources above statutes.

Before 1958, there was no constitutional review of legislation in France. The revolution came as a wish to curtail the power of Parliament who proved inefficient during the IV Republic and especially during the Algerian war. But the rise of constitutional review really began in the 80s, when the Constitutional Court began to force Parliament into introducing conditions and guarantees to protect fundamental rights and freedoms. As the review takes place before the entry into force of the statute, the Court through the doctrine of negative incompetence and interpretation reserves forced Parliament to protect rights. Today the process could be even further with the introduction of ex post review. Now regular courts can ask a preliminary question to the Constitutional Court that will review the constitutionality of the statutory provision.

The second change in the French legal order came with the rise of international law as a superior source of law. As we saw article 6 ECHR was the direct basis of the Courts' decisions and it is more and more used to litigate administrative decisions. Unlike England, France is a monist country, which means that international law has direct effect in the domestic legal system and does not need to be implemented by legislation in order to have the force of law. However, courts were slow to hold that international law was superior to statutes. In 1975 the Civil supreme court made such a judgement. But the State's Council waited until 1989 to make the same judgement. It accepted the international law was superior to past statutes but it held that international law was not superior to statutes enacted after the international instrument. In 1989, international law becomes in effect superior in force to all statutes.⁴⁵³

The same is not true in England and it creates a different legal atmosphere. ECHR law enjoys the legal status of a statute and all statutes should be interpreted compatibly with it but it cannot be said that it is superior to other statutes. Only EC law enjoys a special status in the British legal order, since the Factortame case.⁴⁵⁴

In England, Parliament is still sovereign, which is not the case any more in France.

Another argument can be used to explain the differences: the special relationship each country has between law and administration.

⁴⁵³ Conseil d'État, Ass., 20 octobre 1989, Nicolo, Rec. 190.

⁴⁵⁴ Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (n° 2) [1990] 3 W.L.R. 818 [1991] 1 A.C. 603.

6.3.3 LAW AND ADMINISTRATION IN ENGLAND AND FRANCE

Another difference that explains the divergence between the two countries is the relation between law and administration. After having explained the theoretical differences we will show how this difference is reflected in the sociological membership of regulatory authorities.

It should be born in mind at first that the comparison is not an easy one for a simple reason: the common law and Dicey first as well as Burke before established its principles and defined itself in opposition with French law. There is no clear national doctrinal claim in France that would define its key characters in opposition with the common law. Of course there are many studies emphasizing that there is an administrative judge in France and none in England but there is no clear claim, as Dicey did, of a conception of what law is and of its relationship with the Administration. There are some theories however and we will build on that but, whereas Dicey affirmed the national character of the common law and its difference, theories of French administrative law are very much national, even though Duguit and Hauriou widely read the English and German literature. Maybe Germany, and not only because of the spirit of revenge that was so strong in France in these years, that based its administrative law on subjective rights acted as a foil.

However, this difference does not make the comparison impossible. We will study first the relationships between the law and administration in both countries (1) and then the relationship between law and the training of administrators, taking as a revealing example the comparative membership of regulatory authorities.

1. The law and the conception of the administration: separation v submissiveness

The diverging models of enforcement are another example of the different conception of the relationship between law and administration in the two countries. When using the word separation for the common law conception we, by no means, mean that the Administration is not under an obligation to abide by the law, which would be false. We mean to say that the legal doctrine and judges tend to think the relationship between law and administration in terms of separation and not in the same terms as in France where, maybe more than submissiveness that only views the relationship from the point of view of the judge, the two are completely intertwined, as we will see when studying the membership of regulatory authorities.

In the United Kingdom, there are clear statements that tend to separate law and administration.

First, for the legal academia and in the English constitution, the administration did not even exist as a source of law, for Parliament and judges had stripped all its powers away from it. Foster has very well showed to what extent, in the 19th century, it was Parliament through private bills that regulated the utilities. Also, justices of the peace were given powers that were in fact administrative powers, showing that historically the institutional space for the administration was very small. Of course this changed rapidly in the 19th century with the rise of the State.

Having no place, the administration should also be deprived of a specific law. Dicey's ideas on the subject are very well know. Its conception of the rule of law denied that administrative law even existed, and argued vividly against an administrative law.

Dicey's conception and the common law conception was that the administration should be reviewed using the same principles as for ordinary citizens. The common law would not make any difference between the administration and other subjects. It was on the ground of equality that the administration could be not treated separately. No institutional space, no specific law, it is in this sense that it is as if the administration could not be treated as a specific source of law. Even today, the common law doctrine knows what is a contract, a statute of course but there is no theory of unilateral administrative acts as a source of law for citizens. Private legal acts are theorized but not administrative legal acts. As Lord Diplock puts it: "it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interprets them".⁴⁵⁵

The beginning of the theorization of the relationship between law and administrative historically is that the administration had no existence because it had no legal space and no specific law.

Another factor played in disfavour of a theorization of the administration. The State, as Martin Loughlin showed, was thought of as an emanation from Parliament. Parliamentary sovereignty prevented lawyers from thinking the specificity of the State and the administration. Parliamentary sovereignty and ministerial responsibility played against the linking of law and administration and accredited the idea that the only legitimate check on administrative discretion was not the Courts and therefore not the law, but Parliament. Parliament is the only legitimate check of administration action. That's why, in *Alconbury* for example, Lord Hoffmann bases its decisions on the notion of policy decisions and of democracy and the rule of law according to which policy decision should be controlled by Parliament. Adam Tomkins is of the same view when he says that Courts are unable to safeguards the liberty of the citizen.

But what should also be borne in mind is the specific conception of the notion of law that is framed by many dichotomies. The idea of a separation between law and everything that amount to the King, the State, Parliament, and politics is an ancient one. For example Cook in the famous *Prohibition del Roy* case made a clear distinction between the artificial reason, law and the natural reason embodied by the King: "His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgement of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it". The dichotomy between law and equity played also a part in designing but the law is and what are its boundaries. For Sir Robert Heath, "No ordinary Judges in the realm have this power; but this Court is *Coram Rege ipso*, and notwithstanding that the act leaves the proceedings to the discretion of the Commissioners, nevertheless this discretion is examinable and controllable in this Court. Suppose that the Commissioners do anything without or against their Commission, without doubt this is reformable and examinable here: But as for Courts of *Aequity*, as of the *Marches of Wales* and the like, this Court cannot take notice whether their decrees are just or not: We are alone to examine their Jurisdiction of the case, not their Justice. They themselves are to answer for that, as we for the law: Let us put the case that A bargains and sells to D, and C gives collateral security to B: and the Commissioners make a decree against C, this is against the law, and therefore reformable by us, but equitable cases are nothing to us".⁴⁵⁶ The judge

⁴⁵⁵ *Duport Steels v Sirs* [1980] 1 All ER 529, at 541.

⁴⁵⁶ *Commins v. Massam*, March 196 at 197.

makes here a dichotomy between law and justice that echoes the current reluctance of judges to judge to merits of the case in judicial review proceedings. Today, the law is contrasted to politics, policy decisions are the realm of Parliament and only Parliament is legitimate to review them.

Natural reason versus artificial reason, law versus justice, law versus politics: through history, England has framed a special conception of what the law is according to dichotomies that all appear to separate the world of judges from the world of the administration.

In France, an opposite doctrine seems to be shaping the relationships between law and administration. If there is one idea that does not raise any debate in France is that the administration should be reviewed, controlled by administrative courts. The more intensive the review is, the fairer the results seems. The aura of the administrative judge gained can be explained because it defied and reviewed thoroughly administrative action. Where the English judge will show deference the French judge will not. Through the cases, the expression that comes over and over again is that legal qualifications are always, even if the judge uses a limited review, “under the review of the judge”. The problematic of the lawyers since Duguit was not to think the law in separately from the administration but: how to limit the State through the law? How the law can be used to limit the State? Thus the notion of public service Duguit fashioned and that is so badly understood: for Duguit the notion of public service was a way to limit the State. State’s actions should be limited to make and manage public services.⁴⁵⁷ That’s why Fabrice Melleray says, summarizing Duguit’s thought: “Duguit: the State dethroned”.

Law and administration are intertwined, the latter having to submit to the empire of the former. This fusion can be very well illustrated when one studies the membership of regulatory authorities.

2. The law and the training of administrators: Sociological perspective on the membership of regulatory authorities: Judges v Managers

The training of administrators cannot be more different in both countries. Law is an essential part in the training of administrators in France and one cannot get into the administration if s/he does not take an administrative law exam. The English civil servant, on the other hand has a generalist training.⁴⁵⁸

⁴⁵⁷ F. Melleray, “Léon Duguit – L’État dethroné”, in *Le renouveau de la doctrine française : les grands auteurs de la pensée juridique au tournant du XXe siècle*, N. Hakim, F. Melleray (ed.), Paris, Dalloz, Coll. Méthodes du droit, 2009, at p. 220.

⁴⁵⁸ G. Drewry, “Lawyers in the UK Civil Service”, 59 *Public Administration*, pp. 15-46; G. Drewry, “Lawyers and Statutory Reform in Victorian Government”, in *Government and expertise: specialists, administrators and professionals, 1860-1919*, R. MacLeod (ed.), Cambridge, Cambridge University Press, 1988, at p. 39 ; T. Daintith, A. Page, *The executive in the constitution : structure, autonomy, and internal control*, Oxford, Oxford University Press, 1999, at p. 210; V. Wright, “The Development of Public Administration in Britain and France”, *Annuaire d’histoire administrative européenne*, spéc. p. 309; P. Barberis, “Whitehall Mandarins and the British Elite Network, 1870-1945”, *Annuaire d’histoire administrative européenne*, at pp. 7.

This is taken to this extreme for regulatory authorities: in France they are staffed with judges whereas they are staffed with managers in the United Kingdom. Within the Energy regulator, the special and independent committee in charge of enforcement is only staffed with judges (two senior judges from the State's Council and two judges from the Civil Supreme Court).⁴⁵⁹ The chairmanship of regulatory authorities is most of the time awarded to a senior administrative judge from the State's Council.⁴⁶⁰

In comparison, English regulatory authorities do not comprise any judge and few lawyers. Ofcom's board is made of managers mostly, economists or members of the profession. Ofgem's board, similarly, is made of accountants, managers and also civil servants.⁴⁶¹ Ofwat, ORR are similarly staffed.

The membership of the regulatory authorities translates the conception of law and administration and explains why, in the United Kingdom, a managerial model prevailed, whereas in France a judicial model was adopted.

⁴⁵⁹ Loi 10 février 2000 relative à la modernisation et au développement du service public de l'électricité, article 28-III.

⁴⁶⁰ See for the broadcasting authority, Michel Boyon is a former senior judge at the State's Council; pour the A.R.C.E.P. (electronic communications and mail), Jean-Ludovic Silicani (former chairmans were however not from the State's Council), the board of this agency comprises three other judges (two from the State's Council and another senior judge from the Cour des comptes, the equivalent of the N.A.O.) ; concerning the C.R.E. (Energy regulator) its present president is not a judge but the board comprises one judge from the State's Council.

⁴⁶¹ Department of Energy and Climate Change, Ofgem Review, Final Report, July 2011, at p. 30 and p. 34.

CHAPTER 7: REGULATORY ACCOUNTABILITY

Although there has been a debate in French legal doctrine on whether independent agencies were, because of their independence, immune from judicial review, this debate is now over. On both sides of the Channel, there is no question now on whether regulatory authorities should be amenable to judicial review. Judicial review in both France and the United Kingdom is available against every decision of regulatory authorities. A fortiori, the penalties they impose, the disputes they settle can be challenged. Any contrary solution would be against the rule of law.

However, the notion of accountability can be analysed in different ways and this notion is much richer than any French equivalent. In French, it could be translated by “rendre des comptes”, also by the word “responsabilité” but it does not have in France this constitutional and multifaceted meaning. The richness of this word explains the various angles of the study.

The notion of accountability in common law legal doctrine encompasses many aspects that are relevant to the research. An administrative institution can be accountable in many different ways. The first and perhaps the most important given our research object is the accountability before Courts. Of course, it may not be the first that comes to mind but when individual administrative decisions are concerned there is only one effective remedy: Courts or tribunals that may be able to review, to quash or to vary the penalty or the dispute settlement decision. Where an undertaking is aggrieved by a regulatory decision, it is of the utmost importance that it can go to Court to have the decision reviewed but also, if damage has been suffered, to be awarded compensation. We will therefore study here how the review of regulatory enforcement decisions in English and French administrative law is carried out and how they are liable in tort.

Even so, this is only one aspect of regulatory accountability. However independent they are, regulatory authorities have to answer for their action before Parliament, whenever their action may be subject to criticism. Important though it may be, the question of parliamentary accountability is different when one speaks of regulatory powers and when one studies enforcement powers. Parliamentary intervention in individual cases cannot be warranted. But ex post Parliamentary evaluation is of great importance, given the nature of the powers under study.

All these aspects of accountability will be studied, and we will see, again, that in this respect also, both countries stand apart. And, with all due respect for the first French admirer of the English Constitution we will not explain these differences with reference to “the temper of the mind and the passions of the heart.” As far as administrative law is concerned, it cannot be said that “the laws ought to be in relation both to the variety of those passions and to the variety of those tempers,” as Montesquieu once said.⁴⁶²

It will be our first task to understand how these differences can be accounted for, considering both national administrative law traditions and the changes they have undergone in both

⁴⁶² See Montesquieu, *The Spirit of Laws* (Thomas Nugent trans., J. V. Prichard rev.) 238 (1914) “Of Laws in Relation to the Nature of the Climate” (at Book XIV).

countries, and to what extent can each country learn from the other. We will see that despite the fact that regulatory accountability is deeply rooted in constitutional and administrative law traditions, that explain many differences, both countries have responded differently from external pressures coming from the ECHR and EC law.

The review of the legality of enforcement decisions will be studied first (7.1). Then we will show how differently the tortious liability of these bodies in respect to their enforcement action is engaged (7.2). Eventually, we will analyse how both Parliaments holds these bodies to account (7.3).

7.1 - ACCOUNTABILITY BEFORE COURTS: THE LEGALITY OF REGULATORY ENFORCEMENT ACTION IN ENGLISH AND FRENCH LAW

In order to understand the choices made in each country for the review of regulatory enforcement action, one has first to have in mind and understand two things: how different (or sometimes similar) judicial review of administrative action is in each country, what are the external pressures coming from Europe and finally how each legal system responded to these pressures in our field of study.

These three stages are a requisite in order to understand to what extent the choices made in each country for the review of regulatory enforcement action are different. Even though the choices are not completely coherent (in each own country) and even though we can say that each Parliament succeeded in creating a complete chaos, some lines, some perspectives appear. We will show that France and the United Kingdom chose two different models of review: one based on a specialised tribunal, the Competition Appeal Tribunal, one based on the ordinary Courts of law.

The first step of the demonstration will consist in comparing judicial review in France and in the United Kingdom: the basis, the procedure, the nature, the powers, the grounds of judicial review (7.1.1). The second step will deal with the requirement of EC and ECHR law as regards the review of enforcement powers of regulatory authorities (7.1.2). The third step will be interested in the legal responses judges made to these external pressures. How and to what extent did judicial review evolve because of these pressures? We will see how the problem is different in both countries (7.1.3). Finally, having in mind this background, we will be able to understand the national choices the two countries made. Whereas France relies traditionally on its judiciary, the United Kingdom tries to create special tribunal and procedure in order to deal specifically with the problems raised in each sector (7.1.4).

7.1.1 – English and French Judicial Review Compared

7.1.2 – The Requirement of European Law

7.1.3 – The Legal Responses to the External Pressures: An Evolution of Judicial Review?

7.1.4 – The Different Choices: Specialized Tribunal versus Reliance on Ordinary Magistracy

7.1.1 ENGLISH AND FRENCH JUDICIAL REVIEW COMPARED: DIFFERENCES AND SIMILARITIES

In order to understand the national choices and the compatibility of English and French judicial review with European requirements, it is important to understand and compare the reviews.

In order to study thoroughly the English and French judicial review we will combine the national doctrinal approaches, and how the legal doctrines, in each country think its own review. In England, administrative law textbook studies the basis of judicial review, the grounds of review and the remedies available.

In France two ways have been used to describe judicial review: a formal and a material one. The formal perspective was the first one to be exposed and systematised: it focuses on the powers of the judge or, in English terms, the remedies available. Laferrière, in his *Treatise* first published in 1887,⁴⁶³ was the first to describe the two different reviews available before the Conseil d'État, using the criteria of the powers of the judge. The French administrative judge indeed enjoys two different kinds of powers. Either the judge has only the power to quash the decision (this is the *ultra vires* review, or "*recours pour excès de pouvoir*"), or the administrative judge has full power to vary the decision, issue injunctions, condemn the State in tort or control public contracts, he then enjoys full jurisdiction review ("*recours de pleine juridiction*").

Ordinarily, the review available against an administrative decision is the *ultra vires* review, where the judge had traditionally only the power to quash. It was the review designed to control the legality of administrative action and described as the legal monument of French administrative law. But the power to quash was the only power available to the judge. In other words *mandamus* and *prohibition* were not remedies available before the administrative judge in France because it was thought that, as the State having, as Weber said, the monopoly of "the legitimate use of physical force",⁴⁶⁴ no injunctions could be pronounced against it. The power to issue injunctions against the State was eventually awarded to the administrative judge in 1995.

Duguit opposed strongly this way of presenting the reviews. To him, the important thing was not the powers of the judge but the question asked to the judge. Is it an objective question such as: is this decision legal or within jurisdiction? Or on the contrary, is it a question about the existence of a subjective right such as a contractual or tortious right against the State. These are the two basic ways the French legal doctrine has systematized the two reviews available before the administrative judge. Both explanations have their interest: the analysis focusing on the powers or the remedies and the one focusing on the question asked to the judge luckily overlap and help understanding fully the two different reviews the French administrative judge enjoys.

Having exposed this, it seems obvious that English judicial review can only be compared with the French counterpart, the French *ultra vires* review (that is the best translation of "*recours*

⁴⁶³ See É. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, 2 vol., Berger-Levrault, 1887-1888.

⁴⁶⁴ See, M. Weber, *Politics as a vocation*, Fortress Press, 1965.

pour excès de pouvoir” and sounds better than “excess of power review”). However, the administrative judge has developed a new review, that is especially relevant for your study, and that we call the “objective review of full jurisdiction” combining the objective nature of ultra vires review and the full powers of the full jurisdiction review. This development shows the richness of the description Duguit and Laferrière developed: it is an objective review as it is only concerned with the legality of a decision, it is a full jurisdiction review in the sense that the judge can vary the decision and substitute its own decision to that of the administration’s. It is very convenient, especially where penalties are concerned, for in a full jurisdiction review, the judge has all the powers of the administration.

We would like to combine the English and French presentation in order to build bridges between the understanding of the two legal systems and better account for the similarities and differences between the two systems.

First we will study the basis of judicial review (1), we will then analyse the nature of the review (2) and the procedure (3), and concentrate afterwards on the powers of judges, in other words, the remedies (4). Finally we will explain the grounds of judicial review in both countries (5).

1. The basis of judicial review in England and France: jurisdiction versus legality

Despite an apparent similarity and perhaps a convergence, the way judges analyse administrative adjudication shows deep differences. We would like to show that the English judge tends to think in terms of jurisdiction whereas its French counterpart thinks only and exclusively in terms of legality and hierarchy of norms. This difference entails diverging solutions and different ways of approaching administrative action.

Although there is considerable debate in England about the basis of judicial review, whether it has changed or not, vires or jurisdiction was the basis of judicial review. And this basis explains the difference of legal solutions, explains that some solutions would not be possible or thinkable given the basis of judicial review in France. As Paul Craig explains “The assumption was that there was a distinction to be drawn between jurisdictional and non-jurisdictional errors. The former would result in the decision being regarded as ultra vires and void, because the tribunal had acted outside its jurisdiction. The latter were errors within jurisdiction”.⁴⁶⁵ And Wade and Forsyth add that this conception, encapsulated as “the liberty to err”, “extended to significant mistakes both of fact and law”.⁴⁶⁶ This shows that the judge was concerned in defining the legal boundaries of public authorities.

This distinction between jurisdictional and non-jurisdictional errors is now abandoned. The *Anisminic*⁴⁶⁷ and finally the *Page* decision overturned this conception. In the *Page* decision Lord Brown-Wilkinson said decisively: “Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires”.⁴⁶⁸

⁴⁶⁵ P. Craig, *Administrative Law*, at p. 448.

⁴⁶⁶ H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 211.

⁴⁶⁷ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147.

⁴⁶⁸ *Regina v Lord President of the Privy Council, Ex parte Page* [1993] A.C. 682, at 701.

There is a considerable debate in the legal academia and much ink has been spilt in order to understand, if the basis had really changed and if it had what was the new one. Wade and Forsyth are strongly attached to this basis. Their position is explained thus by Paul Craig: “The courts’ function is to police the boundaries stipulated by Parliament”⁴⁶⁹ and ultra vires remains the basis for Court’s intervention. This position is attacked on several fronts⁴⁷⁰. Dawn Oliver for example contends that “judicial review has moved on from the ultra vires rule to a concern for the protection of individuals, and for the control of power, rather than powers, or vires”. Paul Craig contends that the basis of judicial review has to be found in the common law that supplements the will of Parliament. Some other approaches prefer to adopt a rights-based basis.

The difficulty of the debate is that the search for this basis of judicial review is obscured by constitutional considerations on parliamentary sovereignty, the supremacy and unity of the common law or the importance to vindicate human rights.

It cannot be our purpose here to decide this question. However, it does not seem, reading the cases and comparing with French administrative law, that ultra vires has been replaced. But it is also true that the common law is a source of law for the Administration, as is judge-made law a source of law for the Administration in France.

If we now turn to the basis of judicial review in France, the answer is much simpler. The words scope, boundaries, jurisdiction are unknown, are not the way the French administrative judge thinks about its mission. The role of judicial review is to vindicate legality. It has been held by the Conseil d’État that the purpose of judicial review is to ensure the respect of the legality.⁴⁷¹ It is, as Jean Rivero puts it, the “obvious truth” of French judicial review, or to put it in Jane Austen’s terms “a truth universally acknowledge”. There is no debate.⁴⁷²

⁴⁶⁹ See P. Craig, “Ultra Vires and the Foundations of Judicial Review”, *Cambridge Law Journal*, 57(1), March 1998, 63-90, at p. 65. See also C. F. Forsyth, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review”, *Cambridge Law Journal*, 55(1), March 1996, 122-140; M. Elliott, “The demise of Parliamentary sovereignty? The implications for justifying judicial review”, *Law Quarterly Review*, 1999, 115(Jan), 119-137; M. Elliott, “The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law”, *The Cambridge Law Journal*, Vol. 58, issue 1, 129 – 158.

⁴⁷⁰ See D. Oliver, “Is the Ultra Vires Rule the Basis of Judicial Review?”, in *Judicial review and the constitution*, C. Forsyth (ed.), Oxford, Portland, Hart Pub., 2000, [1987] *Public Law* 543. See also Sir John Laws, “An Extract from: Illegality: The Problem of Jurisdiction”, in *Judicial review and the constitution*; D. Dyzenhaus, “Reuniting the Brain: The Democratic Basis of Judicial Review” (1998) 9 *Public Law Review* 98 ; P. Craig, “Competing Models of Judicial Review” (1999) *Public Law* 428 ; N. Bamforth, “Ultra vires and Institutional Independence”, in C. Forsyth (ed.), *Judicial Review and the Constitution* (Hart. 2000), chap. 6 ; D. Oliver, “Review of Non-Statutory Discretions”, in C. Forsyth (ed.), *Judicial Review and the Constitution* (Hart. 2000), chap. 14 ; J. Jowell, “Of Vires and Vacuums: The Constitutional Context of Judicial Review”, in C. Forsyth (ed.), *Judicial Review and the Constitution* (Hart. 2000), chap. 15 ; N. Barber, “The Academic Mythologists” (2001) 22 *O.J.L.S.* 369 ; P. Craig, N. Bamforth, “Constitutional Analysis. Constitutional Principle and Judicial Review” [2001] *Public Law* 763; P. Craig, “Constitutional Foundations, the Rule of Law and Supremacy” [2003] *Public Law* 92; T.R.S. Allan, “The Constitutional Foundations of Judicial Review: Constitutional Conundrum or Interpretative Inquiry” [2002] *Cambridge Law Journal* 87.

⁴⁷¹ See Conseil d’État, Ass., 17 February 1950, Dame Lamotte, *Recueil Lebon* p. 111 : R.D.P. 1951, p. 478, concl. J. Delvolvé, note M. Waline. V. R. Chapus, *Droit du contentieux administratif*, n° 233, p. 209.

⁴⁷² See V. J. Rivero, “Le juge administratif : gardien de la légalité administrative ou gardien administratif de la légalité ?”, *Mélanges Waline*, L.G.D.J., 1974, tome II, p. 701. See also G. Vedel, “La soumission de l’administration à la loi”, *Revue Al Qanoun Wal Iqtisad*, Le Caire, 1952 ; D. Loschak, “Le principe de légalité”, *AJ.D.A.* 1981, p. 387 ; C. Eisenmann, “Le droit administratif et le principe de légalité”, *E.D.C.E.*, n° 11, p. 25 ; J. Chevallier, “La dimension symbolique du principe de légalité”, *R.D.P.* 1990, p. 1651 ; La mondialisation de

But what legality means is broader and leads to another difference between English and French administrative law doctrines. Whereas in France one cannot open an administrative law textbook without an explanation of the notion of “hierarchy of norms”, this notion is absent from English administrative law textbook. The hierarchy of norms the French administrative judge has to keep in place would be to ensure that an administrative adjudication complies with the administrative rule-making above, that should comply with general principles of the law (that are judge-made such as natural justice), that have to comply with statutes (only statutes can overturn a general principle of the law), that have, in their turn to comply with international law (ECHR and EC law for example) and constitutional law. It is also obvious that, the United Kingdom being a dualist country, the hierarchy of norms would be different because Parliament is sovereign and international law (except for EC law) has the legal status of a statute.

This explains that never could the French administrative judge admit that there are errors of law or fact within jurisdiction because it is concerned only with the correct application of all the norms that apply to a specific adjudication, and all adjudications must comply with all the norms that are above it.

Also the ultra vires basis, as Paul Craig explains very well accounts for the deferential approach of the judge. This is another difference for the French administrative judge has a much more technical and much less constitutional approach to its task, as we will show when studying the grounds of review. Applying the syllogism, the question the judge answers is not one of having jurisdiction but one of correct application of the norms.

The basis of judicial review differs to some extent in the two countries.

2. The nature of judicial review in England and France: both objective reviews

Despite the difference of basis (jurisdiction versus legality), it appears that both reviews have an objective character. In this respect the English and French reviews differ from the German model. As Martin Bullinger notes the French and English conceptions of judicial review have an objective finality.⁴⁷³

For Duguit, Jèze or Waline (even though there are some differences between them) the true reality of a review can only be discovered after answering the question: what is the nature of the question asked to the judge? Is it one of legality, in other words of correct application of the law? Or is it a question concerning the existence of a subjective right like in tort or contract.⁴⁷⁴ The prerogative writs were made to control the powers exercised by inferior

l'état de droit, Droit et politique à la croisée des cultures : mélanges Philippe Ardant, L.G.D.J., 1999 ; L'état de droit, Montchrestien-Lextenso éditions, 2010 ; L'État de droit : mélanges en l'honneur de Guy Braibant, Dalloz, 1996 ; M. Troper, Le concept d'État de droit, Droits, 1992, n° 15 p. 51 ; B. Mathieu, La loi, Dalloz, Coll. Connaissance du droit, 1996.

⁴⁷³ Martin Bullinger draws an opposition between French and English review that have a great influence on community law and the German conception that is shaken in its foundations because of EC law influences : M. Bullinger, “Le contrôle juridictionnel de la régulation”, in Droit de la régulation, service public et intégration régionale, tome 1 : Comparaisons et commentaires, at p. 132.

⁴⁷⁴ See L. Duguit, Traité de droit constitutionnel, 3e éd., tome 2, 1928, p. 475, § 31; G. Jèze, Exposé critique d'une théorie en faveur au Conseil d'État sur la classification des recours contentieux en recours en annulation et en recours de pleine juridiction, Revue du droit public et de la science politique en France et à l'étranger, 1908, p. 671; G. Jèze, L'acte juridictionnel et la classification des recours contentieux », Revue du droit public et de la

courts so that they kept to their assigned jurisdiction. Today, the only question the judge is asked to solve is not whether a subjective right exists (even though with the HRA this may have changed) but whether such administrative action is legal.

The question in France and in the United Kingdom in judicial review is mainly objective, especially as far as the prerogative orders are concerned. Some remedies coming from equity may have a more subjective aspect, especially as far as the tortious liability of the administration is concerned. However, most of them (declaration or injunctions) are used to answer the objective question of knowing if an act or a decision is legal or not.

Despite the objective nature shared by both reviews, a difference lies in the procedure that is inquisitorial in France whereas it is adversarial in the United Kingdom.

3. The nature of the procedure of judicial review in England and France: adversarial versus inquisitorial

Given what was said previously it is only too logical that the procedure should be made to uphold the legal order. It is not for the parties (neither the Administration nor the citizen) to say what the law is, it is for the judge. That's why it is the judge that conducts the investigations and it is given extensive powers to fulfil its task. It is also said that the powers of the judge are made to counterbalance the inequality between the parties. Serving the general interest, correcting the inequality of the parties, these two justifications are at the basis of the inquisitorial nature of the procedure before the administrative judge in France.⁴⁷⁵

By contrast, the common law judicial review procedure is very much adversarial⁴⁷⁶. Allison has studied extensively the procedural differences and has shown how it can account for the

science politique en France et à l'étranger, 1909, p. 667; M. Waline, "Vers un reclassement des recours du contentieux administratif", *Revue du droit public et de la science politique en France et à l'étranger*, 1935, pp. 205-236, at p. 225 ; R. Chapus, "Marcel Waline et la théorie du contentieux administratif", *Revue du droit public et de la science politique en France et à l'étranger*, 2002, n° 4, pp. 947-953 ; E. Garcia de Enterría, "Le contrôle de l'administration. Techniques, étendue, effectivité des contrôles. Contentieux administratifs objectifs et contentieux administratifs subjectifs à la fin du XXe siècle Analyse historique et comparative", *Revue administrative*, 2000, n° spéc. n° 3, pp. 125-131 ; A. Heilbronner, "Recours pour excès de pouvoir et recours de plein contentieux", *Recueil Dalloz*, 1953, chron., p. 35 ; F. Melleray, *Essai sur la structure du contentieux administratif français : pour un renouvellement de la classification des principales voies de droit ouvertes devant les juridictions à compétence générale*, L.G.D.J., at pp. 107; F. J. Goodnow, "The Executive and the Courts", *Political Science Quarterly*, Vol. 1, No. 4 (Dec., 1886), pp. 533-559.

⁴⁷⁵ See J. Morand-Deville, "Le contrôle de l'administration : la spécificité du juge administratif et du juge judiciaire", in *Le contrôle juridictionnel de l'administration : bilan critique*, at p. 188 ; F. Gazier, *Procédure administrative contentieuse (Principes généraux de la)*, *Répertoire de contentieux administratif*, Dalloz, 2010, n° 17; C. Debbasch, *Procédure administrative contentieuse et procédure civile*, L.G.D.J., Coll. Bibl. de droit public, tome 38, 1962, at p. 442.

⁴⁷⁶ See J. A. Jolowicz, "Civil and Administrative Procedure: National Report for England and Wales" in J. P. Gardner (ed.), *United Kingdom Law in the 1990s: Comparative and Common Law Studies for the XIIIth International Congress of Comparative Law*, London, 1990, at pp. 160-75, at p. 160; J.W.F. Allison, *A Continental Distinction in the Common Law A Historical and Comparative Perspective on English Public Law*, Oxford University Press, 2000, at pp. 221; C. Brown, "Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law", in *International Investment Law and Comparative Public Law*, S. W. Schill (ed.), Oxford University Press, 2010, at p. 674.

reluctance of the English judge to enhance its standard of review: “The court’s dependence upon the parties has affected the development of English administrative law”.⁴⁷⁷

This conclusion is only too true and also for France. As we will show that the fact that the French Parliament has given the review of the regulator’s dispute resolution power to the civil judge, therefore applying the adversarial procedure of the code of civil procedure, prevents him from correctly controlling the regulators. Adversarial procedure, both in France and in the United Kingdom proved inadequate to vindicate legality.

4. The powers of the judge: traditionally different but converging

The comparison is complicated by two factors: the English doctrine has systematised the powers of the judge starting from the numerous remedies available whereas the French one distinguished traditionally two reviews, as we said the *ultra vires* review and the full jurisdiction review.

That’s why in order to compare we can only compare the remedies available traditionally against an administrative decision (whether an adjudication or a regulation). In France traditionally the review available against all administrative decisions is the *ultra vires* review where only one remedy was available: *certiorari*. The French administrative judge could only uphold a decision or quash it. In French administrative law there is a principle prohibiting injunctions against the State, and this principle is still very much alive and very much the general rule. This principle was departed from in 1995, Parliament creating an exception to the rule but only in order to vindicate the result of the judgement. In other words, injunctions to the administration in France can only be asked and obtained after the judge has quashed a decision or condemned the administration to damages. Injunctions can only be used to reinforce the result of the judgement and explain how the administration must act.⁴⁷⁸

The development of the objective review of full jurisdiction, especially in the field of administrative penalties, gives greater powers to the French administrative judge, especially the power to vary a decision. But the *ultra vires* review is traditionally very blunt: a citizen can only ask for a quashing order.

The English administrative judge has broader powers; it has also more subtle and convenient power. The declaration is a very useful tool indeed that the French administrative judge does not have. This leads to important problems: in England and in France a quashing order means that the impugned decision has never existed; all its legal effects have to be erased. It can therefore leave a vacuum and entail important consequences. That’s why recently the French administrative judge decided that it had the power to differ the quashing. The decision will only disappear *ab initio* when the judge says it will and not at the time the judgement is given. It leaves some time for the administration so substitute a legal decision to the illegal one. The judge can now control the retrospective effect of the quashing order.⁴⁷⁹ But the French administrative judge does not have such a convenient tool as the declaration.

⁴⁷⁷ See J.W.F. Allison, *A Continental Distinction in the Common Law A Historical and Comparative Perspective on English Public Law*, at p. 221.

⁴⁷⁸ See R. Chapus, *Droit du contentieux administratif*, n° 1092.

⁴⁷⁹ The case that introduced this novelty is: Conseil d’État, Ass., 11 may 2004, Association AC !, Recueil Lebon p. 197.

As far as the powers of the administrative judge are concerned the English judge has both subtler and broader powers than its French counterpart. But it is only when studying the grounds of review that one sees how differently judges reason on both sides of the Channel.

5. *The grounds explained: diverging conceptions of the grounds of review*

The presentation of the grounds of review in English administrative law is quite simple. Although there may be some differences between writers, it has become common to say that the grounds are: illegality, natural justice, irrationality, legitimate expectations, and breach of H.R.A. or EC law.⁴⁸⁰

In France the only ground available is legality but, as will be seen, all the English grounds can be found be organized differently. It is again Laferrière who exposed most clearly in his Treatise the grounds of judicial review in France. The classification is centred on a close examination of the different parts and variables of the administrative decision.

They can be divided in two: external and internal legality and, within these two grounds, three other grounds are to be found and can be raised by the claimant (or have to be raised ex officio by the judge for some of them, such as jurisdiction). The following board will explain more clearly the grounds:

EXTERNAL LEGALITY	INTERNAL LEGALITY
<p>Jurisdiction which is traditionally divided in three:</p> <ul style="list-style-type: none"> - Jurisdiction <i>rationae loci</i>: was the body competent to rule in this place? For example a town cannot take a rule that would have effects in another town for its jurisdiction is limited in space. - Jurisdiction <i>rationae materiae</i>: the jurisdiction is limited to certain matters that Parliament gave the Administration a competence to rule on. It cannot rule on something else, it would be <i>ultra vires</i>. - Jurisdiction <i>rationae temporis</i>: the jurisdiction is also limited in time. 	<p>Misuse of power: when the decision was taken for another purpose than the one intended for by the legislation either the purpose is illegal or the power was used for the private interest of the decision-maker instead of pursuing the public interest.</p> <p>It is a highly moral ground. The Administrative judge, when using this ground, want to cast infamy on the decision maker</p>
<p>Procedural impropriety: it is concerned with the rules of natural justice or fairness</p>	<p>Irregular content of the decision: the content of the decision violates one of the norms in the hierarchy it has to comply with. It can be a general principle of the law such as the principle of equality, or a statute or EC</p>

⁴⁸⁰ See De Smith's Judicial Review, 6th Ed., Sweet & Maxwell; P. Craig, Administrative Law, 6th Ed., Sweet & Maxwell.

	law or ECHR law or the Constitution. The decision below has to conform to all the norms above.
Defect in the formalities such as the signature, the written reasons, etc.	Irregular motives of the decision: a decision-maker will always act according to certain consideration of fact and law. <ul style="list-style-type: none"> - Review of the considerations of law: a decision can be quashed on this ground if it lacks a legal basis (because the legal basis does not exist yet or has ceased to exist for example) or because the decision maker has made an error of law (an incorrect interpretation of the law). - Review of considerations of fact: Here the judge will review the existence of the very facts on which a decision is based.

The majority of the English grounds will therefore be found either within the study if the content of the decision or within the procedural impropriety head.

But there is one ground missing: irrationality or reasonableness. The equivalent of irrationality will not be, in French administrative law, a ground of review *per se*. In French administrative law terms, irrationality is concerned with the intensity of review of the facts, it is not a ground a party can raise, and it is a level of review the judge uses. This study is very broad for the French administrative judge is its own master when it decides the intensity of review (of course sometimes Parliament can dictate the intensity of review).

As far as the intensity of review is concerned the work of the French administrative judge can be analysed in two different ways: the judge will control the legal qualification of facts and the substance of the decision, its adequacy with the legal conditions provided for in the statute, the judge will here review the choice of decision.

LEGAL QUALIFICATION OF FACTS	ADEQUACY OF THE DECISION TO THE CONDITIONS
Absence of review: for example the administrative judge will not review the grades of students at an exam	No control of adequacy. Here even though the facts exist the judge will defer to the choice. If a civil servant has made a fault justifying a sanction the superior is free to sanction or not.
Minimum review or review limited to a "manifest error of appreciation". This is the equivalent of irrationality. The judge will defer to the judgement of the decision-maker and will only interfere to quash obvious	Manifest disproportions: Here the judge will quash only manifest disproportions.

<p>mistakes. As irrationality (and even though some very early authorities exist) the ground developed in the same time as the manifest error of appreciation. The two tests date back from the 60s.</p>	
<p>Complete or normal review: the judge will review completely all the parameters of the qualification. It was first used and developed in 1914 in the Gomel case. It was concerned with a refusal of a planning permission on the ground that the building was to be built in a “monumental perspective” in Paris. Here the judge reviewed the place was indeed monumental perspective for the purpose of the statute and of the shape, the size, the form of the building would be detrimental to this perspective. This review is very frequent and there is a tendency to shift the review from the manifest error to the normal review. For example as far as penalties are concerned the judge will review if the facts justify the penalty.</p>	<p>Maximal review of adequacy: when a breach of a liberty or a right is committed, the judge will require an exact adequacy between the content of the decision and the legal condition that justifies the decision.</p> <p>This review took places when a Mayor decided to prohibit a demonstration because he thought it could cause disruption to the public order. This decision was held inadequate because the liberty to demonstrate is of such importance that a prohibition is disproportionate. The Mayor should have instead taken the necessary measures to contain and prevent any disruption while allowing the demonstration.</p>

What are the conclusions to be drawn from these developments?⁴⁸¹

The first conclusion is that in France judicial review turns around two things: the grounds and the intensity of review. The grounds are only interested in the legality of the decision, whether internal or external. The decision is scanned in order to control all the possible irregularities.

The second concerns the breadth of review. Error of facts is a common and old ground of review and limited review (such as irrationality) is not the general rule, on the contrary. The evolution goes towards a more and more intensive review of administrative action, which is warranted given the broad and dangerous powers the administration is now given. Full proportionality review is not limited in its scope to the breach of human rights.

With this background, it is now important to analyse to requirements of EC and ECHR law as regards the enforcement powers of regulatory authorities.

⁴⁸¹ See P.-L. Frier, J. Petit, *Précis de droit administratif*, n° 778.

7.1.2 THE REQUIREMENT OF EU LAW AND ECHR LAW AS REGARDS THE INTENSITY OF REVIEW

The enforcement powers of regulatory authorities derive increasingly their source, especially as far as electronic communications and energy are concerned, directly from EC law. Therefore both the provisions of the directives and the general principles of EC law are relevant to assess the compatibility of traditional judicial review with these requirements.

ECHR law, that is applicable in English law through the HRA, is of much more relevance where enforcement powers are concerned. Article 6 ECHR has been interpreted as giving a right to a full jurisdiction review when an administrative decision determines a civil rights and obligation or of a criminal charge. It will be seen how both legal systems responded to this demand.

EC law will be studied, as it had a direct relevance in the establishment of the CAT (1) before analysing the complex case law related to the ECHR and the intensity of review (2).

1. EC law and intensity of review: a moderate influence

EC law confers a general right to a review as a general principle of EC law. However the scope of the right is limited by the principle of national autonomy. That's why the directives, in the relevant sectors, go further and impose some stricter conditions on Member State for the implementation of EC law.

The weak influence of the general principle of EU law (a) explains the increased requirement contained in some directives (b).

a. The influence of the right to a review in EU law

The right to an effective judicial protection in EU law was progressively discovered and expanded by the European Court of Justice, in order to establish the European Union as a community based on the rule of law.⁴⁸²

This right stands as a protection of the rights conferred by EU law and vindicates the primacy of EC law. This right gives a right of access to a Court of law, able to issue binding decisions. This explains why the ECJ has held that a "national legislation providing for appeals to independent experts" does not satisfy the requirement of the availability of judicial review that "reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".⁴⁸³ In this case, the requirement of judicial review was not satisfied because "such appeals are to supervisory bodies made up of experts belonging to the Member State concerned, and thus to an administrative authority and not to genuine judicial bodies. Moreover, since those bodies can issue only recommendations they have no decision-making power, which rests with the

⁴⁸² A. Arnall, "The principle of effective judicial protection in EU law: an unruly horse?", *European Law Review*, 2011, p. 51. See also P. Craig, *EU administrative law*, OUP, 2006, at pp. 277-278.

⁴⁸³ Case C-424/99, *Commission of the European Communities v Republic of Austria*, [2001] ECR I-9285.

Member State concerned”. The nature of the body, the nonbinding character of their decision do not satisfy the demands of EU law.

The right of access to a Court has solid foundations: it is according based on the constitutional traditions of Member States, it is moreover stemming from ECHR law. However the case law is scarce. What we can draw from this is that the right of access to a court and the right to judicial review protect EU citizen from manifest breaches. It seems indeed obvious that a body of experts issuing nonbinding decisions cannot adequately replace judicial review.

The ECJ is careful to balance the right to an effective protection of EU law and the access to a Court with another cardinal principle of EU law that is the principle of national autonomy. The Salgoil case first established the importance of the principle. The ECJ held that “it is for the national legal system to determine which court of tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified”.⁴⁸⁴

In other words, it is for the national legal systems to determine the way the rights created by EU law will be protected. National procedures are to be respected, or to put it another way: “Where national authorities are responsible for implementing a Community Regulation it must be recognized that in principle this implementation takes place with due respect for the forms and procedures of national law”.⁴⁸⁵

In principle, Member States are responsible for the design of national procedures, and the ECJ would not interfere unless it was proven that the national rules would prevent the effectiveness of EU law.

In conclusion, EU law put two boundaries between which Member States are free to design any procedure for the implementation of EU law as they wish: they are primarily responsible for the implementation but the rules they establish must not be of such a nature as to prevent the effectiveness of EU law.

That’s why, in the electronic communications sector and, to a lesser extent in the energy sector, directives provide for additional protections.

b. The increased requirements of the directives

The directives, especially in the electronic communications, sector, provide for the efficiency of the review, the body of persons having a right a review and the nature of the body.

Pursuant to article 4 of the framework directive, the effectiveness of the review means that a person aggrieved by a decision of a national regulatory authority (NRA) must have a right of appeal to a body that must be independent of the parties involved and that must enjoy the necessary expertise to be able to effectively review the decisions of the NRA. Article 4 goes

⁴⁸⁴ Case 13/68, SpA Salgoil v Italian Ministry of Foreign Trade, [1968] ECR 661.

⁴⁸⁵ Case Case 39/70, Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-St. Annen, [1971] ECR 49. See also Case 158/80, Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel, [1981] ECR 1805.

even further, assessing that “Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism”.⁴⁸⁶

Article 4 is closely related and stems from the principle of effectiveness, whose scope is difficult to assess in the case law of the ECJ. The ECJ does not impose a fix standard of review. However, for our purpose two cases are of relevance and show that the ECJ only controls the intensity of review in limited circumstances. The *Connect Austria* and *Arcor* cases were not judged under the provisions of article 4 but according to the provisions of the previous directive. They are therefore helpful in assessing the scope of the principle of effectiveness. In *Connect Austria* a constitutional provision of Austria precluded the review of the decision of the NRA by the only competent court that could have judged the compatibility of the decision with community law. In this case the ECJ held that if national law cannot be applied so as to comply with the requirements of the directive which gives a right of appeal against a decision of a NRA, “a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excludes its competence, has the obligation to disapply that provision”.⁴⁸⁷

The *Arcor* decision, a German court asked the ECJ if a limited review giving the NRA a large margin of appreciation when assessing cost-orientation was compatible with the principles of effectiveness. The ECJ answered decisively: “It is a matter solely for the Member States, within the context of their procedural autonomy, to determine, in accordance with the principles of equivalence and effectiveness of judicial protection, the competent court, the nature of the dispute and, consequently, the detailed rules of judicial review with respect to decisions of the national regulatory authorities concerning the authorisation of rates of notified operators for unbundled access to their local loop.”⁴⁸⁸

Therefore, even though the directive seems to increase the intensity of review it is not sure that article 4 provides for a thorough review on the merits. It is a topical subject in the United Kingdom for the labour government, when establishing the CAT, interpreted article 4 as requiring a full appeal and now the conservative government is considering reducing the review to the normal standards of judicial review. It is however clear in the directive that the merits of the decision must be reviewed. But we will analyse this point in due course for there is case in the United Kingdom where a judge held that judicial review satisfied this requirement.

The directive regulates also the holders of the right of appeal. This point has been explained by the ECJ in the *Tele2* case. The directive indeed provides a right of appeal to the users affected by a decision. The scope of affected persons for the purpose of article 4 has been specified by the Court. The terms user 'affected' or undertaking 'affected' for the purposes of Article 4 (1) “must be interpreted as being applicable not only to an undertaking (formerly) having significant power on the relevant market which is subject to a decision of a national

⁴⁸⁶ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services.

⁴⁸⁷ Case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG*, [2003] ECR I-5197. Article 5a(3) of Directive 90/387 provided for a right of appeal.

⁴⁸⁸ Case C-55/06, *Arcor AG & Co. KG v Bundesrepublik Deutschland*, [2008] ECR I-2931.

regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive and which is the addressee of that decision, but also to users and undertakings in competition with such an undertaking which are not themselves addressees of that decision, but the rights of which are adversely affected by it.”⁴⁸⁹

In other words the term affected for the purpose of the directive means both the direct addressee of a decision and also the users and undertakings that are in competition with it and whose rights may be adversely affected by it.

As far as the rules on standing are concerned in France and in the United Kingdom it does not appear that this provision could have any great effect in domestic laws, for judicial review in these countries is quite uses tests on standing that are easily met.

Lastly, the directive provides that the reviewing body should be equipped with the requisite expertise. This does not raise any potential issue for the United Kingdom when the CAT is the reviewing body but may be more problematic for France as it is the ordinary judge that is competent for reviewing such decisions. Also the directive specifies that if the reviewing body is not a Court of law (which is possible), then there must be a right of appeal from this body to such a Court. The rationale for this is that, ultimately, a Court should be able to review the decision and ask a preliminary question to the ECJ in order to ensure a harmonized application of EU law across Europe. This provision is designed to ensure the correct implementation of EU law.

The provisions of EU law are not stringent on domestic laws. The principle of national autonomy ensures that domestic laws are primarily responsible for the way they implement and protect EU law and EU rights.

It is quite different with ECHR law that had profound consequences on domestic laws. Judicial review in domestic laws has to comply with the requirement of article 6.

2. ECHR law and intensity of review

Article 6 (1) ECHR provides that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

Some requirements of this provision do not raise any issue, any more. For example, the requirement of independence and impartiality are now fully respected (a). It is the requirement of the intensity of review that raise more question (b). It will be seen, lastly, how domestic legal systems responded to these requirements and to what extent they adapted their standard of review (c).

c. The reforms of the English and French Supreme Court make them now article 6 compliant

It could be argued though that the House of Lords, combining both judicial and legislative powers did not comply with the condition of impartiality, just as it is sometimes argued that the combination of functions within the Conseil d’État that is both counselling the government on bills and regulations and judging may not be completely impartial.

⁴⁸⁹ Case C-426/05, Tele2 Telecommunication GmbH v Telekom-Control-Kommission, [2008] ECR I-685.

In a dissenting opinion, ECtHR judge De Meyer said in the case *Reinhardt and Slimane-Kaïd v. France*, a case that arose out of the problem of the role of the advocate general before the Cour de cassation in France: “Must one also say that at Westminster there is no fair hearing in the House of Lords either because the judges—the Law Lords—are also legislators and the president, the Lord Chancellor, is not only the President, but also, at the same time, a member of Her Majesty's Government?”⁴⁹⁰ Similarly the Parliamentary Assembly of the Council of Europe has recommended the implementation of a constitutional reform in the United Kingdom of the office of the Lord Chancellor who combined too many roles, which was against the requirements of independence and impartiality of the judiciary provided by article 6 ECHR.⁴⁹¹ Finally the office of the Guernsey Royal Court Bailiff was condemned by the ECtHR because he combined both judicial and legislative function and therefore lacks the level independence or objective impartiality required by the Convention.⁴⁹² With the creation of the Supreme Court, that was not prompted by any European censure but, as Lord Windlesham explained, by a problem of perception and because the justices themselves felt more and more uncomfortable in their position, the impartiality of the judiciary cannot be doubted any longer.⁴⁹³

But it was in France where the Convention had dramatic consequences for the offices of Advocate General before the Cour de cassation and of Government Commissioner before the State's Council. The reforms were prompted by the censures of the ECtHR. The problems of these offices are not that they combine functions. They are here to give their opinion of the case and enlighten the Court with their opinion. They are not therefore considered as a party like any other, that's why they enjoy a privileged position. In the *Kress* case, the claimant argued that as the Government Commissioner was the last one to speak, she was not given the gist of the conclusions and therefore was unable to answer and argue her case. However, in this case, the point was dismissed by the Court on the ground that “lawyers who so wish can ask the Government Commissioner, before the hearing, to indicate the general tenor of his submissions” and “the parties may reply to the Government Commissioner's submissions by means of a memorandum for the deliberations, a practice which – and this is vital in the Court's view – helps to ensure compliance with the adversarial principle”.⁴⁹⁴

The real problem and the reform of the State's Council arose out of another role of the presence of the Government Commissioner at the State's Council's deliberations. Indeed the commissioner is present when the justices deliberate and decide the case. In the *Kress* case, the European Court held that the presence of the commissioner was contrary to “the doctrine

⁴⁹⁰ *Reinhardt and Slimane-Kaïd v France* (1999) 28 E.H.R.R. 59.

⁴⁹¹ Resolution 1342 (2003), Office of the Lord Chancellor in the constitutional system of the United Kingdom.

⁴⁹² *McGonnell v United Kingdom* (28488/95) (2000) 30 E.H.R.R. 289.

⁴⁹³ On the reform of the House of Lords see: Lord Windlesham, “The Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 1”, *Public Law*, 2005, 806 at p. 812; Lord Windlesham, “The Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 2”, *Public Law*, 2006, 35, at pp. 39-40; D. Keene, “The Independence of the Judge”; B. McLachlin, “Judicial Independence: A Functional Perspective” in Tom Bingham and the Transformation of the Law *A Liber Amicorum*, M. Andenas, D. Fairgrieve, Duncan (eds.), Oxford, Oxford University Press, 2009; J. Steyn, “The case for a Supreme Court”, *Law Quarterly Review*, 2002, 382, at pp. 385-386; P. L. Fitzgerald, “Constitutional Crisis over the Proposed Supreme Court for the United Kingdom”, *Bepress Legal Series*, 2004, Paper 276, at p. 15-16; R. Smith, “Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance”, *Journal of Law and Society*, Vol. 32, No. 1, *The Human Rights Act: A Success Story?* (Mar., 2005), pp. 187-201.

⁴⁹⁴ *Kress v. France*, n° 39594/98, at § 76.

of appearances”, a doctrine very well known in the common law world. For “In publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the Government Commissioner could legitimately be regarded by the parties as taking sides with one or other of them.” The importance to vindicate appearances, the feelings of inequality, the consideration that the procedure before supreme courts should not be open to criticism explain the judgement. This is why the office was reformed and the Government Commissioner was replaced by the Public Rapporteur, who has the same role but does not participate any more to the deliberations of the State’s Council.

The procedure and the roles of the advocate general before the Cour de cassation and of the Government Commissioner before the State’s Council were reformed so as to comply with article 6.

The impartiality and independence of the judiciary is not so much the problem now. The real issue lies in the requirement that if the reviewing court should have full jurisdiction to review the case.

d. The requirement of full jurisdiction and the intensity of review in England and France

Article 6 (1) is both flexible and stringent. Indeed the European Court has accepted that “demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect”.⁴⁹⁵

This is exactly the case where regulatory authorities are concerned. They do not satisfy the requirements of article 6, but the Courts gives Member States the following choices: “either the jurisdictional organs themselves comply with the requirements of Article 6 (1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1).”⁴⁹⁶

Therefore the defects of the procedure before the administration can be cured only if the decision can be reviewed by a Court that has full jurisdiction. The European Court has added a further element of flexibility, which does not make its case law clearer, but that ensures the compatibility of many administrative procedures with the requirements of article 6.

The Court has drawn a line between the civil (i) and the criminal side (ii) of article 6, to the effect that the full jurisdiction requirement does not have the same effect in each limb.

i) Full jurisdiction and the civil side of article 6

Full jurisdiction in the civil side means that the Court must have the jurisdiction to review both question of fact and law and shall have the power to quash the decision. It is however not necessary that the Court can vary the decision. This conclusion shows that two angles have to be analysed: the grounds of review and the powers of the judge.

As far as the grounds are concerned, the European Court further reiterated that “that for the determination of civil rights and obligations by a “tribunal” to satisfy Article 6 § 1, the

⁴⁹⁵ Le Compte, Van Leuven and de Meyere v Belgium, (1982) 4 E.H.R.R. 1, at § 51.

⁴⁹⁶ Albert and Le Compte v Belgium (1983) 5 E.H.R.R. 533, at § 29.

“tribunal” in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it”.⁴⁹⁷

Therefore a court that would deny its jurisdiction to review questions of fact would be in contravention with the requirements of article 6, as was held in the *Le Compte* case.⁴⁹⁸ Furthermore, the *Chaudet* case shows the Strasbourg Court does not require, when civil rights are concerned, the power to vary, modify the decision.⁴⁹⁹

It has been argued convincingly that in effect the Court has established a scale and does not require the same degree of review when the core civil rights are concerned, such as the right of respect for family life, and when administrative decisions are concerned, in the field of planning for example.⁵⁰⁰ In the case *W. v United Kingdom*, family life and parental rights were concerned. In this case judicial review was concerned insufficient to meet the requirement of article 6: “An application for judicial review or the institution of wardship proceedings enabled the English courts to examine local authorities' decisions regarding parental access but the scope of their review did not ensure a determination of the merits of the matter”.⁵⁰¹

On the contrary, the *Bryan* decision shows how the requirements of full jurisdiction can be adapted to the rights in question. The *Bryan* case was concerned with a question of planning, which cannot be said to be as crucial as parental rights. That's why, in this case, the Court accepted the compatibility of judicial review. The reasoning shows that the Court is aware that judicial review does not meet the requirements of a full jurisdiction review. It says that the appeal “was not capable of embracing all aspects of the Inspector's decision concerning the enforcement notice served on the applicant.” There was no rehearing, the Court could not substitute its decision to the impugned one and its jurisdiction over the facts was limited.

This is not however incompatible with the Convention in the sphere of planning as the decision could have been quashed “if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the Inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no Inspector properly directing himself would have drawn such an inference.”⁵⁰²

⁴⁹⁷ *Chevrol v. France*, n° 49636/99, at § 77.

⁴⁹⁸ *Herman Le Compte, Frans Van Leuven and Marc de Meyere v Belgium* [1982] E.C.C. 240, at § 51 : “the right to access to such a tribunal covers questions of fact as well as law. Consequently, a professional tribunal from which there is no appeal on questions of fact must comply strictly with the requirements of Article 6 (1) ECHR, even if it is an appellate tribunal and even if there is a further appeal to the ordinary courts on points of law”.

⁴⁹⁹ *Chaudet v France*, n° 49037/06, at § 37.

⁵⁰⁰ See the thesis of L. Milano, *Le droit à un tribunal au sens de la Convention européenne des droits de l'homme*, Dalloz, Coll. Nouvelle bibliothèque de thèses, tome 57, 2006, at pp. 369 suiv.; R. Tinière, « La notion de “pleine juridiction” au sens de la Convention européenne des droits de l'homme et l'office du juge administratif », RFDA 2009 p. 729.

⁵⁰¹ *W. v United Kingdom* (1988) 10 E.H.R.R. 29, at § 80-83. See also *B v United Kingdom* (1988) 10 E.H.R.R. 87; *O v United Kingdom* (1988) 10 E.H.R.R. 82; *R. v United Kingdom* (1988) 10 E.H.R.R. 74.

⁵⁰² *Bryan v United Kingdom* (1996) 21 E.H.R.R. 342.

In the Bryan case the Court explains clearly that in assessing the sufficiency of the review available, it is necessary to have regard to such matters as the subject matter of the decision. But it is important that the judge entertains “all the grounds of appeal pleaded and maintained by the applicant, whose submissions were adequately dealt with point by point”.

The scope of the full jurisdiction requirement is completely different on the criminal side of article 6. This analysis is especially important as far as administrative penalties are concerned as they are concerned criminal for the purpose of article 6.

ii) Full jurisdiction and the civil side of article 6

In *Schmautzer v Austria* the Court explained that the Austrian constitutional court was not a tribunal for the purpose of article 6 because it could not examine all the relevant facts. Similarly, the Austrian Administrative Court that did not enjoy “the power to quash in all respects, on questions of fact and law, the decision of the body” did not meet the requirements of article 6.⁵⁰³

And *Silvester’s Horeca Service v Belgium* further explained that the reviewing body must have the power to substitute its decision to that of the body’s.⁵⁰⁴

Given this background, it is now important to assess to what extent the ECHR had an impact on domestic judicial reviews. It will be seen that the evolution of the standard of review in each country cannot be explained the same way. Whereas the ECHR (through the HRA) had a great importance in England, the more intensive standard of review in France can also be explained with reference to purely domestic concerns.

e. The response of domestic judicial review to meet the requirement of article 6

This study is not an easy one. The evolution of the standard of review concerning enforcement powers of regulatory authorities in England and France cannot be explained the same way, and only with respect to article 6. That’s why it is necessary to divide the study: after analysing the evolution in France (i), we will concentrate on the problem of the compatibility of article 6 with judicial review in England (ii).

i) The evolution of the standard of review in France

The evolution of the standard of review in France is not only due to external influences.

When administrative sanctions are concerned, the Constitutional Council has endeavoured, while admitting that Parliament could establish such out-of-court penalties, to impose guarantees to the citizen. Among these guarantees, the Council has very clearly held that the existence of a full jurisdiction appeal to the administrative court against all decisions imposing fines was an important guarantee⁵⁰⁵. However the Council has not been consistent in all its decisions and has not imposed clearly or quash any statute on the ground that no full jurisdiction appeal existed. It is therefore not very clear the status the guarantee has legally.

⁵⁰³ (1996) 21 E.H.R.R. 511.

⁵⁰⁴ *Silvester’s Horeca Service v Belgium*, n° 47650/99, at § 27.

⁵⁰⁵ See Constitutional Council, decisions n° 92-307 DC, 25 February 1992 ; n° 89-260 DC, 28 July 1989; n° 2000-433 DC, 27 July 2000,

The Council seems to attach some importance to the existence of a full jurisdiction appeal, but it has never quashed a statutory provision on this ground.

This is why the Strasbourg jurisprudence has played an important role. We will first review the cases in order to understand how the Strasbourg Court assesses the compatibility of French judicial review with the requirements of the Convention, in order to show afterwards the evolution domestic judicial reviews underwent, because of this pressure.

What does the ECt HR think about the curative effect of the French *ultra vires* review (or *recours pour excès de pouvoir*)? The doctrine admits that it is indeed a tricky question.

As far as the civil side of article 6 is concerned, it is not difficult to conclude from the cases that *ultra vires* review is indeed sufficient. For the administrative judge can examine, in an *ultra vires* review, all the questions of fact and law.⁵⁰⁶ In the Chaudet case, the Court held that while the claimant did not benefit from an appeal of full jurisdiction in the sense that the State's Council could not have substituted its decisions to the impugned one, the *ultra vires* review was nonetheless compatible with the requirements of article 6 because all the grounds of fact and law were fully reviewed and the decision could have been quashed.

However, the case law shows that the requirements on the criminal side of article 6 go beyond what the *ultra vires* can offer a claimant. The *ultra vires* review can offer a full review of the facts, the law and of the proportionality of the decision. However, it cannot be said that the *ultra vires* review offers a power of substitution; the judge cannot vary and substitute its own decision to that of the administration. In this respect it seems non compliant with article 6, that requires that the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned.⁵⁰⁷

Given this background it is not surprising that an appeal of full jurisdiction has gradually been imposed, first by Parliament in all the relevant sectors under study and secondly by the State's Council in 2009. The State's Council decided in 2009 that all administrative penalties imposed on citizen or undertakings would be from now subject to an appeal of full jurisdiction.⁵⁰⁸ The Atom case, which decided in favour of this solution, brings the review of administrative penalties in France fully in line with the Strasbourg requirements.

ii) Judicial Review and the requirements of article 6 in the United Kingdom

We will first analyse the ECt HR case law on the compatibility of judicial review with the requirements of article 6 and then study how the domestic courts responded to it.

A global assessment is not easy, especially as apparently the United Kingdom was more concerned with the problems raised by the civil side of article 6 than with its criminal side, which is exactly the opposite of France.

⁵⁰⁶ See first Case n° 22108/93, Maryse Reynaud Escarrat; Case n° 49037/06, Chaudet v France, at § 37-38; Case n° 8615/08, Philippe Escoffier v France (decision on permission).

⁵⁰⁷ See Lester, Pannick & Herberg: Human Rights Law and Practice/Chapter 4 The European Convention on Human Rights, at 4.6.23.

⁵⁰⁸ Conseil d'État, 16 February 2009, Société Atom, n° 274000.

However, it seems obvious that on the criminal side and as far as administrative penalties are concerned, judicial review would not be enough. The test of irrationality is for the European Court too difficult to meet to be able to replace a full proportionality review. In *Smith and Grady v United Kingdom*, the test of irrationality was considered so high that in effect the claimant was denied his right to an effective remedy under article 13 ECHR.⁵⁰⁹ Furthermore, for article 6 to be complied with a claimant must have his request reviewed on all points of law and fact and the judge must have the power to substitute its decision with that of the administration.

This explains why, when judicial review has been held article 6 compliant, it was on the civil side of article 6 and in very special areas such as planning⁵¹⁰, a professional pecuniary interest⁵¹¹

But in order to reach this conclusion the Court, accepting that the judicial review does not comply with the requirement of a full jurisdiction appeal, concludes nonetheless that it is compatible, using a very pragmatic approach. The Court actually explained in *Bryan* that “In assessing the sufficiency of the review available to the applicant on appeal to the High Court, it is also necessary to have regard to such matters as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.”

It is difficult to assess the precise scope of the *Bryan* case. However, it seems that the subject matter is of utmost relevance (the same conclusion could not have been reached had a more fundamental right been at stake) and also the fact that some guarantees exist before the administration and the desired grounds of appeal. It is of importance that the judge answers all the grounds of appeal and could quash the decision if it appeared to the judge that the evidence did not justify the decision. The Court should not deny its jurisdiction on any point: that is also the lesson of the *Kingsley* case. This case of special relevance as the Court drew a comparison with *Bryan*, saying that “the subject matter of the decision appealed against was a classic exercise of administrative discretion. To this extent the present case is analogous to the cases of *Bryan*”.⁵¹² However it arrived at a different conclusion because, in this case, the judge could not quash the decision and remit it to the Gaming Board because of the operation of the “doctrine of necessity” that precludes the quashing of the decision. Here the application of this doctrine renders judicial review inefficient and that’s why a violation of article 6 was found. The *Tsfayo* case⁵¹³ emphasizes also the necessary guarantees that claimants must enjoy at first instance when the review available is of limited scope. In *Tsfayo*, the defects of the procedure before the adjudicatory body and the defects of the scope of the review where the judge “did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant’s credibility” renders the whole process unsatisfactory.

As a conclusion, it is possible to assess that the curative effect of judicial review on the civil side of article 6 will only work in certain areas where the administration must be allowed a

⁵⁰⁹ *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493.

⁵¹⁰ *Bryan v United Kingdom* (1996) 21 E.H.R.R. 342; *Iskcon and Others v United Kingdom* (1994) 18 E.H.R.R. CD133.

⁵¹¹ *X v United Kingdom* (1998) 25 E.H.R.R. CD88; *Stefan v United Kingdom* (1998) 25 E.H.R.R. CD130.

⁵¹² *Kingsley v United Kingdom* (2001) 33 E.H.R.R. 13.

⁵¹³ *Tsfayo v United Kingdom* (2009) 48 E.H.R.R. 18.

certain amount of discretion and where no fundamental values are at stake, where the judge does not deny its jurisdiction to as to render the process of judicial review useless and where the defects of the adjudicatory body are not of such breadth that judicial review would become insufficient to offer, on the whole, a fair trial.

The domestic courts had to grapple with the problem of the compatibility of judicial review with the full jurisdiction requirement and the legal doctrine has studied this subject in depth.⁵¹⁴

However, instead of clarifying the position, *Alconbury*⁵¹⁵ obscured the debate with unnecessary constitutional consideration. The outcome of *Alconbury* was pretty clear and straightforward. It is exactly the kind of case, planning, where the ECt HR allows some discretion to Member States and where judicial review has been held to be article 6 compliant. But, instead of sticking to the *Strasbourg* reasoning, the justices and especially Lord Hoffmann decided to add a constitutional element that blurs the lines. The House of Lords indeed held that “when the decision at issue was one of administrative policy the reviewing body was not required to have full power to redetermine the merits of the decision”, which is perfectly consistent with the *Bryan* case, but then the House further contended that “any review by a court of the merits of such a policy decision taken by a minister answerable to Parliament and ultimately to the electorate would be profoundly undemocratic”.

So what conclusions could we draw from the second part of the judgement. One can only assume that for the Lords, in any case, it would be undemocratic to increase the standard of review so that at any rate any defect of adjudicatory bodies would not be addressed by the judicial review Courts.

In *Runa Begum* the House of Lords clarified the position of the law with a much more consistent argumentation.⁵¹⁶ Consistently with *Bryan* and *Kingsley* the House of Lords held that the scheme for the attribution of housing benefits was administered in such a way so as to ensure fair decision-making. Thus, “the context did not require a full fact finding jurisdiction in the appellate court” and judicial review was sufficient.

Many other judgements were made in the field of planning⁵¹⁷, housing⁵¹⁸ and social benefits⁵¹⁹. Judges tend to conclude that judicial review is sufficient. They however stress sometimes that

⁵¹⁴ See H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at pp. 378-379; C. Harlow, R. Rawlings, *Law and Administration*, at pp. 660-666; P. Craig, *Administrative Law*, at pp. 428-435; R. Clayton, V. Sachdeva, “The role of Judicial Review in Curing Breaches of Article 6”, 2003 *Judicial Review* 90; P. Craig, “The Human Rights Act, Article 6 and Procedural Rights”, *Public Law*, 2003, pp. 753-773.

⁵¹⁵ *Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295.

⁵¹⁶ *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] UKHL 5

⁵¹⁷ *V. R. (on the application of Friends Provident Life Office) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 820: “that where an administrative decision depended on the decision-maker making a judgment as to the progress or outcome of some future event, or when the decision was based on purely policy grounds, a combination of the initial decision-making process and the High Court's power of review was sufficient to ensure compliance with article 6; that, where, however, an administrative decision depended on a finding as to some present or future fact, the safeguards of a public inquiry before an independent inspector might well be needed in addition, although there was no absolute rule of law to that effect, and each case had to be judged on its own facts when deciding whether the High Court's power of review was sufficient”. *R. (on the application of Adlard) v Secretary of State for Transport, Local Government and the Regions* [2002]

in order to be fully compliant, some guarantees are necessary before the adjudicatory body so that judicial review can have all its curative effects.

Even though the problem was completely different in both countries, judges responded differently. The Conseil d'État, in the field of administrative penalties and Parliament confers a right to an appeal of full jurisdiction. But it must be seen that the main problem in France is on administrative penalties and not on housing, social benefits, that is on the civil side of article 6 where ultra vires review would be article 6 compliant given the diminished requirements imposed by Strasbourg in this field.

Having this background and having assessed the importance of the review available, we will now study the appeals provided for by Parliament in the fields under study. As will be apparent and despite the absence of a consistent approach in each country, France and the United Kingdom have followed different paths, have chosen different models of review.

It will be also our task to show if the choices made are compliant with the above mentioned requirement.

EWCA Civ 735 (« The remedy of judicial review was available and sufficient to counteract any individual injustice »). R. (on the application of Kathro) v Rhondda Cynon Taff CBC [2001] EWHC Admin 527.

⁵¹⁸ R. (on the application of McLellan) v Bracknell Forest BC [2001] EWCA Civ 1510). R. (on the application of Bewry) v Norwich City Council [2002] H.R.L.R. 2).

⁵¹⁹ V. R. (on the application of Beeson) v Dorset CC [2002] EWCA Civ 1812.

7.1.3 THE DIFFERENT CHOICES: THE COMPETITION APPEAL TRIBUNAL IN THE UK V. THE MAGISTRACY IN FRANCE

There are two ways of studying the reviews available in each country. One way is to study the bodies to which the review was entrusted. This first criteria shows a difference between the two countries that is deeply rooted in administrative law tradition: whereas the United Kingdom tends to create specialized tribunals to carry out the review of specialized decisions, France relies on its magistracy, but as will be seen not the one that one would have expected (for the civil and not the administrative judge is also responsible of reviewing regulatory decisions in France).

Another way of studying the reviews available is to study the intensity of review Parliament has provided for. In this respect a stark contrast is also to be seen. France has decisively chosen to afford an appeal of full jurisdiction in the field of enforcement powers of regulatory authorities, irrespective of the judge concerned. Whether before the administrative or the civil judge the same standard of appeal is afforded. It is the criminal side of article 6, it is therefore warranted. In the United Kingdom, the standards of review are not consistent and are threatened to change. Even though, since the inception of the CAT, this body tends to become increasingly the chosen body to review enforcement decisions of regulatory authorities, the standard of review is not the same in each sector.

We will first study the national choices: in the United Kingdom a special tribunal was put in place whose characters are deeply entrenched in the administrative law tradition of the country (1), whereas in France it is the regular judges who are responsible for the review (2). Finally we will show the review in action: how the standards, the procedures differ (3).

1. The reviews available in the United Kingdom: despite chaotic choices, the model of the CAT seems to be increasingly predominant

We will first review the chaotic choices made the utilities sectors for the review of the enforcement decisions of regulatory authorities (a) in order to show then how the model of the CAT stands in stark contrast with the French choice (b).

a. Presentation of the “mishmash”

As Tony Prosser puts it: “Currently the arrangements for appeal from regulatory decisions are a mish-mash, with some appeals on the exercise of concurrent powers lying on the merits to the Competition Appeal Tribunal, appeals against the imposition of financial penalties lie to the High Court on grounds similar to those for judicial review, whilst the Competition Commission itself hears ‘appeals’ by companies against regulatory proposals to amend their licences and on some decisions of Ofgem in relation to the organization of wholesale markets. In other cases judicial review will be the only applicable remedy”.⁵²⁰

⁵²⁰ T. Prosser, *The Regulatory Enterprise*, at p. 191; T. Prosser, “The Place of Appeals in Regulation – Continuity and Change”, in *Centre for the Study of Regulated Industries, Regulatory Review 2004/2005* (Bath: CRI, 2005), 195–211 ; D. Rose, T. Richards, “Appeal and Review in the Competition Appeal Tribunal and High Court”, *Judicial Review*, Vol. 15, Issue 3 (September 2010), pp. 201-219

We will first analyse the review against the decisions of Ofcom (i), then the changing state of the postal services sector (ii), in order to further study the review available against the decisions of Ofgem (iii), Ofwat (iv) and the ORR (v).

i) Ofcom

It is not easy to assess the reviews available against the decisions of this super-regulator that combines functions in broadcasting, electronic communications and now in mail.

In this sector, the Communications Act 2003 creates a full appeal on the merit to the CAT from all decisions of Ofcom in the field of electronic communications. In this sector, enforcement notices, penalties, disputes resolution adjudications can be fully reviewed by the CAT. However, this may change as the conservative government is consulting on the opportunity to shift from a full appeal to a simple judicial review before the CAT in this field.⁵²¹ The government has the impression that a full appeal goes beyond what article 4 of the framework directive requires and wishes to diminish the rights of undertakings in this field.

In the broadcasting sector, such appeals do not exist and judicial review is the only means of challenging a decision of Ofcom in this field⁵²². Given the fact the penalties in this field are clearly criminal for the purpose of article 6 and that fundamental rights such as freedom of expression are at stake here, it is highly likely that judicial review would be held insufficient in this field to meet the requirement of full jurisdiction. However, as only judicial review is available and given the cost of the litigation, it is improbable that any claimant would wish to litigate Ofcom's decisions in this field.

The board below explains the appeals available against Ofcom's decisions in the fields of broadcasting and electronic communications.

Power	Internal Appeal	First Judicial Control	Further Appeals
<i>Broadcasting</i>			

⁵²¹ V. BIS, Department for Business Innovations & Skills, Implementing The Revised Eu Electronic Communications Framework, Overall approach and consultation on specific issues, September 2010, at § 48: « The Government also believes that the interpretation of the current transposition goes beyond what is required by the Directive and we propose to clarify the position by amending the relevant section of the Communications Act 2003 ... The current transposition has been interpreted by some appellants as requiring a full rehearing of the case and some contend that the UK transposition intentionally goes beyond the requirements of Article 4(1). Ofcom consider that the perception of an 'enhanced' appeal right in the UK has resulted in regulatory uncertainty in the UK. They also consider that the burden of repeated appeals diverts resource from performing their statutory duties and impedes their ability to make timely, effective decisions in the interests of citizens and consumers. In our view an effective appeal that complies with the Directive does not require a full rehearing of the case. It is not the Government's intention to go beyond what the Directive requires - we believe an effective appeal should, as a minimum, consider whether the Regulator acted lawfully, and followed the correct procedures, took relevant issues and evidence duly into account and generally acted in accordance with their statutory duties. In considering these issues, it should take the merits of the case into account ».

⁵²² V. T. Prosser, The Regulatory Enterprise - Government, Regulation, and Legitimacy, préc., p. 165.

Breach of the Code ⁵²³	Broadcasting Review Committee ⁵²⁴	Judicial Review	
Statutory Sanctions pronounced by the Broadcasting Committee ⁵²⁵		Judicial Review	
<i>Radio</i>			
Radio Licensing Committee can revoke licences		Judicial Review	
<i>Electronic Communications</i>			
Injunctions		Competition Appeal Tribunal	
Enforcement Notices		Competition Appeal Tribunal	Appeal on a point of law before the Court of Appeal or the Court of Session
Penalties		Competition Appeal Tribunal	Appeal on a point of law before the Court of Appeal or the Court of Session
Dispute Resolution		Competition Appeal Tribunal	Appeal on a point of law before the Court of Appeal or the Court of Session

What about now the appeals available in the postal services sector. The sector was formerly regulated by Postcomm. However the conservative government decided to change the law and give the responsibility of mail to Ofcom. It is to be noted that it is the same in France. Even though in France broadcasting is regulated by a separate body, electronic communications and post are regulated by the same agency. Historically these two sectors have been closely linked in both countries: the Postmaster General in England and the Ministry for mail and telecommunications in France were involved in the provision and regulation of both services.

ii) The postal sector: from Postcomm to Ofcom

⁵²³ Ofcom, Procedures for the handling of broadcasting standards or other licence-related cases, at § 46.

⁵²⁴ Ofcom, Procedures for the handling of broadcasting standards or other licence-related cases. The review must be first accepted by Ofcom and will be conducted by persons not having been previously involved in the case.

⁵²⁵ Ofcom procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases.

The Postal Services Act 2011 reforms profoundly the regulation of the sector. It also changes the reviews available against the decisions of Ofcom in the sector. The board below show the situation under the previous statute and shows the changes made by the government.

Power	Reviewing Court	
	Postal Services Act 2000	Postal Services Act 2011
Sanction	« Appeal » to the High Court ⁵²⁶	Judicial Review to the Competition Appeal Tribunal ⁵²⁷
Enforcement Notices	Application to the High Court ⁵²⁸	Judicial Review to the Competition Appeal Tribunal ⁵²⁹
Dispute Resolution	Judicial Review uncertain ⁵³⁰	Judicial Review to the High Court ⁵³¹

Two comments can be made: first in the field of dispute resolution and then in the field of administrative sanctions.

If we say that judicial review against dispute resolution powers of Postcomm before the 2011 act was uncertain, it is because of the Mercury decision of the House of Lords. In this decision the House of Lords held that the dispute resolution powers of the Director General of telecommunication could not be challenged by way of judicial review but through the ordinary procedure of private law. In this instance the power of the Director were not statutory, they were contained in the British Telecommunications licence and that's one of the reasons, apart from the fact the dispute resolution looks very much alike a normal contractual dispute, that decided the justices. And, in the case of Postcomm, the same was true. The dispute resolution powers were not statutory but provided for in the Royal Mail licence. However the Postal Services Act 2011 gives a statutory rank to this function. It would therefore be very unlikely that Mercury would apply, especially as it would create a discrepancy between the review of the dispute resolution powers of Ofcom in the electronic communications sector and in the postal sector.

It is hard to reach a definite conclusion on the compatibility of judicial review when dispute resolution powers are at stake. We are not here in the field of planning, housing; it is the core of civil rights and obligations. Regulatory authorities issue a binding decision that decides the rights and obligations of private parties. However, as this point has never been litigated, any definite conclusion on the subject would be dangerous.

⁵²⁶ Postal Services Act 2000, section 36.

⁵²⁷ Postal Services Act 2011, Part 3, section 57(1)(c).

⁵²⁸ Postal Services Act 2000, section 28.

⁵²⁹ V. Postal Services Act 2011, Part 3, section 57(1)(c).

⁵³⁰ See Mercury Communications Ltd v Director General of Telecommunications [1996] 1 W.L.R. 48.

⁵³¹ See Postal Services Act 2011, Schedule 3, Part 2, at § 13.

It is mostly the review against sanctioning powers that appear not to offer the requisite safeguards. The 2011 Act provides that the CAT, in reviewing sanctions, has the same powers as a Court in judicial review⁵³². It follows from this provision that the CAT will not be able to review fully the fact, and substitute its decision to Ofcom's. As far as repressive powers are concerned, the ECt HR is more stringent and the absence of a power to review fully the fact that lead to the sanction are a great impediment to a fair trial.

What about the reviews available against Ofgem's enforcement decisions?

iii) Ofgem

The powers of Ofgem have also been changed in 2010 but only in the electricity sector. The Gas sector did not benefit from the same improvement as regards the review of the decisions. The reform thus increased the inconsistency of the appeals within one agency between sectors.

A full appeal is only available against Ofgem's penalty whether before the High Court (gas) or the CAT (electricity). Dispute resolution is not concerned and only judicial review is available.

Powers	Gas Sector	Electricity Sector
Sanctions	« Appeal » to the High Court ⁵³³	Appeal to the Competition Appeal Tribunal ⁵³⁴
Enforcement notices	Application to the High Court ⁵³⁵	Appeal to the Competition Appeal Tribunal ⁵³⁶
Dispute Resolution	Judicial Review	Judicial Review

The structure of reviews available in the gas sector (and in the electricity sector as well prior to the 2010 reform) is exactly the same in water and rail.

iv) Ofwat

Powers	Appeal
Sanction	« Appeal » to the High Court ⁵³⁷

⁵³² Postal Services Act 2011, Part 3, section 57(5) et (6): "In determining an appeal under this section the CAT must apply the same principles as would be applied by a court on an application for judicial review. The CAT must either— (a) dismiss the appeal, or (b) quash the whole or part of the qualifying decision to which the appeal relates. If the CAT quashes the whole or part of a qualifying decision, it may refer the matter back to the person who made the decision with a direction to reconsider and make a new decision in accordance with its ruling".

⁵³³ Gas Act 1986, section 30E.

⁵³⁴ Energy Act 2010, section 21.

⁵³⁵ Gas Act 1986, section 30.

⁵³⁶ Energy Act 2010, section 20.

⁵³⁷ Water Industry Act 1991, section 22E.

Enforcement notices	Application to the High Court ⁵³⁸
Dispute Resolution	Judicial Review ⁵³⁹

The same remarks apply here. If an appeal against penalties seems completely consistent with the requirements of article 6, judicial review in the field of dispute resolution may seem too low a standard.

The same remarks apply to airport sector and the rail one⁵⁴⁰.

v) Office of Rail Regulation

Power	Appeal
Sanction	Application to the High Court ⁵⁴¹
Enforcement notices	Application to the High Court ⁵⁴²
Dispute resolution	Judicial Review

In 2004, a report of the Constitution Committee of the House of Lords recommended that a special tribunal be established to review on the merits all the decisions of regulators, stressing the weaknesses of judicial review and the importance of the possibility to appeal adverse decision.⁵⁴³ Equally, the Better Regulation Task Force advocated the creation of appeal mechanisms in order to better control independent agencies.⁵⁴⁴ One can only conclude that these wishes have not yet been fulfilled.

Many penalties are not fully reviewed on the merits, which does not seem compatible with the requirement of the fair trial. The Human Rights Joint Select Committee said in this respect that Ofcom cannot be considered “an independent and impartial tribunal”. However, the procedural requirements before Ofcom can impose a penalty and existence of an appeal to the CAT were such that taken as a whole, the scheme seems “to us to satisfy the requirements of the duty of act fairly at common law and, so far as they apply, those of due process under Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.⁵⁴⁵

As we said earlier, the appeal against dispute resolution decisions made by Ofcom in the electronic communications field may change. The creation of a full appeal was motivated by

⁵³⁸ Water Industry Act 1991, section 21.

⁵³⁹ A question arises as the statute provides that dispute resolution adjudications by Ofwat are final (Water Industry Act 1991, section 30A(5)(a)). However, judges have tended to interpret restrictively such provisions.

⁵⁴⁰ Airports Act 1986 c. 31, section 49.

⁵⁴¹ Railways Act 1993, section 57F.

⁵⁴² Railways Act 1993, section 57.

⁵⁴³ House of Lords, Constitution Committee, 6th Report, Session 2003-2004, at “Chapter 11: Improving the Appeals Mechanisms”.

⁵⁴⁴ Better Regulation Task Force, Independent Regulators, october 2003, at p. 34.

⁵⁴⁵ Human Rights Joint Select Committee: Draft Communications Bill, 2001/02, HC 1102, spéc. p. 7

article 4 of the framework directive 2002/21/EC that provides for an appeal on the merits⁵⁴⁶. However, in a different field a judicial review against a decision by Ofcom setting out procedure for bidding for wireless telegraphy licences the Court of Appeal held that judicial review was fully compliant with the requirement of article 4. Jacob LJ said that “there was an obligation on a national court to adapt its procedures as far as possible to ensure that Community rights were protected; that the High Court's jurisdiction in judicial review proceedings was sufficiently adaptable to accommodate whatever standard was required by article 4 of Council Directive 2002/21/EC to enable the merits of the case to be duly taken into account; and that, accordingly, a challenge by way of judicial review, rather than an appeal to the tribunal, was an effective appeal mechanism for the purposes of article 4”⁵⁴⁷.

For Jacob LJ “it is inconceivable that [Article], 4 in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong”⁵⁴⁸. Just as judicial review has adapted itself to the requirement of the ECHR, judicial review is capable of adapting itself to the requirements of EU law.⁵⁴⁹

What conclusion can we draw from this judgement? That judges will adapt this control or that judicial review is, as it is, compliant? At any rate the government uses Jacob LJ's speech in order to justify the change from an appeal to the CAT to a judicial review.

The most innovative aspect, from a French perspective, of the reforms put in place since the beginning of the 21st century is the creation of the CAT, whose creation and characters must now be studied.

b. The CAT: between tradition and innovation.

The choice of the CAT shows both aspects of tradition and of innovations. It is traditional in the sense that it is customary in the United Kingdom to resort to special tribunal to review administrative decision, especially in fields requiring special knowledge and expertise. The aspect of novelty lies in the fact that its creation shows the trend of the English legal order to judicialize tribunals, to make them courts instead of administrative institutions.

The CAT was created in 2002, in order to comply with the requirements of EC law. It was an emanation of the Competition Commission Appeals Tribunal⁵⁵⁰, body that belonged to the Competition Commission, and whose role was to review the decisions of this body.

⁵⁴⁶ Joint Committee on the Draft Communications Bill. Draft Communications Bill, vol. I, Chair/author: Lord Puttnam, 2001/02, HC 876-i, p. 53, n° 193.

⁵⁴⁷ T-Mobile (UK) Ltd and another v Office of Communications [2009] 1 W.L.R. 1565.

⁵⁴⁸ T-Mobile (UK) Ltd and another v Office of Communications [2008] EWCA Civ 1373 [2009] 1 W.L.R. 1565, at § 31.

⁵⁴⁹ T-Mobile (UK) Ltd and another v Office of Communications, at § 19 : « the common law in the area of [judicial review] is adaptable so that the rules as to [judicial review] jurisdiction are flexible enough to accommodate whatever standard is required by Article 4 ». He adds § 29 : « I think there can be no doubt that just as [judicial review] was adapted because the Human Rights Act so required, so it can and must be adapted to comply with EU law and in particular Article. 4 of the [Framework] Directive ».

⁵⁵⁰ M. Jephcott, “The First Two Years of the Competition Commission Appeal Tribunals”, The Cambridge Yearbook of European Legal Studies, vol. 4, 2001, pp. 217 suiv..

Competition Commission Appeals Tribunal reviewed the decisions of the Competition Commission, it appeared necessary, for impartiality's sake, to separate these two entities.⁵⁵¹

Furthermore, the creation of this tribunal was motivated by the feelings that only by providing a full appeal on the merits could the schemes in the electronic communications sector be compliant by the ECHR, as we previously said.⁵⁵² The Minister for E-Commerce and Competitiveness, Mr Stephen Timms, even said to explain the creation of the CAT: « Those changes are a significant enhancement of the regulator's powers. It would therefore not be right to introduce them without at the same time providing firm procedural safeguards for those subject to enforcement action. The new right of appeal on the merits to the Competition Appeals Tribunal, set out in clause 187, is a major safeguard ».⁵⁵³

Therefore the CAT is novel in the sense that it is a Court and it was separated from the administration it reviews. It is the same arrangements that motivated the Leggatt report that led to the Tribunals, Courts and Enforcement Act 2007.

However, in many other respects, the CAT appears to follow the tradition of specialized tribunals. It is indeed a specialized institution that stands in stark contrast with the generalist tradition of French review. Peter Cane showed that specialisation is the main character of tribunals. This specialisation has two consequences: a limited jurisdiction and the presence of experts.⁵⁵⁴ Peter Cane says that tribunal members can be divided in three groups: lawyers, experts and lay members. As far as the CAT is concerned two are represented, lawyers and experts: "Cases are heard before a Tribunal consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields".⁵⁵⁵

The situation and the choice of specialisation stand in contrast with the French model. But, as far as comparative administrative law is concerned, the study is of particular interest for, contrary to common thinking, the civil judge is competent to review many decisions of regulatory authorities.

2. In France: trust in the magistracy

In France, the situation of the appeal is much simpler. As far as enforcement powers are concerned (sanctions, dispute resolution) a full jurisdiction appeal is available. The *ultra vires* review is only concerned with enforcement notices.

However the bodies competent for the review of such decisions are not homogeneous. The State's Council is competent to review all the sanctions of the regulators. However, the appeal

⁵⁵¹ Council on Tribunals: Council on Tribunals annual report 2001/02, HC 14, at p. 9. The Council did not see the fusion of these two bodies with a favourable eye and therefore welcomes the reforms.

⁵⁵² Human Rights Joint Select Committee: Draft Communications Bill, 2001/02, HC 1102, at p. 7.

⁵⁵³ V. Standing Committee on the Bill for this Act in the House of Commons the Minister for E-Commerce and Competitiveness (Mr. Stephen Timms).

⁵⁵⁴ P. Cane, *Administrative tribunals and adjudication*, at p. 91.

⁵⁵⁵ See Competition Appeal Tribunal website, "About the Tribunal".

against the dispute resolution adjudications of the regulators were conferred to the Paris Court of Appeal, in other words, the civil judge.

The fact that the civil judge is competent to review some administrative decision is an occasion to dismiss the too often heard idea that in France, because there is an administrative judge, the control of the administration belongs only to this judge. This has never been true and this is less and less true given the choices made by Parliament in the field of network utilities (but the same choice has been made in the financial services and the competition sectors). When a public body acts as a private persons, because it owns property belonging to the “private domain” or because it makes a private contract (and not a public one), then this body is reviewed by the civil court like any other private person.

This will lead to study two elements: first the review in France, whatever judge is concerned, is unspecialized (i) and second we will see to what extent can Parliament shift the review from the administrative judge to the civil judge (ii).

i) An unspecialized review

It derives from this that the review of regulatory decisions is not specialized in France and ordinary judges, whether from the State’s Council or the Paris Court of Appeal are responsible for handling these cases.

This does not mean that there is not a tendency to specialisation nor that administrative and civil judge should be put on the same footing as far as training is concerned.

Indeed there is a growing tendency now in France to establish the Paris Court of Appeal (and inside the Court, a special section of it) as the Court competent to try economic cases and especially cases coming from administrative agencies. The Paris Court of Appeal (First Chamber, Section H) is competent to hear all appeals against agencies in the financial, competition and utilities sectors (in the utilities only dispute resolution adjudications). But the judges hearing the cases have not had any special training nor any experience in competition law or economics.

Civil or criminal judges in France all come from the same school, the National School for Magistracy (École Nationale de la Magistrature). The exam is a general and national exam that you can after you have a master in law. They have received no training in economics and it may well be that the president of the economic section of the Paris Court of Appeal has been a family judge for ten years, or an investigating judge before coming here. The situation is different at the Cour de cassation that has nominated a prominent economist, Frédéric Jenny (who also a member of the Office of Fair Trading Board).

Administrative judges on the other hand have received an education and training in economics. To become an administrative judge at the Conseil d’État one has to enter the National School for Administration (École Nationale d’Administration) where economics is among the subject they have to study. Inside the school they go on studying the topic for the school is generalist and you may well end, according to your ranking, either at the equivalent of the National Audit Office (Cour des comptes), a diplomat or an administrative judge if your rank, at the end of the school, of sufficiently high (you must be among the first three).

So, even though administrative judges have more training in economics they remain nonspecialists.

Now to what extent can Parliament give the power to review administrative decisions to the civil judge?

ii) The constitutional boundaries on the delegation of review to the civil judge

The first time the Constitutional Council concerned itself with the problem was in 1987. Parliament gave the reviewing powers of all the sanctions of the Competition Commission to the Paris Court of Appeal.

When reviewing the statute transferring the appeal of the Competition Commission's decisions from the administrative judge to the Paris Court of appeal, the Constitutional Court held that the exclusive competence of administrative courts to void acts of public authorities was a fundamental principle.⁵⁵⁶ It created thus a constitutionally protected jurisdiction for administrative courts, which they did not enjoy until then for their jurisdiction was only of a statutory level. The ruling held more exactly that: "Consistently with the French conception of the separation of powers, there figures among the 'fundamental principles recognized by the laws of the Republic' one whereby, except for matters which are reserved by their nature to judicial authorities, there belongs to the competence of the administrative courts the quashing or rectification of decisions taken in the exercise of prerogatives of public power by authorities exercising executive power, their agents, the local authorities of the Republic or the bodies placed under their authority or control".⁵⁵⁷

From this decision, the quashing or varying of decisions taken out of the exercise of public power prerogatives belongs to the administrative judge. Therefore, in order to breach this principle, Parliament had to pursue a legitimate and important purpose. Here the Constitutional Council admitted the justification: Parliament thought that as civil courts could know of similar litigation on competition law issues, the principle of "good carriage of justice" could justify the breach of the principle. In order to avoid unnecessary divisions and in order to foster unity in the jurisprudence the breach was found legitimate.

However the constitutional protection seems very fragile as never the Council quashed any statutory provision on this ground. However, it requires a strong justification of general interest such as the good carriage of justice. In financial markets or telecommunications for our purpose, the transfer was found to be justified on this ground.

It derives from this decision that, for example, the power to declare the State liable in damages for a tortious action is not a constitutionally protected jurisdiction for the administrative judge.

As a conclusion, we have studied so far the requirements of EC and ECHR law as regards the standard of review necessary for enforcement decisions. As was shown, in both countries the bodies responsible for the review vary. In England the CAT or the High Court may be in charge. In France the civil and administrative judges share responsibility. However the difference between the two countries lies in the fact that in France the standard of review is homogeneous irrespective of the judge responsible: a full appeal on the merits ("a full

⁵⁵⁶ Case n° 86-224 DC, 23 January 1987.

⁵⁵⁷ Case n° 86-224 DC. The translation comes from L. N. Brown, L. Neville J. S. Bell, French administrative law, Oxford, Oxford University Press, 1993, 4th ed., at p. 128.

jurisdiction review” to use the French and European expressions) is available. In England, judicial review, applications for review, full appeals coexist. And we may witness a trend towards diminishing the standard of review in some areas.

Now, we are going to study the way the review is undertaken in both countries.

3. Review in action in both countries

How is the review carried out in both countries? This question is wide ranging and many difficulties arise. The first one stems from the many differences of standards of review and bodies involved. In France the review of the most interesting decisions, dispute resolution decisions over questions of access, are resolved by the civil judge (the Paris Court of Appeal and then the Cour de cassation). In England, both judicial review and appeals apply either to the CAT or the High Court.

For comparisons’ sake we will here concentrate in England on the CAT, especially as we have explained earlier how judicial review operates. Two reasons can account for this decision. First many writers have shown that judicial review in regulated sectors does not show any sign of specificity. It is perhaps an area where judges are especially wary not to intervene, but apart from that we concur with the legal doctrine in saying that in economic sectors, judicial review does not show any sign of specificity. The second reason is that when judicial review is the only review available, there is no case law. The cost of judicial review, associated with the unlikely chance of success explains certainly the dearth of decisions. We will however refer to the most important ones for a decision in broadcasting has been challenged by Mr Gaunt, unsuccessfully. The CAT will therefore be our main focus, but when interesting cases for the study exist, we will refer to them.

In France, it will be interesting to compare how judicial review before the civil and the administrative judge is carried out. The comparison will show the inadequacy of the civil procedure to handle properly judicial review and, consequently, the wisdom of the founding fathers of administrative law in France. For the study will show that, the civil judge does not get the essence of what a review means and treats the administrative body as if it were a Court, that why we want to study the status of the administrative body before the reviewing judge because whereas this question is very simple in England and before the French administrative judge, it is far from simple before the French civil judge which denies the regulatory body the status of a party to the litigation.

But firstly we want to study the internal appeals available (a). Then we will analyse the possibilities of asking interim measures to suspend the execution of the administrative decision (b). This point will bring us to study a notion that is not used in common law countries, the notion of *res statuta*, which is a doctrinal construct in France. *Res statuta* is the equivalent of *res judicata* but for administrative decisions. The notion needs to be clarified in order to understand if the legal force of administrative decisions in England and France is the same: are they immediately applicable? We will then briefly examine the delays (both general and special) to file the request for review in England and France (c). A thorny question arises then: at what time does the judge decide? (d). Does the judge decide when the original decision was taken or does s/he take into account what has happened in between, for example changes in the law or in the facts or new evidence? The answer to this question in England is not easy. Afterwards the powers of the Courts will be analysed (e) and the standards of review (f). Eventually, we will deal with the special French problem related to the status of the administrative body before the civil Courts (g). The fact that this does not raise any issue in

England and before the French administrative judge is a strong argument in favour of a change in the law.

a. Internal appeals in England and France

As Peter Cane explains it: “Using a spatial metaphor, review is internal if it takes places within the institution in which the original decision-maker was located at the time the decision was made, but external if it takes place within a different institution”.⁵⁵⁸

As we have seen Ofcom has put in place some internal mechanisms to review the conclusions of some of its board, and stakeholders in the broadcasting industry are very attached to it. For in recent consultation, when Ofcom asked them their opinion about the abolishing of this scheme, they all responded that they were against it, for the cost of judicial review was so high that it deterred them from going to Court to have a decision reviewed.

Internal appeals are of crucial importance. In France, their importance is increased by the necessity to find ways to reduce the burden of litigation on Courts, that’s why Parliament has sometimes provided for a compulsory internal review before going to Court.

In France, as a general rule, internal appeals are always available, a statutory or regulatory provision is unnecessary; they are regulated by no special formality or delay. They can take two forms: if it is addressed to the original decision-maker in order to ask him/her to reconsider the decision it is called a “gracious appeal” (“recours gracieux”), if it is, on the other hand, addressed to the hierarchical superior, it is called a “hierarchical appeal” (“recours hiérarchique”). These two venues are always, as a matter of general law, available to any citizen. The use of internal appeals interrupts the delay for judicial review; so that the delay to challenge the decision was begin to run after the internal appeal has been decided.

However the fact that regulatory authorities are independent means that hierarchical appeal to the Minister is impossible. Also the administrative judge has held that given the nature and powers of independent agencies, a “gracious appeal” was not available against their sanctions.⁵⁵⁹ In this respect, regulatory authorities enjoy a special treatment. However, the solution of the judge is not easy to understand. One explanation is that, again, the administrative judge treats regulatory authorities as courts and not as proper administrative authorities, which they are.

The situation is different in England. The existence and the way internal appeals work in some areas is very well documented, but on a more sociological or administrative science point of view.⁵⁶⁰ Carol Harlow and Richard Rawlings point to the fact that internal appeals

⁵⁵⁸ P. Cane, *Administrative Tribunals and Adjudication*, at p. 7.

⁵⁵⁹ Conseil d’État, 5 December 2001, Sté CAPMA-CAPMI, n° 203591.

⁵⁶⁰ See V. D. Cowan, S. Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Oxford, Portland, Or., Hart Pub., 2003, at p. 4; M. Harris, *The Place of Formal and Informal Review in the Administrative Justice System*, in *Administrative justice in the 21st century*, at p. 42; The Law Commission, *Administrative Redress: Public Bodies And The Citizen*, A Consultation Paper n° 187, p. 12; R. Sainsbury, *Internal reviews and the weakening of social security claimants’ right of appeal*, in *Administrative law and government action: the courts and alternative mechanisms of review*, G. Richardson, H. Genn (eds), Oxford, Clarendon Press, 1994, at pp. 288-289.

are still largely informal.⁵⁶¹ It has not received a legal attention. Is there a general right to an internal review in English administrative law? Some authorities seem to deny this possibility. In *Akewushola*, the Court held « that, once it had reached a final decision on an appeal, there was no power under the Rules of 1984 enabling the Immigration Appeal Tribunal, let alone its chairman acting on his own, to rescind or declare its previous decision a nullity; that, as in the case of any statutory tribunal not explicitly and unequivocally excluded by privative legislation from such review, any procedural error by the tribunal could only be corrected by the High Court; and that, accordingly, the chairman of the first tribunal had had no jurisdiction to rescind his tribunal's decision and the second tribunal had been right to regard itself as without jurisdiction ». ⁵⁶² Only in exceptional circumstances can a tribunal reopen a case and, at any rate, the power must be used sparingly.⁵⁶³ The solution can be certainly be understood on the ground that the power to reach the decision, being vested in the tribunal par statute, it would be very imprudent to allow it to reopen a case.

However, in administrations such as regulatory authorities, the existence of internal appeals as we said is not uncommon. It exists within Ofcom but only for adjudication on the breach of a rule, not for sanctions. In a consultation paper, stakeholder strongly argued in favour of an internal appeal mechanism for sanction. Ofcom's answer was that: "Ofcom accepts that a Sanctions decision is the most serious decision taken by Ofcom in this area. It is for this reason that such a decision is taken by a subcommittee of the Ofcom Board. Were Ofcom to grant internal reviews of Sanctions decisions, this would require the constitution of further sub-committees with different members. This would be impractical as a matter of process. Since the rights to a fair hearing of broadcasters under Article 6 of the European Convention on Human Rights are respected through the judicial review process, Ofcom does not consider it appropriate to establish an internal review of a Sanctions decision".⁵⁶⁴

We have seen earlier that penalties fall within the "criminal" limb of article 6 and therefore require a full jurisdiction appeal. *Alconbury* and *Runa Begum* cannot apply here as only the civil side of article 6 was concerned. Ofcom is clearly wrong in its conclusion and judges in the *Begum* case have argued that for judicial review to cure the breaches the first stage, before the administration, must offer as many protections as possible. Ofcom's confidence is therefore very much mistaken.

As a conclusion, we have seen that although the law concerning internal appeals is very different from one country to another (being a general rule in France) the internal appeals available as far as regulatory authorities are concerned are very rare.

It is now to be studied the possibility to have interim orders pronounced in order to stay the proceedings and to suspend the execution of the decision. This question leads to the more general question of the legal effects of administrative decisions in England and France. Are they applicable immediately so that a stay is necessary?

⁵⁶¹ C. Harlow, R. Rawlings, *Law and Administration*, at p. 456.

⁵⁶² *Akewushola v Secretary Of State For The Home Department* [2000] 1 W.L.R. 2295. See H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 779-780 and p. 791, footnote 193.

⁵⁶³ *R. v Kensington and Chelsea Rent Tribunal Ex p. MacFarlane* [1974] 1 W.L.R. 1486. See H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 791, footnote 196.

⁵⁶⁴ Ofcom, *Review of procedures for handling broadcasting complaints, cases and sanctions, Consideration of responses*, 16 December 2009, at § 2-56.

b. Administrative decisions, Res statuta and Interim measures in England and France

What is the legal force, or *res statuta*, attached to administrative decisions in England and France? Are they immediately enforceable? It appears that although the legal effect attached to administrative decisions, or *res statuta*, is the same in both countries, the conditions to order a stay of the proceedings are very much different.

It should be noted first that EU law does not interfere with the legal force of regulator's decision but emphasizes the need for interim relief to protect EU law rights. In the electronic communications sector, the directive provides that: "Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law".⁵⁶⁵ In the energy sector, the same rule applies: "The regulatory authority's decision shall have binding effect unless and until overruled on appeal".⁵⁶⁶ However EU law has emphasized the importance that domestic Courts can order interim measures. Mr Advocate General Tesauro said, in the *Factortame* litigation, that "Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection".⁵⁶⁷ Therefore full effectiveness of community law requires, in our sectors the possibility of granting interim relief.⁵⁶⁸

After having showed briefly the legal effect of administrative decisions in England and France we will show how courts deal with the problem of interim protection.

In French and in English administrative law, administrative decisions are immediately enforceable, that's why, as a matter of principle, the review does not stay the execution of the decision. The immediate effect of administrative decisions in French law is a fundamental principle; the decision is directly enforceable and creates legal rights and obligations without having to resort to a Court (which does not mean that the breach of the decision by a citizen allows the administration to enforce it, contrary to German law this is not possible in France). This is the same position adopted in English administrative law. As Paul Craig puts it, administrative decisions enjoy a presumption of validity.⁵⁶⁹ In *V. Smith v East Elloe Rural*

⁵⁶⁵ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending article 4(1) of Directives 2002/21/EC.

⁵⁶⁶ Directive 2009/72/CE, article 37(11) in the electricity sector ; Directive 2009/73/CE, article 41(11) in the gas sector.

⁵⁶⁷ Opinion of Mr Advocate General Tesauro delivered on 17 May 1990. *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

⁵⁶⁸ Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

⁵⁶⁹ P. Craig, *Administrative Law*, at n° 23-030; H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 250. See *F. Hoffmann-la Roche & Co. A.G. and Others Appellants v Secretary of State for Trade and Industry Respondent* [1974] 3 W.L.R. 104 : « Held, (...) that, in a case where the Crown sought by the injunction to enforce what was *prima facie* the law of the land, as opposed to its proprietary rights, the person against whom it sought the injunction was required to show very good reason why the Crown should be required to give the undertaking as a condition of being granted the injunction (...) that in determining whether there was such good reason all the circumstances were to be taken into account; that in the present case those circumstances included the Crown's financial interest, the consequences so far as the public were concerned of whether the injunction

District Council judges held clearly that: « An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders ». ⁵⁷⁰

That's why ordering a stay is necessary. In French administrative litigation, it is a usual procedure. Two criteria have to be met:

- some kind of urgency must justify the stay, the claimant must show that the execution of the decision will have a detrimental effect;
- A serious doubt as to the legality of the decision has also to be demonstrated by the claimant. ⁵⁷¹

However, as some reviews have to be directed to the Paris Court of Appeal special provisions apply, drawn not from administrative law but from the code of civil procedure: the consequences of the decision must be shown to be excessive or a new element has happened that justify the stay of proceedings.

The study of the case law shows that there is no specificity in our field of research as regards the suspension of enforcement decisions, whether before the administrative or the civil judge. Where administrative penalties are concerned some cases show that the level of the penalty can be considered as justifying the suspension for the condition of urgency, especially if the company is in a financial distress. However the publication of the penalty is not considered as constituting an urgent situation. ⁵⁷² Concerning the doubts on the legality of the decision, the claimant must show that the claim is likely to be successful.

In English law, the criteria seem to be quite similar. The judge can order a stay of the proceedings. The Civil Procedure Rules ⁵⁷³ and especially Order 53 ⁵⁷⁴ provide for the stay of the proceedings. Order 53 is even clearer for it provides that when permission is granted, the grand shall automatically stay any proceedings. This could lead to the conclusion that whereas

were granted or not, taking into account a scheme put forward by the appellants for their protection if an injunction were not granted, the likelihood of the order being held to be ultra vires, the fact that the appellants' contention was not that what they were doing was not prohibited by the order but that the order, which was on the face of it the law of the land, was not in fact the law and that the injunction was the only means available to the Crown of enforcing the order ; and that, in all the circumstances, the Secretary of State was entitled to the injunction which he sought without being required to give an undertaking in damages ».

⁵⁷⁰ [1956] 2 W.L.R. 888.

⁵⁷¹ Code de justice administrative, article L. 521-1.

⁵⁷² V. Conseil d'État, ord., 1er juillet 2009, Sté Edelweiss Gestion, n° 327981; Conseil d'État, ord., 12 mai 2005, M. Zerbib, n° 279011; Conseil d'État, ord., 24 octobre 2008, M. Beslay, n° 321057.

⁵⁷³ Civil Procedure Rules, section 54.10: "(1) Where permission to proceed is given the court may also give directions. (2) Directions under paragraph (1) may include (a) a stay of proceedings to which the claim relates".

⁵⁷⁴ Rules of the Supreme Court (Revision) 1965/1776, section 3(10)(a): "Where leave to apply for judicial review is granted, then— (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the applications or until the Court otherwise orders".

in French administrative litigation the permission does not stay the proceedings, on the contrary, in England, it stays them. However, the subsequent case law proved difficult to apply to administrative litigation for the term proceedings could be interpreted as not encompassing an administrative adjudication. In *Avon County Council*, Glidewell LJ held that an administrative decision was among the proceedings that could be stayed pursuant to Order 53: “An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. For these reasons I am of the opinion that a decision made by an officer or minister of the Crown can, in principle, be stayed by an order of the court. (...). The effect of a stay would not be to nullify the various statutory provisions. It would be to defer the date for the implementation of the proposals until the judicial review proceedings were concluded. If the Secretary of State's decision were not quashed, the various statutory provisions would then take effect”.⁵⁷⁵ This correctly describes the effect of a stay.

But in which circumstances should the judge suspend the operation of a decision. In *Ashworth Hospital Authority*⁵⁷⁶, the judge says that: “The mere fact that an arguable case for judicial review has been demonstrated is not a sufficient reason for granting a stay”. Permission is not in itself sufficient. Dyson LJ further adds that “the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that the tribunal's decision was unlawful”.⁵⁷⁷ Finally Dyson LJ argues that “the court should not grant a stay in the absence of cogent evidence of risk and dangerousness”.

The conditions for the stay shows that the English and French judges share the same conceptions: an administrative decision should operate in principle, however if stay is granted and if some kind of urgency and a strong case is shown then a stay can be ordered.

However, as we showed earlier, English judges enjoy very broad and practical remedies and could order for example an interim injunction whose effect could be the same as a stay of proceedings. The granting of interim injunctions to stay the proceedings is difficult for the legal conditions were made to operate for private litigation. The judge will balance the different interests (the public and the private interests), and will not order an interim injunction against a public body unless strong evidence shows that the decision was illegal.⁵⁷⁸

⁵⁷⁵ *Regina v Secretary of State for Education and Science, Ex parte Avon County Council* [1991] 2 W.L.R. 702.

⁵⁷⁶ *V. Regina (H) v Ashworth Special Hospital Authority* [2002] EWCA Civ 923.

⁵⁷⁷ *V. Regina (H) v Ashworth Special Hospital Authority* [2002] EWCA Civ 923, § 47.

⁵⁷⁸ *V. Smith v Inner London Education Authority* [1978] 1 All E.R. 411: “a local authority should not be restrained from exercising its statutory powers by interlocutory injunction unless the plaintiff shows that there is a real prospect of his succeeding at the trial, and in these circumstances there was no real prospect of the parents succeeding in their claims at the trial”; *R. v Ministry of Agriculture, Fisheries and Food Ex p. Monsanto Plc (No.2)* [1999] Q.B. 1161: “it was in the public interest that the decision of a public authority should be observed until set aside, and the purpose of the licensing provisions was not to protect individual commercial interests, but to serve the public interest. Accordingly, the balance of convenience did not favour the granting of interim relief to M”; *R. v Durham CC Ex p. Huddleston* [2000] Env. L.R. D20 : “the consequences of work starting without an environmental assessment might make irreversible any harm that might be caused, and in the absence of any indication that appropriate steps could be taken to prevent the envisaged environmental harm, an interim injunction should be granted”. See M. Fordham, *Judicial Review Handbook*, at n° 20.2.

Borrowed from private law and the American Cyanamid decision, the conditions seem unsuited for administrative litigation⁵⁷⁹.

The Competition Appeal Tribunal has a general discretion to allow a stay of the proceedings.⁵⁸⁰ The Tribunal decided to follow the same principles as that applied by the ECJ in similar litigation. The claimant should show that the situation justifies the stay, in other words s/he should show that the execution of the decision would have an excessive detrimental effect. In addition the judge should be persuaded that there is a strong case for suspending the decision.⁵⁸¹ The CAT will use the same criteria to assess the necessity to grant a stay.⁵⁸²

Nonetheless, in some areas, Parliament has provided for an automatic stay where a challenge has been filed. In general, the review against penalties operates as a stay in the gas,⁵⁸³ electricity⁵⁸⁴ and mail⁵⁸⁵ sectors.

In France and in the United Kingdom, administrative decisions enjoy the same legal force. They are immediately enforceable and the review does not, in principle, operate as a stay. In general in English and French administrative law the same criteria apply: there should be a strong case and a compelling necessity (urgency) to order the stay of the proceedings.

After having studied the possibility to stay the proceedings in both countries, it is necessary to study briefly the time delay to file a judicial review claim.

c. Time delays to file a judicial review: general law and special provisions in regulated sectors in England and France

⁵⁷⁹ American Cyanamid Co v Ethicon Ltd (No.1) [1975] A.C. 396. One of the conditions explained by Lord Diplock was that “where there was a doubt as to the parties’ respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo”.

⁵⁸⁰ The Competition Appeal Tribunal Rules 2003, Statutory Instrument 2003 No. 1372, section 61: “The Tribunal may make an order on an interim basis - (a) suspending in whole or part the effect of any decision which is the subject matter of proceedings before it; (b) in the case of an appeal under section 46 or 47 of the 1998 Act, varying the conditions or obligations attached to an exemption; (c) granting any remedy which the Tribunal would have the power to grant in its final decision”.

⁵⁸¹ M. Brealey, N. Green, Competition Litigation, UK Practice and Procedure, at n° 8.55.

⁵⁸² V. M. Brealey, N. Green, Competition Litigation, UK Practice and Procedure, at n° 8.55 à 8-59. See Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No.1) [2001] CAT 1; Genzyme Ltd v Office of Fair Trading (Interim Relief) Competition Appeal Tribunal [2003] CAT 8.

⁵⁸³ V. Gas Act 1986, section 30E(5): “If an application is made under this section in relation to a penalty, the penalty is not required to be paid until the application has been determined”.

⁵⁸⁴ V. Energy Act 2010, section 21(4): “If an appeal is made under this section, the penalty is not required to be paid until the appeal has been determined ». An appeal against an order does not operate as a stay: “Unless the Tribunal orders otherwise, an obligation of a person to comply with the order is not affected by the making of an appeal under this section against the order” (Energy Act 2010, section 20(5)).

⁵⁸⁵ V. Postal Services Act 2011, section 57(9): “Except in the case of a decision to impose a penalty, or give or modify a direction, under Schedule 4, 7 or 8, the effect of a qualifying decision is not suspended by the making of an appeal against the decision under this section”.

Citizens have more time in England than in France to file a claim for judicial review. The general rule in France is that the claim should be filed within two months, whereas English citizens have three months. However, unlike their English counterparts, French judges have a literal interpretation of this criterion and do not require the challenge to be filed promptly. They would not authorize themselves to dismiss a claim filed within two months. Similarly, a claim filed after, even if good justifications are shown, will be dismissed.

A difference lies in the way the time limit will start to run. In France the time-limit begins to run not when the decision is taken but when the decision is notified or published, in other words when the future claimant learns about the decision. If the formalities of notification or publication are not done, then the time limit will continue to run and the decision can be challenged at any time.⁵⁸⁶

It follows from this analysis that when, in France and in the United Kingdom, judicial review is the only venue available the above delays will work. Before the CAT, the delay is shorter, as the claim should be filed within two months, but the delay begins to run at the time when the decision was published or notified. The CAT has even held that “the date of publication of the decision within the meaning of this Rule is the date of the publication of the reasons for the decision and not the date of the announcement by the OFT of the fact of the decision”.⁵⁸⁷ In water⁵⁸⁸ rail⁵⁸⁹ and gas⁵⁹⁰, the claim to the High Court should be made within 42 days following the notification of the decision, but only as regards orders and penalties.

The delay is even shorter before the Paris Court of Appeal (one month).

⁵⁸⁶ Halsbury's Laws of England, Judicial Review, at n° 658.

⁵⁸⁷ The CAT has had to answer the question whether a press release can be assimilated to a notification or a publication. It has held that: “We are extremely doubtful whether the Press Release can be regarded as “a notification to the applicant of the disputed decision”. But the more important question is the meaning of the words “the date of publication of the decision” within the meaning of this rule. In our judgment, the date of publication of the decision within the meaning of this Rule is the date of the publication of the reasons for the decision and not the date of the announcement by the OFT of the fact of the decision. The result of that would be, applied to this particular case, that in our judgment time began to run from the date of publication of the reasons, that is to say 19th March, and not the date of the Press Release which is 5th March. Our basic reasoning is that it is only when a potential applicant is in possession of the reasons for the OFT's decision that he can reasonably assess whether he should apply for a review or not. If applicants are obliged by this Rule to apply for a review at a time when they merely know that there has been a decision but they do not know the reasons for it, in our judgment that is likely to be both an inefficient and an inequitable result. It will be inefficient because, in those circumstances, the applicant does not know where to direct his fire, as it were, and may later have to seek leave to amend his application when the reasons become known. That seems to us likely to create uncertainty and disrupt the proceedings. It is likely to disrupt the preparation of the defence and to lead to a number of disputes under Rule 11 as to whether or not leave to amend should be given. It is likely also, we fear, to lead to a number of appeals being lodged on a purely precautionary basis brought by appellants before they know whether they have grounds or not for appealing. All that appears to us to be extremely unsatisfactory. It also seems to us, in principle, to be inequitable to require an appellant to appeal before he is in a position to assess the legality of the decision, a sufficiency of the reasons being of course a key element in reviews taking place under Section 120 of the 2002 Act. We also notice that Rule 8(6) of the Tribunal's Rules requires the appellant to annex to his Notice of Appeal a copy of the disputed decision. In our judgment, that does not mean the Press Release setting out the fact that a decision has been taken, but the reasoned decision that the OFT has taken” (Federation of Wholesale Distributors v Office of Fair Trading [2004] CAT 11, at §22).

⁵⁸⁸ Water Industry Act 1991, section 21(1) (for orders) and section 22E(2)(a) (for penalties).

⁵⁸⁹ Railways Act 1993, section 57(1) (for orders) and section 57F(2) (for penalties).

⁵⁹⁰ Gas Act 1986, section 30(1) (for orders) and section 30E(2) (for penalties).

It follows from this analysis that even though the delays may be different from one country to another, the approach of the judge is different. The French administrative judge has a very strict and literal approach of the delays but in the same time it has held that this delay only runs when the persons can be assumed to know of the decision, either because it was notified to them or because it was published. As a matter of good administration the French administrative judge want to hold the administration to respect the formalities indispensable in order to establish good relationship between the administration and the citizens. The judgement holding that of the administration does not notify or publish the judgement then the delay will run for ever illustrates that, for the French administrative judge, bad administration cannot be used by public bodies to protect themselves behind time delays.

On the other hand, the English judge has a more flexible approach, holding that challenged should be made promptly. It accepts to shorten or broaden the time-limit according to its judgement of the case.

The study of the time at which the judge decides amounts to study whether the judge accepts to take into account new elements that may have arisen between the adjudication and the litigation (new evidence, new laws). Here again, the flexible approach of the common law judge will be contrasted to the clear-cut approach of the French administrative judge.

d. Time at which the judge decides: Comparison between England and France

The French situation will be studied first, then we will analyse the English approach.

In the areas under study, the approach of the French administrative judge is simple. As it judges as a full jurisdiction judge, it will take into account all the changes that have occurred since the taking of the impugned decision. New evidence is allowed but also it will apply new statutes. It is especially relevant as far as sanctions are concerned for if there is a constitutional prohibition against the retrospective application of more severe penalties, retrospective application of less severe penal statutes is possible. If Parliament has enacted a statute diminishing the penalty for an administrative offence, the full jurisdiction judge will be able to apply it and substitute a less severe penalty to the one under challenge.

This rule contrasts with the more stringent rule in *ultra vires* review (*recours pour excès de pouvoir*) where the judge will place itself at the date when the decision was taken without being able to take into account new statutes or new evidence. The judge places himself in the shoes of the administration when it took the decision.

Given the fact that the Paris Court of Appeal is not used to administrative law subtleties, it is no wonder that, it is difficult to assess which rule it applies. The cases are confusing. However, it would seem logical that, being a full jurisdiction judge, she would take into account all the new relevant elements of facts and law. One clue leads definitely to this conclusion. The conditions Parliament has laid down for the suspension of the decision under challenge before the Paris Court of Appeal is that new elements have arisen. It would be completely illogical that the judge could order a stay and then, judging the merits of the case, could not take into account these new elements. However the state of the law is, in this respect, uncertain.

In English law the situation before the CAT will be studied first, before analysing the situation in judicial review. Before the CAT a recent case has shown that the CAT, in an appeal would take into account new evidence. Ofcom strongly opposed this position. The

Tribunal held that it could accept new evidence to support a challenge against a decision taken by Ofcom.⁵⁹¹ The Court of Appeal upheld this position. Toulson LJ holding that for the purpose of article 4 of the Framework directive it would deprive the appeal of its effectiveness if the CAT was not able to hear new evidence.⁵⁹² We can only regret that the judgement was decided as a matter of European law and not as a matter of English administrative law, setting the limits of appeals as far as domestic law is concerned.

What is the rule in judicial review proceedings? Again here judges are very pragmatic, not wishing to establish clear-cut boundaries. However, the rules of judicial review are the same whether the challenge is brought before the High Court or before the CAT.⁵⁹³

Even though judges do not review the facts and even though they hold that they judge the decision at the time when it was taken they are flexible enough to allow new elements to be presented, especially if the new evidence can help the judge in its task and decide if the decision is valid or not.⁵⁹⁴

Here again, the practical and pragmatic approach of the English judge is to be emphasized. It contrasts strongly with the clear-cut principles established by the French judge. The law seems however similar in both countries: when full appeals on the merits are concerned new elements can be admitted. When the ultra vires review is concerned the judge tends to put itself in the shoes of the administration when it adjudicated in the case. The solution certainly derives from the legality principles: how could a judge decide a case on the legality of a decision without taking into account the law as it was when it was taken?

What are the powers of the judges in the areas under study?

e. The powers of the reviewing judges

As we have already studied the powers of judicial review judges, we are going to study and compare here the powers of appeal judges. What is the extent of their powers when they are judging the merits of the case? Here the difference between the two countries lies in the fact that appeals of full jurisdiction in French administrative law have been systematized. On this

⁵⁹¹ British Telecommunications Plc v Office of Communications [2010] CAT 17, at § 72. This solution was already arrived at in competition law litigation: Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No.3) [2001] CAT 3, [2002] E.C.C. 3: “It is impossible to deduce from the Competition Act 1998 and the Competition Appeal Tribunal Rules 2000 an absolute bar on the admission of new evidence before the Tribunal, whether submitted by the applicant or respondent. The question of what evidence is presented on the appeal and how the evidence is to be handled is a matter for the discretion of the Tribunal. In this connection, the appellant is not limited to placing before the Tribunal the evidence he has placed before the Director. He may expand, enlarge upon or even abandon that evidence and present a new case”.

⁵⁹² British Telecommunications Plc v Office of Communications [2011] EWCA Civ 245.

⁵⁹³ The Court of Appeal held that the CAT « is to apply the normal principles of judicial review, in dealing with a question which is not different from that which would face a court dealing with the same subject-matter. It will apply its own specialised knowledge and experience, which enables it to perform its task with a better understanding, and more efficiently. The possession of that knowledge and experience does not in any way alter the nature of the task » (T-Mobile & Telefónica v Ofcom [2008] EWCA Civ 1373 [2009] 1 WLR 1565, at § 37). V. A. Robertson, “Developments in Commercial Regulation and Judicial Review 2010”, Judicial Review, 2011, at p. 94; B. Kennelly, “Judicial Review and the Competition Appeal Tribunal”, Judicial Review, 2006, p. 160 ; B. Rayment, “Judicial Review under the Enterprise Act 2002”, Judicial Review, 2003, p. 41.

⁵⁹⁴ A. Lidbetter, V. Roberts, “Expert Evidence In Judicial Review and Competition Appeal Tribunal Cases”, Competition Law Journal, 2004, p. 113, spec. p. 116.

point the law is clear. Whereas in England, appeals being statutory one cannot give general answer and has to rely on the relevant statutory provisions. We will therefore compare the powers of the judges in France with those of the CAT.

Before the administrative judge, the situation is simple. In a full jurisdiction appeal the administrative judge has exactly the same powers as the administration has. If the decision is illegal, the judge will remake it and its decision will substitute itself to that of the administration. The litigation will be over. If the administrative judge considers that the penalty is disproportionate it will substitute a new penalty. It is the same before the Paris Court of Appeal.

In this regard the CAT cannot substitute its decision. It will only give directions to the regulatory authority and it is this body that will take the final decision. But the Communications Act provides, although the precision seemed unnecessary, that the CAT cannot direct Ofcom to take a decision it would not have the power to take. We are in this respect in the same situation as the French one: the powers of the judge on appeal are the same as the administration but the French judge can substitute its own decision. In France the litigation is over once the Court decision is taken.

Are there other limits to the power of the judge?

In France further limits have been imposed. First, the judge can only substitute its decision if the investigation done by the regulatory body is regular. If the investigation is irregular for some reason then the judge cannot rely on the evidence produced and cannot substitute its. The second limit lies in the constitutional prohibition of *non reformatio in peius*. The Constitutional Court held in 1989 that the review cannot have the effect of being detrimental to the claimant: the right to a remedy does not allow for *reformatio in peius*, i.e. remedies which, if pursued, would lead to the imposition of harsher penalties than those for which redress is being sought.⁵⁹⁵

In there such a principle of *non reformatio in peius* in English law? In our areas, some statutes provide such a protection (in rail, gas and water).⁵⁹⁶ But it appears that this principle that could only be asked in an appeal has not been received in administrative law.

Furthermore, EU law could not be a basis for the application of such a principle. The ECJ has only held, for the purpose of a preliminary ruling, that “it should be pointed out that Community law cannot oblige a national court to apply Community legislation of its own motion where this would have the effect of denying the principle, enshrined in its national procedural law, of the prohibition of *reformatio in pejus*”. The ECJ further stresses that “Such an obligation would be contrary not only to the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations, which underlie the prohibition, but would expose an individual who brought an action against an act adversely affecting him to the risk that such an action would place him in a less favourable position than he would have been in, had he not brought that action.”⁵⁹⁷

⁵⁹⁵ Case 88-248 DC of 17 January 1989.

⁵⁹⁶ Railways Act 1993, section 57F; Gas Act, section 30E ; Water Industry Act 1991, section 22E(3)(b).

⁵⁹⁷ Case C-455/06, Heemskerk BV and Firma Schaap v Productschap Vee en Vlees [2008] ECR I-8763, at § 46-48.

One cannot conclude from this case that the principle is applicable whenever community law is concerned. However, the Court recognizes that such a principle has a strong basis in the principles of the rights of the defence, legal certainty and legitimate expectation. It could be indirectly appealed to.

The thorniest question is the real standards of review applied. This question is of special relevance here as the two countries chose different models, a specialized Court and an unspecialized magistracy to review expert regulatory decisions.

f. The standards of review compared

We will compare first how the review operates against penalties (i) and then how it is used in dispute resolution cases (ii).

i) The review of penalties

Two questions arise here: how do judges in England and France review decisions not to sanction and afterwards how do they review penalties themselves.

The review of decisions not to take enforcement action seems quite different in both countries due to the deference the English judge shows to the administration.

At first sight the standard of review may seem similar: it is in both cases a limited review, however the outcome may be different, although the cases do not allow a definitive conclusion on this point.

The French administrative judge has held that decisions not to take enforcement action were reviewed according to the standard of the “manifest error of appreciation”⁵⁹⁸. The State’s Council wants to give the regulatory authority discretion on this point: it is for the administrative authority to consider, according to the circumstances of the case and the nature of the breaches, enforcement action is needed”⁵⁹⁹.

But, as always, the administrative judge adds that the administration takes its decision “under the control of the judge”. This is a sentence always used by the administrative judge. That’s why the judge checks the regulatory body actually was right in the particular circumstances not to take enforcement action. If there is strong evidence of a manifest error the judge will quash the decision.

In England on the other hand the review, although limited to irrationality, seems to be different, for the judge repeats that it does not want to interfere with the decision of the agency even though there is compelling evidence that enforcement action is needed. For example in *Cityhook*, the OFT decided to close a case after having concluded that there were strong evidence of an anticompetitive practice. The investigation that the OFT made unearthed evidence of such practices but the case was closed because of a choice of allocation of limited resources. As the judge puts it: “A failure to act because of limited resources does not always render the public authority immune from the court’s intervention... but ordinarily the allocation of limited resources to the implementation of statutory duties (and the

⁵⁹⁸ Conseil d’État, 23 avril 1997, *Société des auteurs et compositeurs dramatiques*, n° 131688, Recueil Lebon p. 163.

⁵⁹⁹ Conseil d’État, 9 juin 2006, *Association des usagers des médias d'Europe*, n° 267898, inédit.

discretionary exercises that inevitably arise) is a matter left to the body with which the responsibility lies”.⁶⁰⁰

However, citing a precedent concerning the Serious Fraud Office, the judge held that the Court would only intervene in exceptional circumstances⁶⁰¹. The judge feels sorry for the claimant but feel powerless to intervene in this case.⁶⁰²

Exceptional circumstances seem a much stronger test than the “manifest error of appreciation test”. The English legal doctrine comments that when an administrative authority is in charge of enforcing the law, it should be interpreted as an obligation and not as a discretion.⁶⁰³ However the fact that the administration has only limited resources is a sufficient argument to justify not enforcing the law.⁶⁰⁴

In effect the review is different: whereas the State’s Council will check and analyse the reasons not to enforce the law in order to control the refusal to enforce⁶⁰⁵; the English judge, although saying that there was a breach apparently, did not want to interfere.

Now, when the regulatory body enforces the law and pronounces a penalty, how do English and French judges review these decisions?

As far as the French administrative judge is concerned the sanctions are reviewed according to the same principles we laid out earlier without showing any sign of originality. Internal and external legality are reviewed and the standard of review is the “maximum standard” (“contrôle maximum”). All the aspects of the decisions are reviewed. The proportionality of the financial penalty will be assessed as well as the proportionality of the interference in a fundamental right when such as right is concerned. It is often the case in broadcasting case. The breach of freedom of expression is often claimed but very seldom successful. It is

⁶⁰⁰ The Queen (on the application of) Cityhook Limited Cityhook (Cornwall) Limited v Office of Fair Trading [2009] EWHC 57 (Admin), § 88.

⁶⁰¹ Regina (Corner House Research and another) v Director of the Serious Fraud Office (Justice intervening) [2008] 3 WLR 568, § 30 : « It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator ». The judge quotes the cases: R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 141; R v Director of Public Prosecutions, Ex p Manning [2001] QB 330, § 23; R (Birmingham) v Director of the Serious Fraud Office [2007] QB 727, § 63–64; Mohit v Director of Public Prosecutions of Mauritius [2006] 1 WLR 3343, § 17 et 21; Sharma v Brown-Antoine [2007] 1 WLR 780, § 14(1)–(6).

⁶⁰² V. The Queen (on the application of) Cityhook Limited Cityhook (Cornwall) Limited v Office of Fair Trading [2009] EWHC 57 (Admin), § 165: “The power of this court to intervene, not merely at the stage with which that case was concerned, but in the stages of the process with which this case is concerned, exists. However, it exists within the well-established, but relatively limited, traditional public law parameters. When it comes to the most appropriate allocation of limited resources, whether financial or manpower or both, the court may only require the body charged with the statutory responsibility for the deployment of those resources to think again if the decision under challenge was irrational in the Wednesbury sense. For the reasons I have given, I am unable to conclude that that threshold has been crossed in this case”.

⁶⁰³ De Smith’s Judicial Review, préc., n° 5-071.

⁶⁰⁴ R v Secretary of State for Social Services, Ex p Hincks (1980) 1 BMLR 93; R v Cambridge Health Authority, Ex p B [1995] 1 WLR 898; R v North and East Devon HA, ex parte Coughlan [2001] QB 213; R v Chief Constable of Sussex, ex p International Trader’s Ferry Ltd [1999] 2 AC 418.

⁶⁰⁵ J.-L. Autin, Autorités administratives indépendantes, JurisClasseur Administratif, Fasc. 75, n° 135.

obvious that no freedom is unlimited and has to be reconciled with the freedom of others, that's why abusive, racist or anti-Semitic talks cannot shield themselves under this freedom. Equally, speech that would offend public order can be sanctioned. The State's Council has, in this respect, held that the agency for broadcasting (Conseil supérieur de l'audiovisuel) was right to sanction a journalist who rejoiced in the death of a policeman on radio.⁶⁰⁶

In English law, penalties imposed by Postcomm and Ofcom have been challenged by way of judicial review. Concerning Postcomm, Royal Mail challenged the level of the penalty imposed but failed to convince Sedley LJ. The Commission sanctioned Royal Mail for the loss of mail, loss that was of such a scale that it was a breach of the licence. Royal Mail argued that the Commission failed to follow its policy on penalties because the policy said that any penalty imposed by the Commission would be soundly based on fact. The Commission considered that on the total loss of mail, 50% of the total losses of mail could be attributed to breach of the licence. For Royal Mail, in the absence of any evidence that actually 50% of the loss could be attributed to the breach no penalty could be imposed. Sedley LJ confirms Postcomm's reasoning: "Royal Mail appears to take the approach traditional in criminal cases in which a defendant could do nothing and see whether the prosecution can prove its case, an approach now much qualified even in criminal cases... Royal Mail's submission that in the absence of proof of a precise percentage of loss resulting from the breach of license, no penalty at all can be imposed, demonstrates the fallacy of the stance it has taken, in my view".⁶⁰⁷

Another case illustrates that where human rights are concerned, the judge reviews the proportionality of the sanction. In the Gaunt litigation, a journalist threw abuses on a politician, calling him a Nazi. Ofcom took enforcement action, found a breach but did not impose a sanction. The journalist challenged the decision alleging that it was a breach of his freedom of expression.

Here the judge carefully reviews the proportionality of the decision and all the factors that should be taken into account when assessing this proportionality: it was a political show, the journalist was known for its strong positions, the interviewee was a politician, used to strong arguments: "It was therefore an interview where G's freedom of expression was to be accorded a high degree of protection". But the judge found that "the offensive and abusive nature of the broadcast was gratuitous, having no factual context or justification". Furthermore no sanction was imposed.⁶⁰⁸ The Court of Appeal confirmed the judgement, after a carefully and detailed analysis of the necessity to respect the journalist's freedom of speech and the need to sanction the excesses in the use of this liberty.⁶⁰⁹

The standard of review concerning penalties seems similar. Even though the English judge should be not reviewing facts, it seems here that it did so, quoting the sentences. Also, the proportionality of the infringement is reviewed. The only difference that remains is that the judicial review judge in the United Kingdom cannot substitute its decisions to that of the regulatory authority. Even in an appeal before the CAT the substitution does not exist, even though it is an explicit requirement of article 6, when a "criminal charge" is at stake.

⁶⁰⁶ Conseil d'État, 20 mai 1996, Société Vortex, n° 167694, Recueil Lebon p. 189, AJDA, 1996, p. 711.

⁶⁰⁷ Royal Mail Group Plc v The Postal Services Commission [2008] EWCA Civ 33, at § 34-36.

⁶⁰⁸ R. (on the application of Gaunt) v Office of Communications (OFCOM) [2010] EWHC 1756 (Admin).

⁶⁰⁹ V. HM The Queen on the application of Jon Gaunt v The Office of Communications [2011] EWCA Civ 692.

How is the review done when disputes resolution is concerned?

ii) The review of dispute resolution decisions

The two bodies responsible for the review of dispute resolution decisions are the CAT in the United Kingdom and the Paris Court of Appeal in France (the State's Council has only a limited jurisdiction concerning the dispute resolution decisions of the broadcasting authority where no expert economic knowledge is needed or, more precisely, in the one appeal available the same degree of expertise was not necessary).

Compared to the decisions of the CAT, the Paris Court of Appeal has achieved neither the consistency nor the accuracy in its role as the reviewing Court of dispute resolution decisions. The inadequacy of the Paris Court of Appeal review can be demonstrated first by showing how the Court does not manage to establish a coherent standard and to what extent the Court misuses its power of substitution.

The Paris Court of Appeal sends mixed signals concerning the standard of review it applies actually. As a full jurisdiction appeal Court, it should in principle exercise a maximum review. It would be completely improper to limit its standard to the manifest error of appreciation standard, for the Court enjoys the same powers as the regulators when reviewing their decisions.

But while saying that it has the power to review the merits of the decisions, the Court also holds sometimes that the regulator did not make any manifest error of appreciation.⁶¹⁰

Furthermore, the analysis of the judgements shows that the Court does not achieve to separate its expertise as contract judge and its role in the present instances as an “administrative judge”. The Paris Court of Appeal is indeed staffed with private law judge, used to adjudicate on private disputes, and dispute resolution decision are apparently about contracts. But what the Court does not achieve to do is to see that regulators, when they adjudicate on these disputes about access, actually fulfil their role, as administrations would do. They have statutory duties and their decision should be judged according to their statutory objectives. The role of the Court of appeal is to explain, and that's what the CAT is doing, to what extent and how the economic methodology used to set a price for the contract achieves the statutory objective. Instead of doing this the Court of appeal, certainly because it lacks the expertise, does not explain the statutory objectives, and after having quashed the decision uses contract law principles to settle the dispute without even explaining how these principles are coherent with the statutory and EC law objectives.

By contrast the work achieved by the CAT seems coherent. The CAT has consistently held that it is not the regulator, it should not therefore usurp its role but it is not either a judicial review judge.⁶¹¹ In other words it is not a *de novo* hearing but it is nonetheless a review on the merits.⁶¹² In this respect, the CAT said that “the question is whether OFCOM's

⁶¹⁰ Cour d'appel de Paris, 1e ch., Sect. H, 26 février 2002, 9 Télécom Réseau c. France Télécom ; Cour d'appel de Paris, 1e ch., Sect. H, 20 janvier 2004, France Télécom c. UPC France, n° RG 03/12848.

⁶¹¹ BT v Ofcom [2010] CAT 17, at n° 68: “A Section 192 Appeal is not a “*de novo*” hearing”.

⁶¹² T-Mobile (UK) Ltd v Office of Communications [2008] CAT 12, spéc. § 80-83.

determination was right, not whether it lies with the range of reasonable responses for a regulator to take”.⁶¹³ It is not a judicial review, it is not a de novo hearing, it is an appeal in the sense that the decision will only be reviewed according to the grounds of appeal mentioned in the notice of appeal. The CAT explains its standards of review very clearly showing that the review will only take into account relevant grounds of appeal: « Section 192 Appeal is a “merits” review as opposed to a judicial review. The second requirement... makes clear that the Tribunal considers (“on the merits”) the decision that is being appealed to it by reference only to the grounds of appeal set out in the notice of appeal. This second limb also says nothing about admissibility, but simply makes clear that the Tribunal must, on an appeal, consider whether the decision being appealed can be justified in the light of the grounds of appeal, as set out in the notice of appeal. A Section 192 Appeal is not a “de novo” hearing... By section 192 (6) of the 2003 Act and rule 8 (4) (b) of the 2003 Tribunal Rules, the notice of appeal must set out specifically where it is contended OFCOM went wrong, identifying errors of fact, errors of law and/or the wrong exercise of discretion. The evidence adduced will, obviously, go to support these contentions. What is intended is the very reverse of a de novo hearing. OFCOM’s decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points. The nature of the appeal before the Tribunal is similarly made clear in sections 193 (3) and (4) of the 2003 Act. These sections make plain that it is not for the Tribunal to usurp OFCOM’s decision-making role. The Tribunal’s role is not to make a fresh determination, but to indicate to OFCOM what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal and then to remit the matter back to OFCOM. In short, a de novo re-run of the original investigation is not envisaged. The Section 192 Appeal process is a sharper tool, based on a three stage process: (a) The notice of appeal must set out specifically the alleged deficiencies in the decision under appeal. (b) The Tribunal considers those deficiencies on the merits. (c) If those deficiencies – or any of them are made out – the matter is then remitted to OFCOM ». ⁶¹⁴

Unlike the Paris Court of Appeal the CAT is very clear about the standard applied. Also, another merit of this Court is that the expertise it has serves the purpose of the statutes. It is very clear reading the decisions of the CAT that Ofcom is not considered as an arbitrator or a commercial judge but as an administration fulfilling its statutory role. The difficulty in regulatory litigation on questions of access is to assess to what extent the methods used fulfil these objectives.⁶¹⁵ That’s what the CAT tries to achieve and that’s what the Paris Court of Appeal has difficulty in doing because of its culture and also because of its lack of expertise.

The other advantage of the ad hoc English solution is that the procedures adopted are very well suited to the specificities of the system of regulation.

g. Procedural specificities: the status of the regulatory authority before the judge

⁶¹³ Competition Appeal Tribunal, *British Telecommunications Plc and Everything Everywhere Limited v Office of communications* [2011] CAT 24, § 192.

⁶¹⁴ *British Telecommunications Plc v Office of Communications* [2010] CAT 17, at § 72-77.

⁶¹⁵ *British Telecommunications Plc v Office of Communications* [2011] CAT 5.

We will study one specific problem here: the status of the regulatory authority before the reviewing Court. This problem shows the consequences of giving the review to a civil judge in France.

Before the French administrative judge or before the English CAT and before the High court it is commonly accepted that the regulatory authority must be a party to the litigation. Its decision is challenged; it is therefore logical that it could defend it and explain it to the Court.

Because of the nature of the litigation (a dispute on access contract) and because the French civil judge denies the regulatory authority its status as an administration and considers it as a first instance judge, the regulatory authority is not party to the litigation. It can only file observations to enlighten the Court on its decision.

It is very likely that this position contradicts community law. In the *Vebic* case, involving competition law, the ECJ held that because the Belgian competition authority was not a party to the litigation before the Brussels Court of Appeals, the effectiveness of EU law was impaired: “In that regard, as the Advocate General has remarked in point 74 of his Opinion, if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly 'captive' to the pleas in law and arguments put forward by the undertaking (s) bringing the proceedings. In a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU. A national competition authority's obligation to ensure that Articles 101 TFEU and 102 TFEU are applied effectively therefore requires that the authority should be entitled to participate, as a defendant or respondent, in proceedings before a national court which challenge a decision that the authority itself has taken.”⁶¹⁶

This statement shows very well the inadequacy of civil procedures to administrative litigation. Administrative bodies such as regulatory authorities are invested with powers they have to use in the general interest; they are enforcers of EU law. How could they defend their remit if they are not a party to the litigation? For example, when Ofcom was dissatisfied by a decision of the CAT, it challenged it before the Court of appeal in order to have some points of law clarified.⁶¹⁷ This possibility is denied to French regulatory authorities so that in fact the litigation is “captured”, as the ECJ puts it, by private interests.

⁶¹⁶ Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkeren (VEBIC) VZW* [2010] ECR 00.

⁶¹⁷ *Floe Telecom Ltd (in liquidation) v Office of Communications (T-Mobile (UK) Ltd intervening)* [2009] EWCA Civ 47: “the general rule was that the only legitimate purpose of an appeal from the decision of a lower court, or in the case of a second appeal to the Court of Appeal from an appellate tribunal, was to reverse or vary an order on the ground that the lower court's decision was wrong, or was unjust because of a procedural or other irregularity in that court's proceedings; that a specialist tribunal established to adjudicate on disputes should ensure it was not pressured by parties or interveners or critics to yield to the temptation of giving generous general advice and guidance on matters it was not intended, qualified or equipped to do, since more harm than good could be done by deciding more than was necessary for the adjudication of the actual dispute; that the Court of Appeal itself, by accepting an appeal against a lower court's unnecessary rulings on points of law, also ran the risk of making a situation worse by expressing unnecessary opinions; but that, in the circumstances of the case, it was right for the Court of Appeal to hear the appeals of the parties who succeeded in the tribunal,

The position of the law is therefore highly unsatisfactory as regards the procedures before the civil judge in France. The Vebic case, even though the legal context is different (competition law governed by an EC regulation and not utility regulation governed by directives that leave more discretion for implementation to member States), pushes for a reform.

In conclusion, the review of the legality of the decisions of regulatory authorities is, in both countries, a mishmash as Tony Prosser puts it. Furthermore it is a mishmash that is not compliant by international law standards. Judicial review to challenge penalties does not seem to meet the requirement of the criminal side of article 6. The review before the Paris Court of Appeal seems highly unsatisfactory as far as the procedure and the standard of review are concerned. The civil judge does not manage to master its role as a judge of the legality of an administrative decision.

The situation calls for a reform in both countries. France could learn from the necessary expertise the reviewing Court should enjoy and establish an administrative court specialised in economic and regulatory matters in order to review these decisions, with a final appeal to the State's Council. The elements shown above call for the transfer of the litigation from the civil to the administrative judge, who is able to manage the control of administrative decisions taken in the public interest.

On the other hand, judicial review seems at the crossroad. It could seem easy to say that a more inquisitorial procedure and a more systematic approach to administrative decision are warranted. It seems however short sighted for many obstacles stand in the way, such as the cost of judicial review. However, given the explosion of administrative repression (administrative penalties were introduced in the fields of Competition law, in all the regulatory sectors under study, in financial markets, in licensing and the Regulatory Enforcement and Sanctions Act 2008) criminal courts are now deprived of much of their role. It cannot be said that the protections afforded before the administration amount to the protections of the criminal law. In order to comply with the requirement of article 6, either the protections are afforded at first instance (i.e. before the administration) or by a subsequent full jurisdiction appeal). This is why the State's Council moved its standard to the appeal of full jurisdiction in case of penalties. Compliance with article 6 needs a choice. That's why we would strongly argue in favour of giving a general right of appeal before a tribunal (perhaps the first-tier tribunal) when a penalty is concerned.

The same caution should be used when proposing reforms as far as liability of regulatory authorities is concerned.

although the court should restrict its judgment to those matters on which there were good reasons, in the interests of the parties and the public at large, for departing from the general rule”.

7.2 - ACCOUNTABILITY BEFORE COURTS: THE LIABILITY OF REGULATORY BODIES IN ENGLISH AND FRENCH LAW

It is true that in France since 1873, administrative liability has been said to be autonomous and to be governed by special principles. It is even one of the reasons why Dicey refused this system. However since then the trend has been very favourable to citizen. Liability for gross negligence (“responsabilité pour faute lourde”) is progressively disappearing, but it can serve a useful purpose when some statutes tend to create an immunity of the State for tortious conduct in some instances, the State’s Council held that Parliament does not intend to exclude liability for gross negligence.

In this respect, the liability of regulatory authorities for their enforcement activities stands in stark contrast for the administrative judge has held that their responsibility could only be engaged for gross negligence (“faute lourde”).

Compared to this situation, the liability of regulatory authorities seems even more difficult to prove in England. The cases show that in only rare circumstances will the judge find a regulatory authority liable for damages.

We would like first to assess and explains what constitutes the difference between the regimes of public liability in the two countries. Contrary to common knowledge, it does not seem to us that the existence of an administrative law in France explains today the main differences (7.2.1). Afterwards we will compare the regimes of liability for regulator’s activities in the two countries (7.2.2). Given the dearth of cases in both countries, the analysis cannot be as comprehensive as the one concerning legality.

7.2.1 THE BASIS AND FUNCTION OF PUBLIC LIABILITY IN THE TWO COUNTRIES

It should first be noted as it is very difficult to assess and give any general answer as to the nature of tort law in the common law system because of the various torts, because of the difference between common law and equity.

Having said this, it is widely contended and acknowledged that the main difference between the systems of public liability in England and France diverge because of the existence of an administrative law of liability in France.⁶¹⁸

This explanation, although it may explain some differences, fails to explain the nature differences of regime. First, as the doctrine has showed the differences in France between public and private liability are not that fundamental, and is converging in many ways⁶¹⁹. We would like to contend that the main difference that explains profoundly the regimes of liability lies in the conception of tort law in both countries, and this conception is indifferent to the private or public nature of liability. Judges tend to think of liability in the same way whether they are administrative or civil judges.

The basis of the difference lies in the conception of fault in both systems. Whereas France has an absolute conception of fault, common law systems tends to have a relative conception of fault. The theory of aquilian relativity has never been received in France (except in criminal law until 1989). The theory of aquilian liability is also received in Germany. The purpose of this theory is to explore the purpose of the legal rule to find the protected interests and the ambit of defendants' liability to plaintiffs. Looking at the interests protected by the norm is never something a civil or an administrative judge is doing. In this respect the fault is absolute and that's why every illegality (whether committed by a private person or a public body) is a fault. The fact that a rule protects the public interest can never prevent people from claiming that a fault has been committed. When Roland Drago asks himself why is the State liable in damages? The answer he gives is that because the one of the State's agents has made a fault, the regime is based on the notion of fault even though sometimes a fault is not needed and many there are more and more instances where the State is liable without fault.⁶²⁰

The basis of the difference in liability (an absolute and a relative conception of the fault) is also explained by the functions of tort law. In France, tort law has a sole purpose traditionally (and the fact that it is public or private does not change the conclusion): to compensate damages. In the United Kingdom, on the other hand, the function of tort law is more obscure

⁶¹⁸ Governmental Liability: A Comparative Study, J. Bell, A. W. Bradley (ed.), at introduction, p. 3; G. Samuels, "Governmental Liability in Tort and the Public and Private Law Distinction", (1988) 8 Legal Studies, 277; D. Fairgrieve, State Liability in Tort, A comparative Law Study, at p. 57; M. Andenas, D. Fairgrieve, "Sufficiently Serious? Judicial Restraint in Tortious Liability of Public Authorities and the European Influence", at p. 286, in English Public Law and the Common Law of Europe, M. Andenas (ed), Key Haven Publications Plc, 1998.

⁶¹⁹ R. Chapus, Responsabilité publique et responsabilité privée, Les influences réciproques des jurisprudences administrative et judiciaire, p. 557. A. Tunc, Étude comparée de la responsabilité délictuelle en droit privé et en droit public; Ch. Eisenmann, "Sur le degré d'originalité du régime de la responsabilité extra-contractuelle des personnes (collectivités) publiques (La soumission de cette responsabilité à un droit "autonome" est-elle le principe ?)", JCP 1949.I.742 et 751.

⁶²⁰ R. Drago, Responsabilité (Principes généraux de la), Répertoire de la responsabilité de la puissance publique, 2004, at n° 29.

due to the numerous torts, the difference between common law and equity, but it seems that the doctrine emphasizes the vindication of rights and interests as a primary function of tort law. For Tony Honore the function of tort law would be to “to define and give content to people's rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed”.⁶²¹ It seems obvious that English tort law may have other functions (punitive, compensatory of course), but the stress put on interests and rights distinguishes it from the French function that is more simple and blunt: compensate a person from damage.

We will see to what extent the differences outlined above explain the differences of regime concerning the liability of regulatory authorities in France and in the United Kingdom.

⁶²¹ T. Honore, “The Morality of Tort Law”, in D. G. Owen (ed.), *Philosophical Foundations of Tort Law* O.U.P., 1995, p.75. See also Clerk & Lindsell on Torts 20th Ed., at n° 1-11; N. Witzleb, R. Carroll, “The role of vindication in torts damages” (2009) 17 *Tort. Law Review* 16; P. Cane, *The anatomy of tort law*, Oxford, Hart Pub., 1997, at chap. 7; C. Harlow, “A Punitive Role for Tort Law?”, in *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, at p. 247.

7.2.2 THE LIABILITY OF REGULATORY AUTHORITIES IN THEIR ENFORCEMENT ACTIVITY IN FRANCE AND IN THE UNITED KINGDOM COMPARED.

As the French study is quite simple, we will begin by showing that regulatory authorities in France can be held liable for their enforcement activity only for gross negligence (“faute lourde”) (1). We will expose afterwards the difficulties of engaging the liability of regulatory authorities in England (2).

1. The liability of regulatory authorities for their enforcement activity in France: the need for gross negligence

It should be noted first that given what we said about the transfer of the judicial review function to the civil judge in certain instances, it has been held that the transfer also entails the transfer of liability actions but only in so far as the tort alleged is the illegality of the decision. In other words the civil judge, reviewing the legality of the decision will also be responsible to assess the liability that such an illegality causes.⁶²² All other actions must be brought to the administrative judge (for example the defective functioning of regulatory authorities). The tort resulting from the functioning of the agency goes to the administrative whereas the tort resulting from the illegality of the decision goes to the administrative judge but only in so far as Parliament has transferred the appeal to the civil judge. Whatever the competent judge the same law applies, the French civil Supreme Court held since a long time that the civil judge has to apply administrative law when judging administrative law cases⁶²³.

Also it should be noted that where Parliament has conferred the legal personality to the agency, this agency is personally responsible for the damage it causes. The liability of the State only comes where the agency would not be capable to compensate the loss. In the sectors we study no agency has legal personality independent of the State, they therefore engage the liability of the State (except in rail, the agency, equivalent of the ORR, was given legal personality).

It was a long established principle that the liability of the State for enforcement activities, or activities of monitoring is only engaged for gross negligence. This solution was extended to the prudential regulator (there is no litigation in the field of utilities). The explanation for the solution is interesting. The case concerned the collapse of a bank. The State’s Council considered that accepting the liability of “simple fault” of the State in this instance would have the effect of transferring the primary responsibility from the banks to the State. For the administrative judge, it is the bank itself and its shareholders maybe that are responsible for the collapse and not primarily the regulator, that’s why gross negligence was required. Thus

⁶²² Tribunal des conflits, 22 juin 1992, Mizon, n° 02671, Recueil Lebon p. 486; Conseil d’État, Sect., 6 juillet 1990, n° 62716, 77723 et 84309, Compagnie diamantaire d’Anvers et Delcourt, Recueil Lebon 1990, p. 206; Tribunal des conflits, conflit sur renvoi du Conseil d’État, 2 mai 2011, Société Europe Finance et Industrie c. Autorité des marchés financiers, n° 3766.

⁶²³ Cour de cassation ; civ., 23 novembre 1956, Trésor Public c. Giry, Bull. civ. II, 407.

the State's Council quashed the judgement of the Paris Administrative Court of appeal that thought that a simple fault was needed.⁶²⁴

In the Kéchician case, concerning the prudential regulator gross negligence was found because, the Commission knew of the very difficult situation of the bank and did not take all the necessary measures to prevent the collapse. The judge reproached the Commission its lack of firmness and determination towards the directors of the bank to order them to restore the financial stability of the institution.

However, where there is a real specificity in the liability of regulators for their enforcement powers is that the State's Council held that the liability of the State because of the illegality of a penalty imposed by a regulator was again under a regime of gross negligence.

It is therefore settled that regulators are responsible for their gross negligence. But the dearth of cases renders the analysis difficult. The comparison seems very difficult for the French cases concern financial regulation where, as we will see, English regulators enjoy a statutory immunity. We will show however how difficult it is to hold a regulator liable for its acts.

2. The difficulty to engage the liability of regulators in the United Kingdom

We will study the different torts that could be relevant to our study. Because there is a litigation that is very close to the facts in the Kéchician case we studied (the collapse of a bank) it is important to study the tort of misfeasance in public office (a). The tort of negligence will then be studied (b). Finally, we will assess to what extent liability can be found where an administrative decision is held illegal.

a. Misfeasance in public office

The only really public tort is perhaps the most unsuited to today's concerns to compensate for the damage suffered because of the State.

The Three Rivers litigation shows to what extent it can lead to unfortunate results. Parliament had protected the Bank of England from the engagement of its liability except in case of misfeasance in public office. It was therefore the only tort the claimants could use. The Three Rivers litigation shows how hard it is and how unsuited this tort is when injured people want to claim damages for unlawful administrative action.

It follows from Bourgoïn and Three Rivers that the tort has two limbs according to the fact that the action is legal or not. However, irrespective of the legality of the action, the claimant must show the intention of the public official who must have acted intentionally, maliciously or recklessly.⁶²⁵ What is especially difficult when using this tort is to prove the intention.

⁶²⁴ Conseil d'État, 30 novembre 2001, Kéchichian, n° 219562, Recueil Lebon, p. 587, Conseil d'État, 18 février 2002, n° 214179, Groupe Norbert Dentressangle.

⁶²⁵ Bourgoïn SA v Ministry of Agriculture, Fisheries and Food Court of Appeal (Civil Division), 29 July 1985 [1986] Q.B. 716. See P. Craig, Administrative Law, pp. 984-989; Clerk & Lindsell on Torts 20th Ed., chap. 14, sect. 4; Three Rivers District Council v Governor and Company of the Bank of England (n° 3) [2001] UKHL 16. V. C. Proctor, Financial Regulators -- Risks And Liabilities, Part 1, Journal of International Banking and Financial Law (2002) 1 JIBFL 15.

Proving the subjective recklessness of an institution or an agent (but which agent?) makes “it difficult for any action to succeed”, as Paul Craig puts it.

Furthermore, the tort bears such an infamous connotation and is such a strong censure that the Court would be shy to hold that the Bank of England committed such a tort. That’s why the litigation proved to be, according to Adrian Zuckerman, such “a colossal wreck”.⁶²⁶

On the other hand the liability of the French prudential regulator for gross negligence is not as strong or infamous, some errors were found to amount to a gross negligence and compensation was awarded to the extent that the errors found could account for the loss. The judge held that the faults made by the regulator accounted for 10% of the damage suffered and claimants were compensated accordingly.

Apart from the tort of misfeasance in public office, the tort of negligence can be of relevance.

b. Negligence

As is well known, the tort of negligence requires a duty of care and a breach of that duty. However the Courts have found many obstacles to the existence of a duty of care when public bodies are concerned.

First, they have refused as non justiciable the existence of a duty of care when questions of policy are concerned. It is true that tort law seems unsuited to tackle this kind of problems and that policy questions seems unlikely, at first glance, to create a duty of care. That’s why judges have established the policy/operational distinction preferring to treat the question at the operational level. The *Dorset Yacht*⁶²⁷ case shows how this distinction operates in practice. The Home Office had chosen to establish a policy of open instead of closed borstal institutions in order to reform young offender. These young boys achieved to escape the supervision of their guards and caused damage to a Yacht nearby. The Lords thought it was easier to engage the liability of the administration because of lack of supervision (the operational part of the scheme) than on the merit of the policy, which was not for them to discuss. The same problem arose in a planning case where the inspectors proved careless in their inspection of a house. In this case, *Anns*⁶²⁸, it was also better to approach the problem out of the careless inspection rather than on the problem of planning.

An element of proximity has also been sometimes found to justify the existence of a duty of care⁶²⁹, and this element of proximity is relevant for the cases concerned supervision activities and even one case was about financial supervision.⁶³⁰ However, here the aquilian relativity theory played against the claimants. Lord Keith held that the regulator had a duty to supervise

⁶²⁶ A. Zuckerman, “A colossal wreck - the BCCI - Three Rivers litigation”, *Civil Justice Quarterly*, 2006, 25(Jul), 287-311. F. Rossi, “Tort Liability of Financial Regulators: A Comparative Study of Italian and English Law in a European Context” (2003) 14 *European Business Law Review* pp. 643-671, at p. 671: « Some authors have furthermore pointed out that the test of misfeasance in public office will lead the internal staff of the Bank of England to be subject to an intensive and unpleasant public examination. This may affect both the reputation and honor of the Bank itself and lead to a loss of market confidence ».

⁶²⁷ *Home Office v Dorset Yacht Co Ltd* [1970] A.C. 1004. See also *Perrett v Collins* [1999] P.N.L.R. 77

⁶²⁸ *Anns v Merton LBC* [1978] A.C. 728.

⁶²⁹ Clerk & Lindsell on Torts 20th Ed., préc., n° 14-42.

⁶³⁰ *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] A.C. 175.

companies in the general public interest, “but no special responsibility towards individual members of the public”. Therefore no special duty of care was found and consequently no liability could be placed on the regulator, because the statutory provisions were taken to protect the public interest and not the public.

If we compare this case to the French one we see that for the Privy Council the financial regulator cannot be liable in tort because it acts in the public interest whereas it can be liable in France but for gross negligence. The State’s Council does not even ask itself the question of the protected interest. As we said earlier, in French tort law (whether public or private) a fault is not dependent on the interest protected.

For the same reason the failure to act when a public authority has a statutory duty to do so is not in itself sufficient to create a duty of care. The only exception is when the failure to act amounts to an irrationality: « [T]he minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised ». ⁶³¹ Here again the purpose of the norm is taken into account by the judges.

It derives from this study that only in exceptional circumstances would a utility regulator be liable for the damage caused by its action. It exercises its power in the public interest and it has to balance, in its action, the different interest of the members of the public with the ones of the undertakings being regulated. A duty of care would therefore be very difficult to acknowledge.

The last element of the study is the liability of public bodies for illegalities.

c. Illegalities and liability

The common law position is that an illegality is not in itself sufficient to give rise to liability. ⁶³²

This point is crucial for it shows very well how public and private law are consistent with one another. In English law of torts a breach of statutory duty, whether by a public or a private person, is not in itself sufficient to create a cause of action, whereas in French law of tort an illegality (whether a breach of a statutory or regulatory duty) is always a fault. There is no need in France to know what Parliament intended, unlike in the United Kingdom. ⁶³³

⁶³¹ V. Stovin v Wise [1996] A.C. 923. See P. Craig, Administrative Law, at p. 977, n° 29-023.

⁶³² H. W. R. Wade, C. F. Forsyth, Administrative Law, at p. 663 ; Law Commission, Monetary Remedies in Public Law, at n° 2.22. See X (Minors) v Bedfordshire County Council [1995] 2 AC 633, at p. 730: “It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action”.

⁶³³ Clerk & Lindsell on Torts 20th Ed., at n° 9-01 and 9-02.

We see again here how fault is considered differently in both countries: it is an absolute concept in France; it is relative in the common law. That's why in France every illegality in the part of a public body is a fault.

However this may change given the new remedy available for breaches of human rights provided at article 8 HRA and also with the remedy against breaches of community law.

A decision has held Ofgem liable in damages for a breach of the HRA.⁶³⁴ In this judgement, a decision of the Gas and Electricity Market Authority to refuse accreditation for two power stations was found unlawful. The judge further found that the consequence of the unlawfulness "was to deny the claimants a pecuniary benefit to which they were statutorily entitled". It followed from this conclusion "that there has been a breach of the claimants' right to property under article 1 of the First Protocol of the European Convention on Human Rights".

This decision seems to us an improper application of the HRA. Article 8 HRA provides that "any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate". And article 8 (6) provides that "'unlawful' means unlawful under section 6 (1)".

But the unlawfulness is an article 6 unlawfulness, in other words the action must be unlawful on the ground that it is contrary to human rights ("It is unlawful for a public authority to act in a way which is incompatible with a Convention right"). Here what the judge says is not that the decision is illegal on the ground that it violates a human right but on the ground that it is contrary to the relevant legislation and furthermore breaches their right to property.

It does not seem a proper application of the HRA. From this judgement one could say that any illegality that constitutes also a breach of a human right can give rise to damages. This is not what was intended by Parliament when one reads article 8 and 6 HRA.

Community law could also be used to compensate for a breach of EU law. However, as Wade and Forsyth argue: "English law and Community law are evolving in opposite directions"⁶³⁵ for the House of Lords "has set itself firmly against damages as a remedy for breach of statutory duty in public law".⁶³⁶

As a conclusion tort law operates indeed very differently in the two countries, but not for the reasons usually given. In order to understand the differences one has to take into account the profound unity of French tort law, in the way judges think about the notion of fault and the function of tort law in the legal system. Consistently with the universal and absolute conception of article 1382 of the Code civil and despite the Blanco statement of autonomy, French public law of tort does not stand apart. The favourable solutions to the injured in

⁶³⁴ V. *Infinis Plc v. Infinis (Re-Gen) Ltd, R (on the application of) v Gas & Electricity Markets Authority & Anor* [2011] EWHC 1873 (Admin) (10 August 2011), at § 103.

⁶³⁵ H. W. R. Wade, C. F. Forsyth, *Administrative Law*, at p. 667. See P. P. Craig, "Once more unto the breach: the Community, the State and damages liability", *Law Quarterly Review*, 1997, 113(Jan), 67-94.

⁶³⁶ V. R. Carnwath, "The Thornton heresy exposed: financial remedies for breach of public duties" *P.L.* 1998, Aut, 407-422.

administrative law can be explained by the general function attributed to tort law in the French legal system and not to the existence of a special judge.

After having studied the legal accountability of regulators in their enforcement activity (both at the legality and the liability levels) it is now requisite to analyse the political accountability of these bodies.

7.3 - ACCOUNTABILITY BEFORE PARLIAMENT

The issue of accountability of the regulatory bodies is a wide ranging one. However consistently with our research object we can only review it as far as enforcement powers are concerned. The question is therefore how Parliaments hold regulators to account as far as they exercise their enforcement powers.

The conclusion we have been lead to formulate is that obviously the role played by Parliament in an activity that is so akin to a judicial activity can only be ex post and limited. One would not see with a favourable eye Parliament intervening in the sanctioning process of a regulator. Would it be fair? That's why the review can only be ex post facto.

The conclusion we have been lead to formulate is that despite the importance of the notion of accountability to Parliament in the United Kingdom in justifying judicial deference to administrative decision, the interest of Parliament in the enforcement process is very small. The reports of the different committees of the Houses show two elements. Parliament is interested in the value for money effect of enforcement activities, not the legality of respect fro human rights.⁶³⁷ When Parliament interests itself to enforcement activity, it has been because of under enforcement. For example, Parliament has severely criticised Ofwat (after a report of the National Audit Office) for not enforcing the licences. The N.A.O. report showed that few water undertakings met their objectives, but Ofwat did not sanction them.⁶³⁸

Parliament is therefore not interested in compliance with human rights, but with efficiency and effectiveness.

The Select Committee on the Constitution however put great emphasis on the need to design effective appeals mechanisms to protect undertakings against enforcement actions. It even proposed the establishment of a special court to review the decisions of regulators.⁶³⁹ The new animal would have been the regulatory appeals tribunal. The proposition has not been implemented. It seems that the CAT is progressively given this role.

The Parliamentary ombudsman has played, in some instances, a critical role in redressing the wrongs against miscarriage of regulation and to raise the awareness of Parliament on important occasions. The shortcomings of tort law in regulatory settings were here addressed by the Ombudsman and people could be compensated for their loss, through Ombudsman and Parliamentary intervention.

⁶³⁷ House of Lords, Select Committee on Regulators, UK Economic Regulators, tome 1, at § 4.21.

⁶³⁸ House of Lords, Select Committee on Regulators, UK Economic Regulators, tome 1, at § 5.54 suiv. ; National Audit Office, Ofwat—Meeting the demand for water, published 19 January 2007, HC 150, Session 2006-07, at pp. 19 suiv..

⁶³⁹ House of Lords, Select Committee on the Constitution, *The Regulatory State: Ensuring its Accountability*, HL Paper 68-I, at § 224: "There are those who think there should be greater rights of appeal. According to Professor Prosser, 'The safest course is to provide a full right of appeal on the merits whenever a regulatory decision may have substantial consequences for a regulated enterprise'. Royal Mail told us that lack of appropriate appeal mechanisms meant more confrontation in the regulatory relationship. The Electricity Association, noting the development of the Competition Appeal Tribunal, suggested that the answer would be a comprehensive 'new animal', a regulatory appeals tribunal. Professor Prosser supported an enhanced role for the Competition Appeal Tribunal though his views were questioned by the Competition Commission, which suggested that its expertise and resources made it a suitable focus for any fast track appeals."

The focus of the French Parliament is completely different. The enforcement powers of the regulators are a constant concern of Parliament. The reports commissioned always study this as a problem and try to find ways to improve the guarantees to the citizens and the undertakings. However, the role of Parliament in judicial review being completely different in that the State's Council shows no deference to administrative action, the French Parliament has less importance in this respect. However, as we saw in chapter 6, the great input of the French Parliament is to design proper protection when passing the laws.

As a conclusion, the focus of both Parliaments is completely different as regards the enforcement activity of utility regulators. The French Parliament is interested in human rights safeguards against a function it regards as a judicial one (the Administration usurping a function that is not its) whereas the British Parliament is interested in efficiency and effectiveness.

The English Parliament is not unconscious of the problem. The Select Committee on the Constitution said on the Regulatory Enforcement and Sanctions Bill⁶⁴⁰ that the scheme went against the rule of law as Dicey envisaged it. Quoting Dicey who said "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint"; the Select Committee considered that "this passage in our view continues to provide a powerful reminder of the importance of the role of ordinary courts, rather than the executive, in dispensing justice and punishment. The scheme envisaged in the bill will enable the transfer, on an unprecedented scale, of responsibilities for deciding guilt and imposing financial sanctions (with no upper limit) away from independent and impartial judges to officials."

This quotation shows that the English Parliament can also, as well as the French one be sensitive to the traditional principles that were once at the foundations of the rule of law in each country.

⁶⁴⁰ 1st Report of Session 2007–08, HL Paper 16, at § 9.

