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SOME ARGUMENTS IN DEFENCE OF A FORMAL MEANING OF THE RULE OF LAW

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1. THE RULE OF LAW AS AN ESSENTIALLY CONTESTED CONCEPT

One of the few Italian scholars who has explicitly put the “rule of law” at the core of his research programme wondered some years ago if «this old concept, which they still

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discuss abroad, if only to analyze its agony, and which in Italy does not even deserve an encyclopaedia entry, could be the key to rethinking the theory of public law», and who founded the new journal "Diritto Pubblico" on this question[2].

The aim of the "programme" which sprang from this issue was to question the compatibility between public law (as a special system) and the rule of law, purporting the need for a "unique scientific order" of the State as a condition of human liberty. It was no coincidence that the slogan created to synthesize this programme of implementation of the rule of law (especially towards the government-public administration institutions) was the following: «one subject, one law, one judge».

Such a programme involves the assumption of a point of view about the relationship between public authorities and the law, which is neither neutral nor banal, and which can be included among theories that assign a formal meaning to the rule of law. It is based, indeed, on the simple claim that if people must be guided by rules, it should be really possible to follow such rules. More to the point, what these theories stress is the factor of the stability of law, which depends on the generality of norms which the law is made up of[3]. According to this idea, the law, among other social institutions, is normally one of those typically devoted to stability and not to change. This outcome is pursued, on the one hand, by putting human actions in wider categories (erasing differences) instead of trusting the individual discretion of people, and, on the other hand, by embracing the idea of authority: this gives more importance to what comes from certain sources insofar as they are only such: a book, a group of wise people, a particular court. We may or may not desire a social system like this, and we may or not believe it is achievable (to some extent), but it is

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[2] A. ORSI BATTAGLINI, *In limine*, *Dir. Pubb*., 1/1995, p. VII.

[3] About this requisite see F. SCHAUER, *Thinking Like a Lawyer. A new Introduction to Legal Rasoning*, Cambridge (US), London, 2009, section 2.3.

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difficult to conceive law as an autonomous social institution if we do not take these formal elements into account.

It is, however, doubtful that in using expressions like "rule of law" or "principle of legality" – of which the former is an implementation according to Bobbio[4] – we can grasp a core-meaning shared by legal culture. Even if we extend our view beyond national and continental European boundaries, where "rule of law" means a typical historically determined State organization (*Rechstaat*)[5], we realize that the "rule of law" (ROL), is an essentially contested concept[6]. This concept (or ideal) has, however, at least in the Anglo-

[4] N. BOBBIO, *Legalità*, in N. BOBBIO, N. MATTEUCCI, *Dizionario di politica*,Torino, 1976, p. 518-9. There are some who sustain conversely that the principle of legality referring to the administration represents the implementation of the ROL connected to the non arbitrariness of government (R. GUASTINI, *«Un soggetto, un diritto, un giudice». I fondamenti teorici di una giustizia non-amministrativa, Dir. Pubbl., 1/2008*, p. 31).

[5] G. PALOMBELLA, *The Rule of Law and its Core*, in *Relocating the Rule of Law*, eds. G. PALOMBELLA e N. WALKER, Oxford and Portland, Oregon, 2009, p. 19.

[6] J. WALDRON, *Is the Rule Of Law an Essentially Contested Concept* (in Florida)?, *Law and Philosophy*, n. 21, 2002, p. 137; Y. HASEBE, *The Rule of Law and Its Predicament*, *Ratio Juris*, 17/2004, p. 489. The syntagma "role of law" is able to express both a conceptual and a symbolic meaning. The ambiguity itself of the word 'rule' makes at least two different meanings possible. According to F. SCHAUER, *Playing by the rules*, Oxford, 1991, p. 315, it may represent both a system in which the practice of organized administration prevails and the kind of relationship that exists between a rule-based decision-making strategy and the decision-making process adopted by the institution designed by the term law. Naturally the term rule of law can assume different meanings in different contexts. For instance, S. CASSESE, *Le basi costituzionali*, in *Id*., Ed., *Trattato di Diritto Amministrativo*, t. I, Milano, 2003, p. 213, uses the expression "rule of law" in opposition to "principle of legality" insofar as the latter, in the field of administrative law, is interpreted as a subjection of administrative authority only to the legislative acts of the Parliament. With regard to disagreements about values which support the ROL see P.P. CRAIG, *Legislative Intent and Legislative Supremacy: A Reply to Professor Allan*, *Oxford Journal of Legal Studies*, 24/2004, p. 585-6. For a recent analysis of the ROL both from a historical and a political-legal point of view see B.Z. TAMANAHA, *On the Rule of Law*, Cambridge, 2004.

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Saxon tradition, a core consisting in the almost banal fact[7] that public authorities and citizens are «*bound by and act consistently with the law*»[8].

As Scheuerman effectively wrote «the "centerpiece" of the rule of law has always been the idea that governmental action must be rendered calculable and restrained: it was the exercise of arbitrary power, of despotism as they dramatically labelled it, that worried liberals as diverse as the bourgeoisie Locke and the rabble-rousing Paine, the aristocratic Montesquieu and the state-building Madison»[9].

There are three objectives we may traditionally associate with the ROL:

to protect against the Hobbesian war of all against all;

to enable people to plan their business with reasonable confidence in the legal consequences of their actions;

to guarantee at least against some kinds of officials arbitrariness[10].

What in my opinion remains interesting are the following two questions connected to the above mentioned "programme": a) to what extent we can say that the ROL is a

[7] Somehow «es plausible sostener que los sistemas juridicos, tal como los entendemos contemporaneamente, constituyen en alguna medida ejemplos de rule of law» (M.C. REDONDO, *Sobre Principios y estado de derecho*, in M.C. REDONDO, J.M. SAUCA, P.A. IBAÑEZ, *Estato de derecho y decisiones judiciales*, Madrid, 2009, p. 9).

[8] B.Z. TAMANAHA, *The Rule of Law: an Elusive Concept*?, in G. PALOMBELLA e N. WALKER, *quoted*, p. 3.

[9] W. SCHEUERMAN, Between the Norm and the Exception: The Frankfurt School and the Rule of Law, Cambridge, Mass., 1994, p. 68-9.

[10] In this sense see R.H. FALLON JR., *"The Rule of Law" As a Concept in Constitutional Discourse*, Col. Law Rev., 1/1997, p. 7-8.

concept and to what extent it is an ideal; b) to what extent such an ideal is possible and therefore worth pursuing .

2. THE DIFFERENT INSTANCES ENTAILED IN THE ROL

One of the reasons why the ROL is an essentially disputed concept is that it entails apparently opposite instances.

In such an illustrious philosopher as Aristotle, considered the founder of the ROL tradition, we can already find the terms of the modern discussion, synthesized in the maxim about "government by law, not by humans" extracted from a famous fragment of "Politics": «It follows therefore that it is preferable that law should rule rather than any single one the citizens. And following this same line of reasoning further, we must add that even if it is better that certain persons rule, these persons should be appointed as guardians of the laws and their servants (…) Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetition»[11].

Those who believe that law is something which deals with reason (including some ideal of fairness) will understand the requisite of the ROL implied in this fragment as an attitude of legal institutions to facilitate the use of reason. This requires a belief in the fact that it is reasonable to entrust oneself to the discretion of the decision-makers and not to the rigidness of rules[12]. Those who, conversely, consider law as a way to reduce risks of

[11] Aristotle, *The Politics*, ch. III, ed. T.A. Sinclair, London, 1992, p. 226.

[12] L.B. SOLUM, *Equity and the Rule of Law*, in I. SHAPIRO, ed., *Nomos XXXVI: The Rule of Law*, New York, 1994, p. 120.

individual judgment, will interpret this fragment as the need to confer little, or if possible, no discretion, on decision-makers[13].

Such an opposition becomes clearer when we consider other statements by Aristotle. In the fragment quoted above, he says in hard cases the ROL could only limit itself to specify which subjects must have the legal responsibility of deciding the case through appropriate procedural rules[14]. In *Nichomachean Ethics* he adds that «all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. (…) And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts»[15].

In the Rhetoric he sustains, further, that the solution of all problems must be decided in advance, according to the widest extent, through general norms[16].

So, it is true that Aristotle's discourse points out an unavoidable tension between universalism and particularism, but, on the one hand, this doesn't necessarily threaten the ROL, on the other hand, it seems quite clear that Aristotle considers the universalism of law more desirable than case by case decision-making (particularism). This has not prevented

[13] A. SCALIA, *The Rule of Law as a Law of Rules*, University of Chicago Law Review, 56/1989, p. 1182.

[14] ARISTOTLE, *Politica*, III, 1287 a, *quoted*.

[15] Aristotle, *The Nichomachean Ethics*, ch. V, ed. D. Ross, Oxford New York, 1998, p. 133.

[16] ARISTOTELE, *Retorica*, I, 1354.

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us from developing a centuries old controversy «about whether judge-made law is to be regarded as the epitome of the Rule of Law or as part of the problem that the Rule of Law is supposed to solve»[17], starting from the unarguable authority of Aristotle in Western culture.

3. THE PIVOTAL FUNCTION OF LAW IN GUIDING HUMAN CONDUCT

A necessary move to try to attenuate the above mentioned ambiguity is to consider the distinction between the formal and substantive conceptions of the ROL, or as other scholars prefer to say between legalistic or non-legalistic conceptions[18].

Non-legalistic or substantive conceptions are those which believe that the State should justify the treatment of individuals with reference to the common good, which should include, for example, basic freedom of thought, speech, conscience and association[19.] But, as Joseph Raz explains, rule of law is different from rule of good law[20]. In the latter meaning the ROL loses every specific function, while it becomes interesting if it indicates the conditions which the law must accomplish to fulfill its function of pivot in guiding human conduct[21]. The intuition at the basis of the concept is, therefore, that the law

[17] J. WALDRON, *quoted*, p. 142.

[18] N.W. BARBER, *Must Legalistic Conceptions of The Rule of Law Have a Social Dimension?, Ratio Juris*, 4/2004, p. 474.

[19] N.W. BARBER, *quoted*, p. 481-2.

[20] J. RAZ, *The Authority of Law. Essays on Law and Morality*, Oxford, 1979, p. 211, who argues that the ROL has nothing to do with ideals such as democracy, justice, human rights, etc. We can find bad legal systems which deny human rights but which, however, perfectly accomplish the ROL.

[21] A. MARMOR, *The Rule of Law and Its Limits, Law and Philosophy*, 23/2004, p. 5.

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must be capable of guiding the behaviour of its subjects. It is precisely in this sense that the ROL must be a formal concept[22]. As Raz observes, Friedrich August von Hayek has provided one of the clearest and most powerful definitions of the idea of the ROL: «Nothing distinguishes more clearly a free country from a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Thus, within the known rules of the game, the individual is free to pursue his personal ends, certain that the powers of government will not be used deliberately to frustrate his efforts»[23].

As for the above mentioned function of "pivot" there have been endless attempts to individuate requisites that a legal system should possess for this outcome. One of the most famous and influential lists is the one provided by Lon Fuller, according to which the law should undertake the seven following conditions: generality, adequate publicity, non retroactivity, intelligibility, non contradictoriness, stability, consistence (that is the practical possibility for a disposition to be followed), plus an eighth referring to the congruency between the behaviour of officials and what rules establish[24]. To these requisites we can add some doctrines of the separation of powers, at least in the sense – implied by some of the conditions we have just listed – that organisms which respectively produce and apply the law are different from each other[25].

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[22] J. RAZ, *quoted*, p. 214. V. B.Z. TAMANAHA, *On the rule of Law, quoted*, p. 91-101.

[23] F.A. HAYEK, *The Road to Serfdom*, London, 1944, 54.

[24] L. FULLER, *The Morality of Law*, Yale, 1969, p. 39 ss..

[25] See M. JORI, *Interpretazione e creatività: il caso della specialità*, *Criminalia. Annuario di scienze penalistiche*, 2010, p. 218.

Fuller, like many others, points out that these criteria should be integrated in a system and that the implementation of each of them is a question of degree, as they do not all have the same importance[26]. They figure out a structure of a legal system which is in some respects even utopian, and which however poses a question of degree regarding the objectives indicated not only for their reciprocal importance but also for their practical achievability[27]. No legal system could effectively fulfill the above mentioned eight requisites and as a matter of fact none actually fulfills them.

Moreover these requisites constitute causes for disputes and disagreements. Some of these requisites are in fact vague: when is a statute reasonably stable? Some requisites may be in conflict with each other: for example the determinacy of norms with the stability and supremacy of the law over the decisions of judges[28].

Nonetheless, the ROL seems to remain an unavoidable concept from a theoretical point of view and an ideal continuously recalled by lawyers and non-lawyers. A more detailed analysis of the ROL's ingredients can explain the reason for this.

[26] Many lawyers have provided alternative lists, often similar to Fuller's list. According to T. ENDICOTT, *The Impossibility of the Rule of Law*, *Oxford Journal of Legal Studies*, 19/1999, 1-2, this ideal requires that: «laws must be open, clear, coherent, prospective and stable; legislation and executive action should be governed by laws with those characteristics; and there must be courts that impose the rule of law».

[27] J. RAZ, *quoted*, p. 222.

[28] We can think about the case of a vague rule written in a legislative act replaced by a clear rule created by courts, which, at the same time, fails to comply with the criteria of the supremacy of legislative law and the stability of law, but complies with the requisite of the determinacy of rules.

4. The Actual Guidance of Action Permitted by Rules

The above mentioned requisites can be divided into two groups, respectively corresponding to the two fundamental faces of law: rules and their application.

The criteria of the first group are those related to the need that law is made up of directives designated to permit an actual guidance of action. We can say that the appropriate form for a norm to be a "rule" represents, from this point of view, an indispensable requisite of the ROL, and that this appropriate form consists of generality[29], completeness and definitiveness[30]. They are the properties of a rule suitable to achieve that basic need of a normative order consisting in correcting a lack of coordination, deliberative costs and mistakes due to inexperience which accompany a particularistic decision-making strategy[31]. In other words these properties allow for the allocation of decision-makers responsibility, choosing whether to adopt, through "serious rules"[32], a universalistic strategy (which we can associate with other values commonly connected with the ROL, such as predictability and equality of treatment[33]) or to rely on the sensibility of particular decision-makers.

One of the main functions of the ROL, as we said, is to foster the coordination of actions through the self-direction of people, also in cases in which the legal system establishes forms of control to respect the law, entrusted to the public administration.

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[29] Both from the subjective and objective point of view (see A. MARMOR, *The Rule of Law…, quoted*, p. 9-15).

[30] R.S. SUMMERS, *Form and Function in a Legal System. A General Study*, Cambridge, 2006, p. 136-164.

[31] L. ALEXANDER, *Law and Formalism, Revista Argentina de Teoría Jurídica*, vol VI, n. 1, 2005, 21.

[32] L. ALEXANDER, *quoted*, p. 18.

[33] All things that «enable and facilitate efforts of citizens to rely on the law and to plan their lives accordngly» (R.S. SUMMERS, *The Place of Form in the Fundamentals of Law, Ratio Iuris*, 14/2001, p. 123).

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We can consider the two following legislative rules. According to art. 4 of the legislative decree n. 152 of 2006, «the environmental evaluation of plan, programmes and projects have the aim of guaranteeing the compatibility of human activities with the conditions for a sustainable development». According to art. 5 of the Ministerial Decree n. 1444 of 1968 «in new factories and similar constructions included in D zones, the surface which is to be destined to public spaces or collective activities, public gardens and parking places, cannot be less than 10% of the whole surface destined to such buildings».

It seems clear that the first rule does not pursue the objective of allowing people to coordinate their own reciprocal actions, applying the rule by themselves; while the second rule is much more consistent with the above mentioned objective. The first rule contains vague, ethically controversial or evaluative terms; so those who want to follow norms like this should look for a solution by themselves: as a matter of fact the norm does not provide a real help. In such a hypothesis the aim of the rule is, probably, not to guide conduct but to confer decision-making power – depending on different hypothesis – on judges or administrative officials, who, in turn, may use such power either in a case by case way or producing, albeit in an informal structure, more definite rules[34].

But the problem of vagueness and ambiguity of the terms of law is a part of law itself – since it is based on ordinary language – and a certain degree of unpredictability is nonetheless unavoidable.

However, vagueness in itself in not necessarily bad for the ROL, just as the discretion which derives from such vagueness, as in norms like those quoted above about the powers of administrative authorities, is not always bad[35]. Some controlled administrative discretion, in circumstances such as environmental evaluations of projects,

[34] V. F. SCHAUER, *Playing*…, *quoted*, p. 345.

[35] T. ENDICOTT, *The Impossibility*…, quoted, p. 17; A. MARMOR, *The Rule of Law*…, quoted, p. 14-15.

can be considered more desirable than no discretion[36]. In this respect we should recall that there are two kinds of general rules deliberately aimed at posing limitations to the unpredictability caused by particular commands (especially administrative acts and regulations): those which grant the powers needed to emit lawful orders and those which instruct the decision-makers about how to use these powers.

5. Administrative Law and the Principle of Legality

The latter, as is well known, is a central theme of administrative law, concerning the meaning itself of the principle of legality. From the point of view of the Italian legislative system, scholars continue to debate on whether the Constitution has established, in addition to the "right of the Parliament to the last word", the right of the Parliament to the "first word"[37]: in other words if and how a formal legislative act must be the parameter for administrative power including regulatory power.

In this respect we can stress two main aspects.

The first deals with the connection between the rule of law (The State founded on law) and representative democracy. The latter is not a necessary ingredient of the ROL in a strict sense: however, from an historical point of view, it is undoubtedly true that parliamentary democracy and separation of powers have been the area in which the ROL has grown in the modern era[38]. Moreover a political theory of the ROL is surely allowed to

[36] J. RAZ, *The Authority* …, quoted, p. 222.

[37] M. DOGLIANI, *Il principio di legalità dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima*, *Dir. Pubb*., 1/2008, p. 13.

[38] According to C. HARLOW, *Global Administrative Law: The Quest for Principles and Values*, *The European Journal of International Law*, 2001, (17), p. 190, «Every Western administrative law system is founded on the rule

add further ingredients to the formal ones and also claim that they do not derive from a political theory but from the law system. There is, however, a common opinion among public law scholars that the value of legality is above all in its derivation from parliamentary legislation.

The second aspect deals with the content that is to be given to this legality. It is common to distinguish between a substantive and formal legality. Oddly in this context the substantive legality is such as to recall more the formal than the substantive conception of the ROL. In fact it requires that the norm which grants the administrative authority the power is not "blank", but it effectively constrains the power of administration to a great extent both from a material and procedural point of view. So this closes the technique of legality to the dominant way of conceiving the principle of "reserved to the law" ("riserva di legge")[39]. What further characterizes this doctrine is the search for an anchor for the official legislation: especially the persuasion that such a requisite constitutes a legal necessity on constitutional grounds[40].

I would like to concentrate on the first aspect. According to an important doctrinal view the core of legality is in its connection with the principle of parliamentary sovereignty, insofar as it guarantees fundamental rights through the features of the

of law and, while an administrative law system can – and may have to – function outside a system of democratic government, a system of democratic government that does not observe the rule of law is simply paradoxical. The rule of law ideal forms the central background theory against which the principles of administrative law operate, while at the same time acting as a governing principle. It gives rise to a further set of principles, which form the body of administrative law».

[39] With regard to these issues see R. CAVALLO PERIN, *Potere di ordinanza e principio di legalità*, Milano, 1990, p. 126, also for references to the literature about public law. See also G. SALA, *Potere amministrativo e principi dell'ordinamento*, Milano, 1993, p. 244.

[40] See Constitutional Court n. 32/2009. In the past, on the contrary, the Constitutional Court seemed to express a tendency towards the sufficiency of the formal legality (see for example Const. Court n. 201/1987).

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procedures with which law is created. In particular the legislation has an axiological content of a guarantee of rights because it is an expression of the subject (democratically representative) which is able to solve conflicts of interests coming from society, insofar as it has certain typical requisites of the institutional bodies which directly represent the people. Such requisites are the dialectic between the majority and the opposition, the publicity of parliamentary procedures (versus the secrecy of governmental procedures), the inclusive and reversible character of legislation, fairness as a whole, the diachronic element of legislature, which is not relative to a single act[41]. As we noticed above – with some lexical complexity – this is the aspect which is defined as the law in a formal sense, that is as an act of the "representative body", in opposition to the substantive meaning of law, that is a cluster of legal norms[42].

This aspect is, therefore, directly connected to the representative democratic regime, the political system in which the principle of legality has developed in Western Society[43], but it does not affect, as we noticed, requisites, either formal or substantive, necessary for the ROL[44]. The two approaches are not necessarily compatible. Let us think, for instance, of the way in which the problem of administrative decision-like statutes ("leggi-provvedimento") is treated. According to the formal conception of the principle of legality such statutes should be considered an infraction of the principle itself, while according to the democratic-representative approach to the ROL (primate of the Parliament)

[41] In this direction see M. DOGLIANI, *quoted*, p. 15-16.

[42] For the formal conception of the ROL legal norms have requisites not only of generality and abstractness, but also of "precision" and they pursue multiple objectives: certainty, consistence, accountability, efficiency, justiciability (R.S. SUMMERS, *A Formal Theory of the Rule of Law*, *Ratio Juris*, 2/1993, p. 131).

[43] For a view which aims to identify the historical-constitutional premises of the principle of legality in Italian legal system, see. A. ROMANO, *Amministrazione, principio di legalità e ordinamenti giuridici*, *Dir. Amm*., 1/1999, p. 115 s.

[44] B.Z. TAMANAHA, *A Concise Guide*…, quoted, 13.

these statutes are fully consistent with the principle of legality (and this was the position of the Constitutional Court for a long time)[45].

It is just about this specific aspect of the principle of legality that we find the main divisions: for supporters of a full and clear implementation of the ROL it is above all important that norms come from a directly representative institution[46]; for others the element necessary and sufficient for the legality of administrative action is the pre-existence of a rule which outlines the decision.

Sabino Cassese, in an open dispute with the idea of the principle of legality as asking for a previous conferring power rule of the legislative power, observes that «the principle of legality has a limited value and simply expresses the need to respect the law, when there is a law […] When a legislative discipline is absent we ought to guarantee that the administration does not decide in a case by case fashion, so risking a violation of the principle of impartiality […] the principle of legality assumes, then, the meaning of a predetermination, through a legislative act or an administrative regulation, of the general criteria of administrative action»[47]. It must be said that – though not always in a coherent way – case law (not only administrative courts) seems to propend for the idea that a legislative act is not always needed to confer a power, as a non primary source of law would be sufficient[48].

[45] With regard to this M. DOGLIANI, *Riserva di amministrazione*?, *Dir. pubbl*., 2000, p. 675; for the prohibition of statute-like decisions, see S. SPUNTARELLI, *L'amministrazione per legge*, Milano, 2007, p. 132.

[46] See, for instance, A. TRAVI, *Giurisprudenza amministrativa e principio di legalità*, Dir. Pubbl., 1/2005, p. 108, p. 121; more recently N. BASSI, *Principio di legalità e poteri amministrativi impliciti*, Milano, 2001, p. 117.

[47] S. CASSESE, *Le basi costituzionali*, *Trattato di diritto amministrativo*, ed. S. Cassese, t. I, *Diritto amministrativo generale*, Milano, 2000, p. 202.

[48] A. TRAVI, *quoted,* p. 108.

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In the direction indicated by Cassese, if, on the one hand, the principle of legality «has a more restricted range, on the other hand, it has a wider range, since it is referred to what that French call *règle de droit* […]»[49]. This "rule of law" has positive and negative aspects. The second concerns the difficulty for general legislative norms to keep administrative decision-making under control[50]. The positive aspect is that the norms that guide administrative agencies are not only to be found in the legislature, but also in the Constitution, international treaties, European Union directives and regulations, and in secondary sources of law. In addition we can find these norms in the "general principles of law", some of which «are created by courts themselves that extract them either from the same norms … or from criteria of a more general kind»[51]. In this phenomenon the distinguished scholar glimpses an affinity with the "Anglo-Saxon tradition", that is with a prevalently case law legal system, in which doctrine takes part in the formation of law.

Is this approach compatible with the formal conception of the ROL? Yes, insofar as it considers both the need for a normative predetermination of public and private subject conducts and the need to limit the discretional privileges of administrative authorities – through a sort of cooperation between legislators and judges[52]. No, insofar as he puts on the

[49] S. CASSESE, *quoted*.

[50] With regard to the discussion concerning the legitimacy of regulatory decisions of government, see R. BALDWIN, *Rules and Government*, Oxford, 1995, p. 60.

[51] S. CASSESE, *quoted*, 204.

[52] A very interesting field of investigation concerns the compatibility between the so called "regulation", which is increasingly entrusted to administrative authorities, and the values of the ROL. "*Regulation*", as has been said, «*is an intimate, albeit not affectionate, process of negotiation, threat, bargaining, compromise, and confrontation that cannot be subjected to fixed, pre-established rules without becoming either excessively lax or excessively harsh*» (M.M. FEELEY, E.L. RUBIN, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, Cambridge, 1998, p. 348). The point is that, apart from the kind of legal sources and procedures through which regulations are produced, «*by focusing on the issue of whether or not the rule of law is constitutive of law, we can too easily miss the possibility that legislation of the sort Rubin considers may in fact be part of a*

same level every type of norm (rules, standards, principles)[53], without stressing that they are different from each other. This idea is, moreover, more suitable for a system characterized by a slight separation of powers as in the relationships between the State Members of the European Union, the Union itself and the "global order".

The issue of the deriving of powers from standards[54] – calling into question the creative role of courts – is, on the contrary, viewed with displeasure by those who adopt a substantive conception of the principle of legality (that is, apologizing for the linguistic confusion, a formal conception of the ROL), not only for the difficulty in acknowledging the conferring of power as coming from the representative body (that in some cases of standards written in a statutory act may be possible), but also because it weakens the strict legality of administrative power.

regulatory regime which does, nonetheless, comply with rule of law requirements» (L. MACDONALD, *Positivism and the Formal Rule of Law: Questioning the Connection*, *Australian Journal of Legal Philosophy*, 26/2001, p. 125).

[53] Questioning about principles, especially principles like reasonableness or proportionality – putting at stake the balancing of interests or values – often causes a shift towards a substantive conception of the ROL. However, also those who think that this ideal must pragmatically take into account a number of approaches (among which the substantive one), sustain that there are at least two reasons for minimizing the commitments of a substantive theory of the ROL. The first is the persistent fact of moral disagreements; the second is the lack of attractiveness of the ROL if it is not distinguishable from a theory of substantive justice (R.H. FALLON JR., *"The Rule of Law" As a Concept in Constitutional Discourse, quoted*, p. 53-54).

[54] We can find an example of this approach in the case law of administrative courts about the so called "self made review" (the power of annulling and revising a previous decision without a judicial review), entrusted to administrative authorities – also in the absence of a written statute – starting from the principle of the inexhaustibility of administrative power (see. A. TRAVI, *quoted*, 116).

6. The "Consistent" Application of Law

The theme of the application/creation of law allows us to go back to the Fullerian ingredients and particularly to those of the second group concerning the articulation[55] of the last condition, called "consistent application"[56], in a series of more defined criteria. These regard the guarantee that the machine created to have the law respected, fulfills this objective effectively and appropriately: the guarantee of the independence of courts, whose duty is to apply the law to the cases under their scrutiny (citizens can be guided by the law only if judges apply its norms faithfully, since judges are those who actually establish what the law is in every single case); fair trial; the role of courts limited to conformity to the rule of law, without powers of decision-making; the exclusion of discretionary powers regarding criminal prosecution.

The first point is the most important, because it means that judiciary independence is a necessary condition for the correct application of law, even though it is not a sufficient condition for this.

The requisite of the exclusion of decision/making powers seems to be the consequence of the independence of courts, but also in this case we need to understand what such an exclusion really means: in fact, either we should accept a cognitive approach to the interpretation of law[57], or some kind of choice at the moment of application is in

[55] Made by J. RAZ, *The Authority of Law…, quoted*, p. 216-218.

[56] «A very complex requirement which entails a whole range of principles and practices» (A. MARMOR, *The Rule of Law …, quoted*, p. 7).

[57] A thing that entails a lot of conceptual and practical problems. Moreover, unlike what is generally believed, a cognitive approach to interpretation of law is not included among the necessary requisites of the ROL. An inclination towards certainty – that is towards the importance of text – does not entail at all an adherence to epistemologically fallacious theories, such as the ones according to which it is sufficient to take into consideration the words written in a statute to get the only right answer to a legal question.

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some cases unavoidable. It is a question of degree: on many occasions a full congruence between general norms and single decisions is possible, on other occasions this cannot occur (for instance when the relative norms are vague). In this second case we need to establish if the choice must be limited to the public administration or if it belongs to the court. And also this interpretive decision can depend on establishing to what extent the requisite of judicial independence is satisfied. Much can be said about this regarding administrative courts in Italy[58].

7. FACTORS WHICH SEEM TO UNDERMINE THE RULE OF LAW

Those who claim that the ideal of the ROL is undesirable would be radically dissenting from most of what we have sustained so far, even though they would probably argue that the ROL is either conceptually inconsistent or empirically false. But in doing so they would probably attribute a series of features to the ROL which are quite far from its core. The many skeptical positions regarding the ROL in Italy share the conviction that we should be aware of a "crisis" or deep decline of the concept at stake, even though – and I want to stress this point again – this "perception" is very often "polluted" by the prescriptive objective to shed discredit on the formal meaning of the ROL.

The fact that is principally purported as a symptom of the crisis of the ROL is the "normative mess", which deprives the legal system of the requisite of stability and certainty: confusion both between legal sources at state level and in the relationship between state legal sources and other sources at regional, local and supranational level (EU,

[58] See A. ORSI BATTAGLINI, *Alla ricerca dello Stato di diritto. Per una giustizia «non- amministrativa» (Sonntagsgedanken)*, Milano, 2005, p. 60.

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global institutions); bad quality and too many legal rules; increasing appropriation by the government of Parliamentary prerogatives etc.

The issue would require a long and articulated exposition, but we can fix some points.

In a recent article a scholar used the term “critical facts” of the system of legal sources to refer to a series of “violations” grouped in three categories[59]. These factors of crisis of the principle of legality affecting the formal characteristics of the production of law are: a) violations of written rules regarding the production of law; b) violations of rules regarding the unwritten production of law (implied rules); c) deviations from an ideal pattern of a system of law sources. In the quoted article each of these infractions is analyzed with reference to the different types of sources of law: ordinary legislation; urgent decrees by government; delegated legislation; simplification and normative rearrangement; annual simplification legislative acts and unified texts; regulations and other normative acts made by the government; orders of the Prime Minister; regulations of independent authorities.

The interesting thing which this analysis shows is that almost all the cases of violations regard either a «determined ideal pattern of the system of legal sources» or just a presumed (unwritten) rule. Some examples, limited to the legislative branch, give an idea of this. Let us think, first of all, of the violations regarding the technique used to make a legislative act; for instance the statutes consisting of a few articles with hundreds of paragraphs. In such a case in order to identify the violation of the principle of legality we need to sustain that this praxis represents a betrayal of the purpose of art. 72 of the Italian Constitution, according to which legislative power is given to the parliamentary assemblies. This would mean that parliamentary assemblies must actually have the power to establish what the content of a statute is, but when a bill is prepared by the Government in a manner

[59] See L. GENINATTI SATÈ, *I fatti critici del sistema delle fonti e la crisi del principio di legalità, Dir. Pubbl,* 3/2005, p. 885.

that hardly makes it possible to do so (as in the above mentioned cases of articles of enormous length), Parliament would be deprived of its own prerogatives. Secondly, we may wonder whether the violation of the principle of the action reserved for the public administration through decision-like statutes, may be actually considered a violation, since the existence itself of a space of decision reserved for the public administration against the legislature is highly disputed. Let us also think, finally, of norms which establish the so called delegification and simplification of the legislation, which, according to many scholars appears to show a tendency towards a deep reform of the system of legal sources, such as requesting a revision of the principle of legality because of the erosion of boundaries between legislation and regulation.

In all these hypotheses we can see that in order to claim an infringement of the ROL we need to elaborate a set of values which determines a particular view of the principle of legality. The problem is that doing so we risk to undermine the ROL itself, because in the end we are trying to impose our view as the “true” meaning of the principle of legality. The above mentioned author points out a clever consideration when he wonders whether to stressing these threats to ideal or presumed requisites of legality could turn in favour of critics of the idea itself of the ROL in a parliamentary regime.

When, in other words, someone moves from these remarks to a judgment of inadequateness (not of a particular cluster of legal norms) but of the principle of legality as such, he makes an improper leap from a descriptive to a prescriptive argument. The proof of this shift is in the circumstance that generally the claim about the inadequateness of the ROL, which should be founded on a very accurate and difficult empirical inquiry, is considered to be self evident. Actually, to establish the degree of distance or proximity of a legal system from the ROL in general terms, we need to examine every single aspect of legal phenomenology, also taking into account whether and to what extent decision-makers themselves adopt strategies aimed at creating more stable and certain rules than the ones promulgated by legislators.

As a scholar has recently observed, we can see a tendency to deduce negative judgments about law from claims about facts regarding its bad quality, implying that, on the contrary, in the times of the liberal State the laws were all perfectly intelligible, provided with the requisites of generality and abstractness, etc.[60] We meet standard arguments like the following: while the domain of the bourgeoisie of the XVIII Century would guarantee uniformity which allowed the functioning of a State based on the ROL, the pluralism of the contemporary State would cause such a conflicting social context, with the consequent legislative mess typical of the democratic system, leading to the necessity to give up the guarantees offered by written law in favour of different kinds of guarantees provided by institutions more suited to facing the challenges of a complex world.

As well as the aspect regarding the quality, function, structure, etc., of the written law there are also other factors of stress, such as the eclipsing of the division of powers; the affirmation of the "result-oriented" administration, also related to the increase in the activities of public service carried out by public bodies with a corresponding decrease in the action regulated according to "formal legality"; the questioning of the independence of courts also favoured by the "discovery" of the non mechanical nature of the application of the law[61]. They are all issues of great importance, but for which – as for the question of normative disorder – it is hard to believe that they have such a novel character as to undermine the ideal of the ROL.

The real threat to the conceptual and empirical sustainability of the ROL comes, instead, from the so called globalization, insofar as it seems to attack the overall historical

[60] It is common to implicitly sustain that «judgements about values regarding the law, stated in the past by theorists of the ROL, were founded on judgements about facts (obviously dealing with facts which were very different from contemporary facts). It is the procedure which is incorrect (since a judgement about values cannot be deduced by an observation about facts) and it is the starting point which is misleading (that is that Orlando, Cammeo or Carré had a real world before them, which was absolutely different from the contemporary world, made up of an Olympian, general and abstract legislation ...). It is not true that administering through legislation, as a systematic and not episodic trend, is a recent phenomenon».

[61] With regard to all these profiles see R. Bin, *Lo Stato di diritto*, Bologna, 2004, p. 67 and more recently M. Dogliani, *quoted*, p. 18.

and conceptual construction on which the ideal of the ROL has developed[62]. The problem is too complex to be mentioned in this work[63]. What we need to mention, instead, is the approach that aims to redefine the principle of legality according to elements and assumptions different from those which are usually associated with its core meaning, sustaining the existence of a ROL of the global system.

This idea is strictly connected to the emergence of a global administrative law, an unexciting name, as has recently been said[64], to mean certain processes in action in the global order, which consist of a set of procedural rules and normative standards promulgated outside the national institutions and, at the same time, not belonging to the international public law. Standards which are imported in this sphere of regulation are based upon administrative law principles such as transparency, participation, and justiciability. It is a kind of answer to the need to control globalization which has no regard for the need to govern globalization itself through democracy.

As regards this body of norms of various genres – «agreement-norms and unilateral norms; external imposed norms and norms developed inside global institutions; global norms and national norms which have been applied to global institutions (for instance, those of the country where the headquarters of the organization is); hard and soft law»[65] – the ROL is often invoked. According to Cassese «the great number of norms, the development of principles and rules, the settlement of courts, enables us to say that the

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[62] See R. BIN, *quoted*, p. 103, who entitled the last chapter of the book «the ROL without the ROL?».

[63] For an approach to this issue and above all for some initial bibliographical references see S. CIVITARESE MATTEUCCI, *La forma presa sul serio*, Torino, 2006, p. 110.

[64] S. CHESTERMAN, *Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance*), in *New York University School of Law - Public Law & Legal Theory, Research Paper Series*, Working Paper no. 09-52, September 2009, http://ssrn.com/abstract=1435170, p. 4.

[65] S. CASSESE, *Il diritto amministrativo globale*, Riv. Trim. Dir. Pubb., 2/2005, p. 337.

administrative global system has a high degree of institutionalization (or legalization as the American scholars prefer to say). This is in direct relationship with the extension of the effectiveness of global decisions towards citizens, organizations and national companies (just think of tradable emissions regulated by the Kyoto agreement). Indeed the more the action of global organizations increases and goes beyond State boundaries and domestic public bodies, the more it becomes important to secure the respect of the rule of law, the principle of participation, and the duty to justify every decision, in order to guarantee a protection for citizens, organizations and companies not only from the States and other national public powers, but also from new global public powers»[66].

As we can see it is a picture of a global order or system (which seems to be identified just thanks to the reference, albeit evocative, to the ROL), which uses a somewhat superficial version of the ROL[67]. This version is so superficial as to induce the impression that even in this description there are prescriptive elements aimed at fostering the ideal, also useful in a domestic discussion, of a system founded on the principles-judges binomial, already expressed in the above mentioned argument of this author.

An issue only partially analogous concerns the ROL in the EU legal system. According to a recent opinion, this legal system appears to be quite far from the principle of legality even though the Court of Justice (since the Les Verts case) qualifies the EU as a «community based on law», and the Treaty of Maastricht has welcomed the principle of the ROL (art. 6.1 EUTr): «the failure of division of powers and the hierarchy of legal sources

[66] Last *quoted*, p. 338.

[67] The version which R.H. FALLON JR., *"The Rule of Law" As a Concept in Constitutional Discourse, quoted,* p. 30, calls The Legal Process Ideal Type, that is to say procedural fairness in creation and application of law; connection between the concept of law and reasonableness; a reasoned elaboration of connection between certain authoritative legal sources and certain rights and responsibilities in particular cases; judicial review. According to this author, however, this ideal type is compatible with the ROL only if it is accepted as a complementary or subsidiary instrument of the ideal types that he calls "historical" and "formal".

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to become enrooted; executive powers entrusted to national administrations, and above all a remarkable "jurisdicialization" of the principle of "community based on law", entrusted to the strong creative role of the Court of Justice, have so far prevented this principle from being outlined according to the outcomes of the continental tradition of administrative legality. In the Charter of Nice, the right to a good administration and an equal and impartial treatment (art. 41), is specified through the right to be heard, have access, and give reasons, which without doubt evoke justiciability more than legality of administration»[68].

The warning is, in other words, to take into consideration the real meaning of the terms used, because the expression "rule of law" often refers exclusively to the submission of every act of application of the EU law to the control of a court[69].

8. How to Keep Supporting the Rule of Law Ideals

Other scholars – sincerely worried about the above mentioned phenomena of abandoning the principles of the ROL – have begun to look for new answers which do not betray the values of the ROL.

In a recent article it has been sustained that lawyers have four possible arguments to face the crisis of the ROL, some implying, however, a substantial and radical

[68] B. Sordi, *Il principio di legalità nel diritto amministrativo che cambia. La prospettiva storica, Dir. amm.*, 1/2008, p. 5.

[69] V. K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in *Common Market Law Review*, 2007, p. 1625.

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abandonment of it: a) nihilism; b) an anchorage to scientific rationality (as in the doctrine of law and economics); c) a return to natural law; d) a cautious historicism[70].

Putting aside the first three, we can briefly consider the latter, which is the approach the author recommends. Starting from a positive historical judgment of the Italian tradition of public law doctrine, he purports that we should rely on doctrine and case law because they are an expression of an objectivity responding to the regulative idea of the ROL: «an authoritative and elaborate law made by doctrine and courts can surely subsidize the dispersed legislation; so, as far as possible, a solid and certain law, apt to "create limits" and bear the various functions of the principle of legality»[71].

This "recipe" may be only superficially considered a simple acknowledgment to the judge made law based on principles, an approach that cannot be associated with the idea of the ROL supported in this work. It is, on the contrary, an extreme attempt to defend the core of the ROL (to produce stability and certainty) giving up the aspect (conceptually unnecessary) of the creation of legal norms by legislative assemblies. The author invite us to be aware of the total ineptitude of Parliaments to make laws capable of guaranteeing that the legal system «is in a good state»[72], to go back to a sort of "sapiential law". It is clear that this solution requires the sharing of a positive ethical judgment about the corporation of lawyers and above all a commitment to the political legitimacy of such an appointment. But these are issues we cannot face here for reasons of space.

[70] M. DOGLIANI, *Il principio di legalità ..., quoted*, p. 22.

[71] Last *quoted*, p. 69.

[72] J.M. FINNIS, *Natural Law and Natural Rights*, Oxford, 1992, trad, it. *Legge naturale e diritti naturali*, Torino, 1996, p. 294.

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In the field of administrative law, there are even distinguished scholars who react to the tendency to forsake "the paths of legality"[73]. We are referring, firstly, to the recent theory according to which it is plausible to repropose apparently traditional patterns to contrast the factors of "deconstruction", viewed particularly in the practice of statute-like decisions and in the "escape" into "private law"[74]: the need for a more effective separation of powers and the return to the "construction" of administrative law rooted on the ROL conceived as a guarantee of the typicality of powers and the predictability of administrative decisions regardless of their content. Also in this case, therefore, we find an invocation of the role of the doctrine in recalling «patterns and principles of the ROL» to «contrast the anarchy of the legislator».

What in this approach appears original, and somehow countercurrent, is the identification of an impulse towards new configurations of the substantive legality coming from the EU law, which, almost paradoxically, would impose new normative standards against the domestic formal legality, but at the same time guaranteeing fundamental rights and liberties coming from the erosion of discretional powers conferred on public administration by domestic law.

We can, finally, look at the "crisis" from a different perspective as well, which, starting from a full adherence to the ideals of the ROL, considers the latter as factors that must still produce their innovative effects on the Italian legal system (even in the new context of considerable integration among legal systems). The point is not to go back to broken paths, but to draw new ones. This is the perspective which takes us back to the beginning of this article. It aims to determine, through adherence to the ROL, the dissolution of public law as a special branch of the legal system and so a complete rewriting of the language of rights, the dynamics of public power, and the judicial review of

[73] F. MERUSI, *Sentieri interrotti della legalità*, Bologna, 2007, p. 9.

[74] Last *quoted*, p. 27.

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administrative action. For this reason it has been recently noticed that the point of reference for this approach seems to be Albert Venn Dicey, one of the main historical figures of the ideal of the ROL[75].

9. THE "POLITICAL" COMMITMENT TO THE RULE OF LAW

There are no conclusions to draw. The only issue to stress is that the arguments about the ROL are essentially political ones. The important thing, in other words, is not to disguise precise choices about values as empirical facts.

Those who follows the ideal of the ROL claims that this has two different kinds of virtues[76].

The first concerns the conceptual side, actually the concept of law itself. With regard to this the effective image used by Raz is to compare law to a knife: a knife is not a knife if it is not able to cut, law is not law if it is not able to guide human behaviour, albeit ineffectively[77]. This means that, although the ROL is also a political ideal and therefore among the premises that a lawyer should assume, there is a part of such an ideal that concerns a value rooted in the law as a law, insofar as it is an instrument to pursue social outcomes, a kind of social institution which is to be used – like all devices – in the appropriate way. This inherent value is not a value in a moral sense, but just the value of

[75] R. GUASTINI, *Un soggetto, un diritto, un giudice*, *quoted*, p. 33.

[76] The two different meanings of the term "virtue" referring to the ROL, which I speak about in the text, have been outlined by N.W. BARBER, *Must Legalistic ...*, *quoted*, p. 477.

[77] Raz, *last quoted*, p. 225-6.

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the instrument as such, to be projected for the guidance of human conduct. Its specific virtue is to be morally neutral. This is, according to Raz, the virtue of efficiency, the virtue of the instrument as an instrument.

We cannot exclude, and this is the second aspect, the possibility to associate other virtues in the moral sense of this term with the ROL, although the ideal does not include all the virtues which a fair political system requires: for instance, impartiality, which can be better assured by general rules; public discussion and transparency, which can be fostered by an adequate publication of norms; more protection for the autonomy of citizens, which follows from a convinced adherence of courts to the ideal of the ROL; and we cannot exclude that sometime these virtues may also make it preferable to reduce the sharpness of the “knife”[78].

I shall end as follows. If the consistency between the rule of law and a single legal system is, after all, a question of degree (no law exists without a minimum amount, a full achievement of the ideal is not of this world), the extent to which a legal system is inspired by the ROL depends, mainly, on empirical factors. As has been argued, the “impossibility” of the ROL does not derive from conceptual or theoretical reasons, but more simply from the "infidelity" of officers in following the law and the incapacity (or convinced choice) of legislators to pursue the ideal[79]. But this does not mean that we should not keep on criticizing “unfaithful” judges and officers and that we should give up, for example,

[78] This is the thesis stated by A. MARMOR, *The Rule of Law and its Limits, quoted*, p. 8, according to whom it is not true that if «the sharper the knife, the better it cuts», then «the more a legal system instantiates the conditions of the rule of law, the better it functions in regulating human conduct». We can think, for instance, of the case of a not clear rule, depending on a political compromise, that is better than no rule at all. Indeed this compromise has permitted the promulgation of the norm which limits, at least partially, the discretion of the decision makers.

[79] T. ENDICOTT, *The Impossibility of the Rule of Law, quoted above, same page.*

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prescribing the use of a more appropriate and rigorous legal language to different legislators[80].

[80] F. SCARPELLI, M. JORI, V. FERRARI, *Molteplicità, frammentazione e oscurità delle fonti: è possibile la trasparenza?*, *Lavoro e Diritto*, 2001, 4, 579.

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SELF-ANNULMENT OF ADMINISTRATIVE ACTS IN BREACH OF EU LAW: THE ITALIAN EXPERIENCE

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INDEX

1. SCOPE OF THE PAPER

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Purpose of this paper is analyzing a topic already widely addressed by the jurisprudence and the scholars: which impact may really have EU law, and, especially, its jurisprudence, in the evolution, in Italy and in the Italian jurisprudence, of the self-annulment (in other terms, annulment *ex officio*, by the same Administration which has released the act[2]) of administrative acts not in line with EU law[3].

[2] On the self-annulment of administrative acts under Italian administrative law, see, in the international literature, in general terms, RAMAJOLI, *Administrative Internal Review, annual report, 2011, Italy*, in *Jus Publicum Network Review*, and, with specific attention to the influence of EU law, ELIANTONIO, *The Enforcement of EC Rights Against National Authorities and the Influence of Koebler and Kuehne & Heitz on Italian Administrative Law: Opening Pandora's Box?, Maastricht Faculty of Law Working Paper No. 2006/4.*

[3]On the this topic, many contributions have been offered by the legal scholars.

Among others, ARDITO, *Autotutela, affidamento e concorrenza nella giurisprudenza comunitaria*, in *Dir. amm*., 2008, 631; especially. 662; BECKER, *Application of Community Law by Member States' Public Authorities*: *between Autonomy and Effectiveness*, in *Comm. Market Law Rev*. 2007, 44, 1035.; CARANTA, *Comment to Case C-453/00, Kuhne & Heinz NV v. Produktschap voor Pluimvee en Eieren*, in *Comm. Market Law Rev.*, 2005, 42, 179; CARINGELLA, *Affidamento e autotutela: la strana coppia*, in *Riv. it. dir. pubbl. com.*,2008, 425; CHITI, *Diritto amministrativo europeo*, Milano, 2008, 572; CONTALDI, *Atti amministrativi contrastanti con il diritto comunitario*, in *Dir. Un. Eur*., 2007, 747; D'ANCONA, *Interesse pubblico, discrezionalità amministrativa e istanza di parte nell'annullamento d'ufficio: riflessioni su recenti sviluppi dottrinari e giurisprudenziali fra diritto interno e diritto comunitario,* in *Riv. it. dir. pubbl. com.,* 2009, 574.; DEL SIGNORE, *Il ruolo della Pubblica Amministrazione nazionale ai fini dell'effettività del diritto comunitario,* in *Riv. it. dir. pubbl. com.*, 2009, 442.; DE LUCA, *Sull'obbligo di riesame delle decisioni amministrative contrarie al diritto comunitario"*, in *www.giustamm.it*.; DE PRETIS, *«Illegittimità comunitaria » dell'atto amministrativo definitivo, certezza del diritto e potere di riesame*, in *Giorn. dir. amm*., 2004, 723; FERRARI, *Annullamento in autotutela di provvedimenti contrastanti con il diritto comunitario,* in *Giur. It*., 2008, 1286.; GALETTA, *Autotutela decisoria e diritto comunitario*, in *Riv. it. dir. pubbl. com*., 2005, 35; GALETTA, *I procedimenti di riesame, in La disciplina generale dell'azione amministrativa: saggi ordinati in sistema*, edited by CERULLI IRELLI, Napoli, 2006, 393, 398; GAROFOLI, *Concessione di lavori: discrezionalità del potere di annullamento d'ufficio e vincoli comunitari*, in *Urb. e app*., 1998, 1343; GATTINARA, *Il ruolo comunitario delle amministrazioni nazionali alla luce della sentenza Kuhne & Heitz*, in *Dir. com. scambi internaz.*, 2004, 489; GIOVAGNOLI, *L'atto amministrativo in contrasto con il diritto comunitario: il regime giuridico e il problema dell'autotutela decisoria*, in *www.giustamm.it*; GRECO, *Illegittimità comunitaria e pari dignità degli ordinamenti*, in *Riv. it. dir. pubbl. com*., 2008, 505; GRECO, *Il potere amministrativo nella (più*

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This legal issue has been largely debated. Still, it remains substantially unsettled. We will try to elaborate certain answers, also in the light of the recent reform of art. 97 of Constitution[4].

2. THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE: PROCEDURAL AUTONOMY AND PRINCIPLE OF EQUIVALENCY

European jurisprudence, although probably still in progress and so susceptible of stronger developments, shows, so far, a certain degree of prudence.

It is manifest and declared, in fact, the attention with which the European Court of Justice (ECJ) (sometimes in contrast with the opinions of General Advocates[5]) avoids to

recente) giurisprudenza del giudice comunitario, in *Riv. it. dir. pubbl. com.*, 2009, 819; GRUNER, *L'annullamento d'ufficio in bilico tra i principi di preminenza e di effettività del diritto comunitario, da un lato, ed i principi della certezza dl diritto e dell'autonomia procedurale degli Stati membri, dall'altro*, in *Dir. Proc. Amm*., 2007, 235 ss.; PIGNATELLI, *L'illegittimità "comunitaria" dell'atto amministrativo*, in *Giur. cost*., 2008, 3635.; RAIMONDI, *Atti nazionali inoppugnabili e diritto comunitario tra principio di effettività e competenze di attribuzione*, in *Dir. Un. Eur*., 2008, 773; TABOROWSKY, Comment to *Joined cases C-392/04 & C-422/04, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04), formerly ISIS Multimedia Net GmbH & Co. KG v. Bundesrepublik Deutschland,* in *Comm. Market Law Rev.,* 2007, 44, 1463; VALAGUZZA, *La concretizzazione dell'interesse pubblico nella recente giurisprudenza amministrativa in tema di annullamento d'ufficio*, in *Dir. Proc. Amm*, 2004, 1245; VILLATA - RAMAJOLI, *Il provvedimento amministrativo*, Torino, 2006, 560.

[4] Constitutional Law 20 April 2012, no. 1, which introduced a new par. 1 in art. 97 of Constitution, according to which «Public Administrations, in coherence with European Union law sistem, shall ensure an equilibrated balance-sheet and the sustainability of public debt» (« Le pubbliche amministrazioni, in coerenza con l'ordinamento dell'Unione europea, assicurano l'equilibrio dei bilanci e la sostenibilita' del debito pubblico»).

[5] See for example Opinion of Advocate General Lèger released on the 17 June 2003, case C-453/00, *Kuhne & Heitz*: « The principles of direct applicability and the primacy of Community law, and also the provisions of Article 10 EC, preclude a national administrative body from refusing an individual's claim for payment based on

invade (except in very particular and marginal cases[6]) the field of procedural and judicial autonomy of member states.

The interest of full effectiveness of EU law is, in other terms, limited by the procedural choices that the member states lawfully may oppose to compulsory (i.e., not discretional) self-annulments and to the absence of time-limits for the exercise of the power of self-annulment. These limitations may find an explanation essentially in the need of safeguarding the principle of legal certainty (so to avoid that «administrative acts which produce legal effects» are «called into question indefinitely»[7]), and, at the same time, in the protection of the legitimate reliance of the recipient of the act (wherever the act is beneficial for the recipient).

For sake of completeness, the position so manifested by the EU judges does not impose any time limits or substantive limits to the self-annulment. It simply legitimates possible national choices to establish terms and guarantees, if and to the extent that the

Community law on the ground that the claim seeks to call into question a prior administrative decision which has become final, following the dismissal of an action for the annulment of the decision by a decision which has the legal authority of a final judgment, although that final decision is based on an interpretation of Community law which was invalidated by the Court in a subsequent preliminary ruling ».

[6] See the judgment of the ECJ, 13 January 2004, case C-453/00, *Kuhne & Heitz*, in which the obligation of internal review of administrative acts is made subject to four stringent conditions: « The principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where - under national law, it has the power to reopen that decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and - the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court. ».

[7]ECJ, 19 September 2006, C-392/04 e C-422/04, *i-21 Germany GmbH* e *Arcor*, point 51.

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latter are reasonable[8]. This position seems consistent with the one about revocation of EU unlawful administrative acts: enjoying a presumption of validity (as, in the EU judges view, also the national administrative acts), EU administrative acts create a legitimate reliance on the recipients, and thus are revocable exclusively without unreasonable and disproportional sacrifices for the recipient[9].

Equally clear is, on the other side, in relation to self-annulment, the request, from EU law, of an equivalent regime between the safeguard offered to EU legality and, respectively, to the national one.

In few words, where and to the extent that, in a given legal system, self-annulment of administrative acts is mandatory as a result of violations of domestic law, equally mandatory should be, at the same conditions, the self-annulment for violation of EU law: «It must be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the

[8]See in particular, ECJ, grand chamber, 12 February 2008, case C-2/06,*Willy Kempter KG*: «Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence ».

[9] See for example ECJ, 26 February 1987, case C-15/85, *Cons. Coop. D'Abruzzo c. Commissione*, point 10: « under Community law, as under the national laws of the various Member States, an administrative measure, even though it may be irregular, is presumed to be valid until it has been properly repealed or withdrawn by the institution which adopted it ».

Among the scholars, for a comparative research, CORLETTO, *Provvedimenti di secondo grado e tutela dell'affidamento*, in *I procedimenti di secondo grado e tutela dell'affidamento in Europa,* edited by CORLETTO, Padova, 2007, 1.

On the principle of so called "vertical equivalency", i.e. on the fact that it seems disputable the request, from EU side, of a stricter regime of self-annulment in relation to domestic administrative acts than in relation to EU administrative acts, see GRECO, *Illegittimità,* and, fully in line with the former, DEL SIGNORE, *op. cit.*

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rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) »[10]. This with the consequence that « in relation to the principle of equivalence, this requires that all the rules applicable to appeals, including the prescribed time-limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law. It follows that, if the national rules applicable to appeals impose an obligation to withdraw an administrative act that is unlawful under domestic law, even though that act has become final, where to uphold that act would be 'downright intolerable', the same obligation to withdraw must exist under equivalent conditions in the case of an administrative act which does not comply with Community law»[11].

3. THE ITALIAN JURISPRUDENCE: FROM THE UNDERESTIMATION OF PROCEDURAL AUTONOMY TO THE UNDERESTIMATION OF THE PRINCIPLE OF EQUIVALENCY

The Council of State has already expressed its opinion on the possible peculiarity, and, in particular, compulsory character, of the self-annulment of administrative acts for EU violations.

Two positions in the sense of a reinforced regime for the safeguard of the EU legality seem specifically identifiable.

[10] ECJ, 19 September 2006, point 57.

[11] ECJ, 19 September 2006, points 62-63.

According to the first one, the administrative act in violation of EU law should always be self-annulled, on the basis of the supremacy and primacy of EU law on national law. The contrast with EU law would be «sufficient to create a concrete and current public interest and to exclude that a the private interest to preserve the act may prevail»[12]. In fact, «in the light of the necessity to fulfill EU obligations, any other interests, either public or private, may be sacrificed », also because, in relation to «acts or orders released in application of a norm to be disapplied», it should be declared «their annulment in consideration of the recognized ineffectiveness of the legal provisions on which they were based»[13]. In sum, «the administrative consequences » of the disapplication would represent a «fulfillment of an international obligation of the State…such to justify the sacrifice of any other interests, either public or private»[14].

In reality, such jurisprudence (that dates back to the 90s of the XX century) seems based on an extreme view of the EU law supremacy, deemed as such to directly affect the stability of administrative acts in violation of EU law (in terms of either their disapplication, or their compulsory self-annulment). This perspective, that appears in a way consistent with (although not necessarily descendent from) the regime of the normative acts[15] in contrast with EU law has been nonetheless rejected (after a first, apparent, support offered by the Ciola case in 1999[16]) by the same European Court of Justice. The European

[12]Council of State, IV, 5 June 1998, n. 918, in *Urb. e app.*, 1998, 1343 ss.

[13]Council of State, IV, 18 Jannuary 1996, n. 54, in *Riv. it. dir. pubbl. com.*, 1997, 177

[14]Council of State, 54/1996, cit.

[15] Among them, administrative regulations, that according to domestic law, are still administrative acts.

[16] ECJ, 29 April 1999, case C-224/97, *Ciola*: «A prohibition which is contrary to the freedom to provide services, laid down before the accession of a Member State to the European Union not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession ».

Court has not only clarified the full acceptability of the preclusion to appeal administrative acts, once expired the time-limit to appeal, but, above all, in the already mentioned jurisprudence on self-annulments or revocations, has recognized great importance to principles like the procedural autonomy and the certainty of law, that, in its opinion, shall prevail, in relation to the self-annulment of administrative acts, on EU law supremacy.

According to the second position, the compulsory character of self-annulment is grounded on more traditional arguments: it is not *per se* the EU law supremacy such to justify the removal of the act in violation of EU law; but, more indirectly, this compulsory character of the self-annulment descends from the negative consequences for the State triggered by the failure to fulfill the EU obligations. In fact, such failure may eventually result in a fine (pursuant to art. art. 260, par. TFUE[17]). Thus, based on the traditional idea of the compulsory character of the self-annulment of administrative acts that risk to create (and not necessarily directly create) economic losses for the administration, the self-annulment is necessary and compulsory (as opposed to being just admissible, to the extent that all other preconditions of public interests exist; in other words, as opposed to be a discretional decision). In this connection, for example, the Council of State noted that «the public interest, very evident, consists not in the simple restoration of the violated legal order, but in the purpose of avoiding a future condemnation, and, meanwhile, the diminution of prestige for our country abroad, resulting from the well-founded accusation of having breached the treaty»[18].

[17] « If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. ».

Previously, an equivalent provision was laid down by art. 228, par. 1, of the EU Treaty.

[18]Council of State, V, 18 April 1996, n. 447.

These two positions seem, therefore, partially similar, as both based on the awareness of the specific compulsory character of the EU obligations and the seriousness of the relative sanctions (to be applied to the State). However, the first position seems to have overestimated the current stage of evolution of EU law, as clearly emerging, now, from the ECJ jurisprudence. The second position starts from an objective fact (the EU sanctions against the State), to derive from them well known consequences, as descending from national law (the necessity of avoiding economic losses for the State, by exercising of the power of self-annulment). In such a way, it seems more in line with the current EU law jurisprudence on internal review of administrative acts, that, as noted, seems based on the principle of equivalency (rather than on the principle of supremacy of EU law).

More recently, the administrative jurisprudence has, on the contrary, demonstrated a clear refusal of recognizing any peculiarity to the self-annulment of administrative acts in breach of EU law. In fact, the self-annulment should be «deemed subject, also in these cases, to the general principles governing the lawfulness of the relative acts, i.e. the simultaneous presence of preeminent reasons of public interest to remove the act»[19]. In other terms, the «principle of consolidation of acts not appealed and of the compulsory character of the self-annulment» would not be derogated where a violation of EU law is claimed as a reason of unlawfulness»[20]. This line of jurisprudence additionally observes that «Even in the EU legal system, the mere unlawfulness of the administrative act is not a sufficient element to justify the removal of the act by the Administration, as being necessary a careful balancing of the other involved interests, including that of the recipient who relied on the unlawful act»[21]. As we will immediately see, in such a way, there has

[19]Council of State, V, 8 September 2008, no. 4263.

[20]In the same exact terms,, Regional Administrative Court of Veneto, I, 28 February 2008, no. 493.

[21]Council of State, VI, 22 November 2006, no. 6831.

In the same sense, Council of State, VI, 3 March 2006, no. 1023 and Administrative Court of Appeal for Sicily, 21 April 2010, no. 553.

been a shift between two equally unbalanced positions: from a probably too enthusiastic view, by which the supremacy of EU law has been overestimated (without recognizing adequate significance to the procedural autonomy), to a view that, by contrast, underestimate the principle of equivalency.

4. THE PRINCIPLE OF EQUIVALENCY AND THE FINANCIAL BURDEN DESCENDING FROM FAILURE TO FULFILL EU OBLIGATIONS: ART. 1, PAR. 136, OF LAW NO. 311 OF 2004 (AND ITS INTERPRETATION) AND ART. 16 BIS OF LAW NO. 11 OF 2005

According to a by now traditional line of jurisprudence of the Council of State, in particular inaugurated by the judgment Fiori of 1976[22] (in which it was mentioned the existence of a « *in re ipsa* public interest to self-annul… », wherever «the enforcement of the administrative act would have caused current or future expenditures of public money, whose lawfulness appear disputable»), the concrete and current interest to annul an act which entails an unlawful payment, even future, of public money is *in re ips*a, in the sense that it does not require any justification). In other terms, it is sufficient to mention as a reason of in the self-annulment the circumstance of the possible expenditures of public money, to justify the annulment, without any further need of giving reasons addressing the other involved interests..

It could be discussed whether such line of jurisprudence may, *per se*, justify the application of the principle of equivalence to the issue of the self-annulment of administrative acts in breach of EU law.

[22] 2 March 1976, no. 124, in *Cons. St.*, 1976, I, 373 ss..

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In particular, one could doubt about such application based on two considerations: at first because we are talking about a line of jurisprudence, that, as such, may always mutate; secondly, because this doctrine presents certain intrinsic limits, as being developed in very specific cases essentially related to the career moves of civil servants: such moves are directly (and not only possibly) such to produce an expenditure of public money (as a result of the increased salary). On the contrary, administrative acts in violation of EU law, ordinarily, create only a possibility of financial exposure for the State, excepts where the failure to comply with EU law has been already ascertained by the ECJ.

However, in reality, not only jurisprudential positions may be mentioned in national law.

In 2004, a new legislative intervention took place, perhaps suggested by a 2000 ruling of the Constitutional Court, according to which the discretionality of the Administration in the field of self-annulment can well be consumed by the legislator, as such discretionality does not enjoy any constitutional coverage, but, on the contrary, the self-annulment represents «a corollary of the principle of legality, that is intended, among other purposes, to avoid the consolidation of situations *contra legem*»[23]. In particular, art. 1, co. 136, of law no. 311 del 2004, states that «with the purpose of realizing savings or avoiding financial costs for public administrations, the self-annulment of unlawful administrative acts can always been decided, even if the act is under enforcement». The second paragraph makes it clear that this type of self-annulment «in relation to administrative acts affecting contractual or conventional relationships with private parties, shall keep harmless the private parties from the possible deriving economic prejudices, and,

[23]Constitutional Court, 22 March 2000, no. 75, in *Giur. cost.*, 2000, 810, with comment by SCOCA, *Una ipotesi di autotutela amministrativa impropria*.

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in any case, shall not be decided more than three years later from the entrance in force of the administrative act, even where the relative enforcement is still in progress »[24].

As well emerging form the legislative wording, this provision is not only of a general nature, but, most f all, does not distinguish between acts that just hypothetically might create economic burdens, and, respectively, the ones that, directly and immediately, create such burdens. Put it in a different way, no distinction is established between acts that generically might produce economic consequences, and, respectively, acts that certainly (as a result of their unlawfulness) such consequences are due to produce.

The jurisprudence has sometimes offered an interpretation of this legal provision restrictive, if not abrogative. For example, in 2009, the Council of State held that «with respect to the provisions of art. 1, par. 136, law no. 311 of 2004 (Budget law for 2005) ….they are intended to restrict the so called consolidation of subjective positions of the citizen deriving from unlawful administrative acts, allowing the self-annulment regardless the time-period passed from the releasing of the act, but, as made it manifest by the use of the term "can" preceding the attribution of the power of deciding the self-annulment, it does not remove the very discretionary nature of this power, whose exercise cannot be claimed by the recipient of the act or by a third interested party »[25].

This reading - probably explainable in relation to the fear that public administrations are overflowed by requests of, allegedly compulsory, self-annulments - does not seem persuasive. On the contrary, the use of the term «can» seems simply intended to indicate that a certain administrative power has been conferred. Such a power (and this represents a real novelty) is not conditioned (unlike it normally happens) to the

[24]On this legal provision, see GIOVAGNOLI *Autotutela e risparmio di spesa nella finanziaria 2005*, in *Urb. App.*, 2005, 395 and CASSATELLA, *La nuova disciplina dell'annullamento d'ufficio al vaglio della giurisprudenza amministrativa*, in *Foro amm. TAR* 2006, 2186.

[25]Council of State, VI, 18 September 2009, no. 5621.

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ascertainment of a public interest different from, and additional to, the safeguard of the lawfulness, wherever the Administration may face economic burdens as a result of this unlawfulness. This is confirmed by the fact that the term «always», cannot have, contrary to opinion of the Council of State, a merely temporal meaning: in the second part of the same paragraph, in applying to a specific case (administrative acts affecting contractual relationships) the same rule of the first part of the paragraph, a three years time-limit is introduced; this time-limit is logically incompatible with the use of the term «always» in a temporal meaning. As a result, the term «always» seem to be referred to preconditions of objective (as opposed to temporal) nature. In other words, the adverb «always» relates to whether it is necessary to take in count interests different from the one to save public money.

The same Council of State, however, in 2010 seems to have construed the 2004 legal provision differently, by expressly recognizing that «par. 136 has introduced the only case of self-annulment for *in re ipsa* reasons of public interest, with exclusion of any other case previously admitted by the jurisprudence, not connected with the savings of public money or the reduction of economic burdens for the Administration»[26]. Similarly, in 2012, the Administrative Court of Appeal for Sicily has defined the self-annulment at stake as characterized by the fact that a given public interest (the objective of saving public money) would *ex lege* prevail on any other public interests. This appears just as a different way to express the same concept: this type of self-annulment is not discretional, as exclusively based on a *in re ipsa* public interest[27].

If this reading of the legislative provisions is correct, and, if, as a result, Italian law system is to be interpreted in the sense that self-annulment of unlawful acts such to generically cause economic burdens for the Administration is compulsory, then the same

[26] Council of State, V, 7 April 2010, no. 1946.

[27] Administrative Court of Appeals for Sicily, 1 February 2012, no. 110

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rule should find application also in relation to administrative acts in violation of EU law. These latter, in fact, are always at risk to generate expenditures for the State, in relation both to EU penalties and the request of compensation that the citizen could raise against the State, if directly affected by the violation of EU law). We can even conclude that, pursuant to the EU principle of equivalency, this application seems to emerge as imposed by the EU law.

On the other side, it cannot be forgotten that a strict connection between violation of EU law and (sufficiently) probable – and in any case *ex lege* recognized as such and therefore *per se* material - economic burdens for the State and the other public bodies is by now clearly expressed by the legislative provisions at stake. In particular, it is exactly to avoid such economic burdens that, reflecting a provision originally (significantly) laid down by the Budget law for 2007[28], art. 16 *bis*, par. 1, of law no. 11 of 2005 states that «in order to prevent the commencement of infringement procedure under art. 226 and following of the EC Treaty or to stop them, regions, autonomous provinces of Trento and Bolzano, local authorities and other public bodies and subjects equivalent to them shall adopt any necessary measure to promptly correct any violation imputable to them of the obligations descending from EU law to member states. Such authorities are required to promptly comply with judgments released by the European Court of Justice, pursuant to art. 228, par. 1, of the Treaty». The main sanction provided in case of violation of the mentioned par. 1, is, pursuant to the subsequent par. 4, a financial one: «the State can claim compensation vis-à-vis the subjects responsible of the violation to the obligations established by par. 1, in relation to the financial burdens descended by the condemnation judgments released by the European Court of Justice, pursuant to art. 228, par. 2, of EC Treaty».

An hypothetical interpretation according to which such legislative intervention would not require a compulsory self-annulment of administrative acts in breach of EU law (or in contrast with the European Convention of human rights, as art. 16 *bis* , par. 5

[28] Art. 1, pars. 1216-1219, of law. no. 296 of 2006.

mentions also the economic burdens descending from judgments of the European Court of human rights) and so such to expose the State to financial penalties would mean not only assuming a position inconsistent with the traditional doctrine, as we have seen codified in 2004, according to which the self-annulment intended to prevent economic burdens for the State is compulsory (with the consequence of violating the EU principle of equivalency). It would also imply a refusal to recognize any effective significance (and content) to the duty - clearly and even emphatically expressed by the legislative provisions - of adopting «any measure necessary to promptly correct any violation of the obligations descending to the member states from EU law…».

This point has been well understood by a 2007 judgment of the Regional Administrative Court of Sicily, which has recalled, based on the mentioned law provisions, that a self-annulment of administrative acts in violation of EU law, would be compulsory not just generically «in force of the obligations of cooperation pursuant to art. 10 EC Treaty», but also «in relation to the need of avoiding that administrative action in violation of EC law affects from a financial standpoint local communities, as a result of the possible compensation action brought by the State, as responsible entity, according to the international law, of the failure to fulfill EC obligations, pursuant to art. 1, par. 1215, of law no. 296 of 2006»[29].

5. THE CONSTITUTIONAL REFORM OF ART. 97 OF CONSTITUTION

Constitutional Law 20 April 2012, no. 1, just introduced a new par. 1 in art. 97 of Constitution, according to which «Public Administrations, in coherence with the EU law system, ensure an equilibrated balance sheet and the sustainability of public debt».

[29]Regional administrative Court of Sicily, Palermo, II, 28 September 2007, no. 2047.

Traditionally, art. 97 has represented probably the most important constitutional parameter for all the administrative action. In fact, the main principles governing the organization and the action of the public administrations have been identified and developed by the jurisprudence and the legal scholars on the basis of, and in relation to, art. 97.

The circumstance that, as a result of the last constitutional reform, the first principle laid down by art. 97 is now represented by the need of avoiding unjustified expenditures of public money is likely to influence the topic of self-annulment of administrative acts. The traditional position according to which the self-annulment may be compulsory, wherever intended to prevent unlawful costs for the Administration, seems in fact clearly reinforced. No need to say that, in this connection, also the opinion expressed in this article about the specific compulsoriness of the acts in violation of EU law should be equally strengthened. This conclusion may find support also in the specific wording of the new art. 97, par. 1, that expressly mentions the obligation of acting in «coherence with the EU law system». In other words, a specific connection between EU obligations and the financial interest of the State and so the sustainability of the public debt may even be said to be directly suggested by the constitutional provision at stake.

6. CONCLUSIONS

In conclusion, art. 1, par. 136, of law no. 311 of 2004, especially in the light of art. 16 *bis*, of law no. 11 of 2005 and, most o all, of the just passed constitutional reform of art. 97 of Constitution, opens the way (from a domestic, as well as EU law, perspectives) for a compulsory self-annulment of administrative acts, in violation of EU law. The same can be said in relation to administrative acts in violation of the European convention of human rights (although exclusively from a domestic law standpoint, not be applicable, in this case, any principle correspondent to the EU one of equivalency).

This conclusion is not directly and mostly imposed only by the EU law. It is not, in other terms, an external imposition, such to put in discussion basic principles of the

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domestic administrative law. Rather, it is a matter of consistent application of domestic legislative choices, from which all the due consequences are to be derived, in harmony with the principle (this one a really EU one) of equivalency.

Obviously, legislative choices, once fully appreciated as to all their consequences, may also appear disproportional and to be better balanced: for example, it is easy to appreciate the difference among an act (or a contract[30]) already definitively recognized as unlawful by the EU authorities (and so to be annulled, in order to avoid almost certain financial consequences for the State) and, respectively, a possible reason of unlawfulness that, just hypothetically, might be ascertained by EU authorities, and, eventually, trigger a fine.

[30] See ECJ, 18 July 2007, case C-503/04, *Commissione* c. *Germania*, in *Riv. it. dir. publ. com.*, 2009, 431 ss., with a dissenting comment by GRECO, *Superprimato del diritto europeo: le direttive sui mezzi di ricorso vincolano tutti, ma non la Commissione e la Corte di giustizia*, and in *Dir. Proc. Amm.*, 2009, 112 ss. with comment by GOISIS, *Ordinamento comunitario e sorte del contratto, una volta annullata l'aggiudicazione*. According to the judgment (point 29), « The adverse effect on the freedom to provide services arising from the disregard of the provisions of Directive 92/50 subsists throughout the entire performance of the contracts concluded in breach thereof (Joined Cases C-20/01 and C-28/01 Commission v Germany, paragraph 36). Furthermore, at that date, the failure to fulfill obligations was to continue for decades, given the long period for which the contract in question had been concluded. ».

Lastly, consistent with the principle established by ECJ, 18 July 2007, ECJ, 21 December 2011, C-465/10, point 57: « In respect of such a breach of the tendering rules laid down by Directive 92/50, which was adopted in order to eliminate barriers to the freedom to provide services and to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32), it should be recalled that the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach of the directive (see Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraph 36, and Case C-503/04 Commission v Germany [2007] ECR I-6153, paragraph 29).».

However, given, from one side, the attention for the safeguard of public finances in administrative action that, with increasing intensity, emerges from the domestic legislation and now, expressly, even from art. 97, par. 1, of Constitution, and, from the other side, the special consideration for the respect of EU obligations that is manifested by the Constitution in relation to both the legislative activity (art. 117, par. 1[31]) and the administrative one (art. 120, par. 2[32]), a compulsory nature in a strict an proper sense for the self-annulment of administrative acts in breach of EU law frankly does not appear an unreasonable conclusion.

[31] «The legislative powers are exercised by the State and the Regions in compliance with the obligations descending from EC law and the International law».

[32] According to which the Government is empowered to exercise substitutive administrative powers against the Regions and the Local Authorities, among other reasons, in case of violation of European law.

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REGULACIÓN, INICIATIVA PÚBLICA ECONÓMICA Y LIBRE COMPETENCIA: HACIA UN MODELO SIN INMUNIDADES[1]

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INDÍCE

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RESUMEN

Este trabajo tiene por objeto aclarar las dudas interpretativas que se derivan de la aplicación del Derecho de la competencia a las Administraciones públicas, bien cuando éstas llevan a cabo una actividad económica en pie de igualdad con el resto de compañías, bien cuando ponen en marcha los mecanismos de regulación en su función arbitral. Trata de demostrarse que, más allá de la prestación de servicios públicos o de la actividad de fomento, la Administración no puede exonerarse del cumplimiento de la normativa en materia de defensa de la competencia. De lo contrario, se corre el riesgo de captura del regulador, primando los intereses de determinadas empresas frente a una regulación democrática y equitativa del mercado.

PALABRAS CLAVE: mercado; potestad administrativa; defensa de la competencia; regulación;servicios públicos.

ABSTRACT

This work has the object to clarify the doubts about applying *antitrust* laws to public Administration, either when it competes on equal footing with other companies, nor when it exercises its function as arbitral. It is tried to prove that, beyond provisioning public services or development powers, Administration can't discharge from applying *antitrust* rules. Otherwise, it causes the risk to capture the regulator, and some enterprises can take advantage of Administration prerogatives. All that would dismiss an equal and democratic regulation of market.

KEY WORDS: market; administrative prerogative; *antitrust* law; regulation; public services.

1. INTRODUCCIÓN

La intervención administrativa en la economía se presenta en la actualidad como uno de los principales baluartes de que disponen los poderes públicos para resolver los retos que plantea la crisis económica. Las cifras e indicadores macroeconómicos dibujan un panorama especialmente delicado para el bienestar de buena parte de los sectores de la ciudadanía, que exigirá la actuación efectiva de la Administración para impulsar la economía o generar un mayor clima de confianza a los agentes económicos. A eso cabe añadir la habitual opacidad que practican los conglomerados y grandes compañías privadas, que ejercen un poder tal en lo económico que se traslada al ámbito político en forma de amenazas veladas o expresas de despidos masivos, expedientes de regulación, disoluciones y cierres de empresas.

Se demostró que la ausencia de una regulación, de mecanismos de control *ex ante* y de una Administración dotada de poderes y recursos suficientes podía desembocar en desastres financieros que han repercutido en la economía real. Esa misma Administración, acusada actualmente de arrastrar un excesivo déficit público por quienes otrora fueron rescatados a golpe de partida presupuestaria pública, debe afrontar el coste económico y social de despidos masivos, de generar empleo o de incentivar su creación y, fundamentalmente, ocupar una posición de garante ante la ciudadanía, haciendo valer su legitimidad democrática. Esta problemática alcanza mayor calado si, al cobijo de una legislación muy restrictiva con la intervención administrativa en materia económica, se condicionan o limitan las políticas públicas que constituyen el resultado, precisamente, de la legitimidad democrática de los gobernantes.

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En este contexto la regulación económica no puede mantenerse al margen de estos problemas, enfrentándose al dilema de proteger los intereses de las grandes corporaciones, que pretenden mantener el *statu quo* y sus posiciones en el mercado, o bien de fomentar la competencia real como motor no sólo del crecimiento económico, sino también de la capacidad de decisión de la ciudadanía respecto a su futuro económico. Por ello, el Derecho de la competencia desempeña un rol esencial para impedir ventajas injustificadas de muchos operadores o, incluso, la posibilidad de que los poderes públicos aboguen por una regulación demasiado condescendiente con los operadores con mayor peso específico en un segmento del mercado. Implantar una regulación acorde con el Derecho de la competencia no significa desregular o trasladar el poder público al mercado. Supondría, por el contrario,ejercer una potestad administrativa en aras de una distribución más equitativa de los recursos.

En este trabajo se aborda la iniciativa económica de la Administración partiendo de la regulación económica como mecanismo para fomentar la competencia, por un lado, y corregir los desequilibrios que arroja el mercado, por otro. Ambos objetivos deben convivir no como contrapuestos, sino como complementarios, entendiéndose bien que ni la Administración en su regulación ni los privados en sus estrategias empresariales queden al margen del Derecho, en este caso del Derecho de la competencia. Así, se exponen los fundamentos de la regulación económica en actividades donde concurre la Administración con los privados y en aquellas donde no lo hace. Asimismo, se analizan las previsiones de la Ley de Defensa de la Competencia y los problemas procesales que se derivan de la aplicación de la normativa *antitrust*.

2. LA REGULACIÓN ECONÓMICA Y EL DERECHO DE LA COMPETENCIA

En este apartado se abordan los elementos confluyentes que presentan ambas disciplinas, así como las materias en que pueden colisionar, generándose un conflicto de normas, cuya resolución exige tener en cuenta los fines de cada uno de los ordenamientos:

por un lado, la regulación económica trata de prever y evitar mecanismos que ocasionan comportamientos contrarios a la libre competencia desde una perspectiva *ex ante*[3]; por otro, el Derecho de la competencia tiene por objeto castigar o provocar el cese, aunque sea provisional, de conductas prohibidas por la ley y que tienden a crear una desventaja en el mercado para ciertos operadores, interviniendo *ex post*. La regulación, en general, hace siempre su aparición ante la inexistencia, los fallos o los fracasos del mercado[4]. En ocasiones, no obstante, no parece sencillo delimitar ambos campos, en tanto que la regulación también tiene por objeto la vigilancia, y de ahí que se reconozcan a las autoridades reguladoras facultades inspectoras o sancionadoras[5].

Interesa abordar aquí los supuestos en que la Administración pública interviene mediante medidas reguladoras que podrían producir efectos en la libre concurrencia. En otras palabras, se pretende examinar la confrontación entre la regulación y el Derecho de la competencia[6]. Cabe distinguir tres supuestos: cuando la Administración no transmite bienes ni presta servicios en el mercado y actúa como árbitro; medidas reguladoras en caso de que el Estado participe activamente en el mercado como un operador más; y, por último, la adopción de mecanismos de fomento y la reserva de la titularidad del servicio o actividad.

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[3] J. MONÉGER, «Competition, regulation and system coherence», en H. ULRICH (Coord.), *The evolution of european competition law: whose regulation, which competition?*, Edward Elgar Publishing, Londres, 2006, pág. 276; A. TRONCOSO RIEGADA, «Dogmática administrativa y Derecho Constitucional: el caso del servicio público», *REDC*, 57, 1999, pág. 132.

[4] G. ARIÑO ORTIZ, «El nuevo servicio público», en G. ARIÑO ORTIZ (Dir.), *Principios de Derecho público económico*, Comares, Granada, 2001, pág. 561.

[5] S. MUÑOZ MACHADO, «El nuevo modelo de regulación de la economía», en S. MUÑOZ MACHADO y J. ESTEVE PARDO (Dirs.), *Fundamentos e instituciones de la regulación*, Iustel, Madrid, 2009, pág. 112.

[6] J. C. LAGUNA DE PAZ, «Regulación sectorial y normas generales de defensa de la competencia: criterios de relación», *REDA*, 145, 2010, pág. 89.

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2.1 La regulación como potestad arbitral de la Administración

La regulación económica consiste en una medida de intervención administrativa sobre las relaciones de los particulares, cuya actividad consista en el intercambio de bienes y servicios en el mercado. Tiene como finalidades básicas controlar el excesivo poder derivado de una situación de monopolio natural, ejercer un control sobre las ganancias inesperadas y corregir las externalidades, es decir, todos aquellos elementos o conceptos que, influyendo en los costes de la actividad, no están directamente relacionados con la misma[7]. Se ha afirmado que tiende a alcanzar una composición entre los objetivos y valores económicos y los no económicos[8]. Desde un punto de vista teórico, la regulación representa una forma de delimitación de los derechos de los particulares, de modo que la Administración les constriñe a aquéllos al cumplimiento de determinados deberes, como el de ceder las infraestructuras o pagar una tarifa[9].

Esa actuación administrativa puede albergar una tipología diversa, al margen de que revista una diferente naturaleza jurídica. La Administración puede aprobar un reglamento de desarrollo de una ley que, asimismo, ha previsto obligaciones que recaen sobre los operadores en materia de servicio público o, simplemente, puede resolver conflictos mediante un acto administrativo que vincule a las empresas privadas[10]. Aquí la

[7] L. CASÉS PALLARÉS, *Derecho Administrativo de Defensa de la Competencia*, Marcial Pons, Madrid, 1995, págs. 25 y 26.

[8] G. MARCOU, «La notion juridique de régulation», *AJDA*, 7, 2006, pág. 348.

[9] G. ARIÑO ORTIZ, *La regulación económica. Teoría y práctica de la regulación para la competencia*, Ábaco Rodolfo de Palma, Buenos Aires, 1996, pág. 119.

[10] G. TIMSIT, «Normativité et Régulation», *Les Cahiers du Conseil Constitutionelle*, 21, 2006, pág. 86; J. L. MARTÍNEZ-LÓPEZ MUÑIZ, «La regulación económica en España», en G. ARIÑO y J. M. DE LA CUÉTARA, *El nuevo servicio público*, Marcial Pons/UAM, Madrid, 1997, pág. 233.

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entidad pública carece de cualquier interés por competir con el resto de compañías privadas. Se limita a corregir las deficiencias que presenta el mercado para atender necesidades básicas a precios asequibles.

Al trastocar o modular la esfera jurídica de los particulares, creando derechos e imponiendo obligaciones que forman parte del contenido esencial de un derecho fundamental, en todo caso debe respetarse el principio de reserva de ley, impidiendo que la Administración, ya sea mediante actos o reglamentos, conmine *ex novo* a los operadores económicos al cumplimiento de órdenes, instrucciones o cargas[11]. No puede ignorarse la importancia de este principio, en tanto en cuanto conlleva el máximo control democrático de las decisiones gubernamentales que afectan a aspectos sustanciales de la vida económica de la ciudadanía[12].

Las medidas de regulación se hallan jalonadas de diversos objetos, inspirados todos ellos por la protección del interés general. Este concepto jurídico indeterminado ha arrojado no pocas dudas en torno a su diferente interpretación y aplicación caso por caso. Con carácter general, se ha señalado que la regulación debe corregir los desequilibrios que puede provocar la búsqueda desmesurada de beneficios en perjuicio de sectores sociales más desfavorecidos o del resto de competidores[13]. En este caso, la Administración debe velar por que las personas puedan disfrutar de una vida digna y por que las condiciones de

[11] J. M. GIMENO FELIÚ, «Sistema económico y derecho a la libertad de empresa», núm. 135 de esta REVISTA, 1994, pág. 165; G. ARIÑO ORTIZ, *Principios constitucionales de la libertad de empresa. Libertad de comercio e intervencionismo administrativo*, Marcial Pons, Madrid, 1995, pág. 92.

[12] S. CASSESE, «Administrative Law without the State? The challenge of global regulation», *New York University Journal of International Law and Politics*, 4, 2005, pág. 694.

[13] C. KIRCHNER, «Regulating towards what? The concepts of competition in sector-specific regulation, the likelihood of their realization and of their sustainability, and their relationship to rendering public infrastructure services», en ULRICH (Coord.), cit., pág. 242.

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igualdad puedan ser reales y efectivas[14]. Cohonestar valores colectivos, habitualmente no asociados a condiciones económicas, y objetivos individuales, de corte económico, se muestra como el principal reto de la regulación[15].

Todo ello requiere adaptar las medidas reguladoras a las volubles circunstancias en que se desenvuelve cualquier mercado en la actualidad. La delimitación y alcance del concepto interés general se funda en variables económicas y técnicas que impiden una intervención más intensa del legislador y atribuyen a la autoridad reguladora o a la Administración poderes demasiado amplios, muy vinculados a la discrecionalidad técnica[16]. No resulta sencillo fiscalizar la actividad reguladora teniendo en cuenta que los expertos son los que determinan los criterios interpretativos de los conceptos jurídicos indeterminados. En cualquier caso, debe rechazarse la inmunidad o exención de control de la regulación por el hecho de que se ampara exclusivamente en modelos económicos o prospecciones de mercado[17].

En el caso en que trate de promoverse la competencia, el fundamento estriba en que la concentración de riqueza en cada vez menos operadores afectaría gravemente a una distribución equitativa de los recursos y rentas[18], lo que no se ajusta a los objetivos que deben cumplir los poderes públicos de acuerdo con los principios rectores de política social

[14] J. M. SOUVIRÓN MORENILLA, *La actividad de la Administración y el servicio público*, Comares, Granada, 1998, pág. 212.

[15] MARCOU, cit., pág. 349.

[16] J. ESTEVE PARDO, «El encuadre de la regulación de la economía en la sistemática del Derecho Público», en S. MUÑOZ MACHADO y J. ESTEVE PARDO (Dirs.), *Fundamentos e instituciones...*, cit., pág. 397.

[17] E. GARCÍA DE ENTERRÍA, *Democracia, jueces y control de la Administración*, Civitas, Madrid, 1998, págs. 244-246.

[18] C. KIRCHNER, «Regulating…», cit., pág. 242. Véase también M. SZDYLO, «Sector-specific regulation and competition law: between convergence and divergence», *European Public Law*, 2, 2009, pág. 259.

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y económica establecidos en la Constitución[19]. En este caso debe considerarse que la Administración complementa las funciones de tutela anticoncurrencial que debe llevar a cabo la autoridad de la competencia[20].

El concepto de interés general parece diluirse en el caso de adoptarse medidas que favorecen a sectores estratégicos para la economía, pero con impacto desigual en los consumidores o en los gastos sociales. Se ha tenido la oportunidad de comprobar todo ello con motivo de la inyección de fondos públicos a entidades financieras que celebraban sus beneficios en los mercados bursátiles o en sus cuentas de resultados meses más tarde. Ahí surge la controversia respecto a las discrecionales facultades atribuidas a los poderes públicos en materia económica. Ni la Constitución ni las leyes deberían conceder un amplio margen de apreciación a las Administraciones respecto al modo en que puede regularse y los mecanismos empleados para ello. Al menos sí sería recomendable precisar algo más los conceptos de índole técnica o económica en vía legislativa, al objeto de que no escapen del control democrático y queden en manos de las empresas y el mercado[21].

En definitiva, la regulación económica debe partir de unos postulados concretos, precisos, unos objetivos que deben inspirar toda la actuación administrativa e, incluso, legislativa. Si todos ellos fueran vinculantes e introdujeran una definición clara y concluyente respecto al modelo económico que se persigue por un Estado, los poderes públicos no estarían sometidos a los vaivenes del mercado y a la inseguridad jurídica que provoca en la vida de las personas. Sin un modelo económico reflejado en los deberes económicos de los diversos agentes de la regulación, el interés general carece de sentido y funcionalidad. En otras palabras, debe preverse sin matices ni excepciones que

[19] Artículo 40 CE.

[20] LAGUNA DE PAZ, cit., pág. 90.

[21] S. MUÑOZ MACHADO, cit., pág. 115.

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determinados valores, como la desigualdad económica, cada vez más acentuada, priman sobre cualquier afán especulativo o de obtención de la máxima riqueza.

2.2 Regulación cuando la Administración compite con los privados

Los entes públicos pueden constituir sociedades que ofrecen productos o prestan servicios en el mercado. La iniciativa económica de las Administraciones públicas ha sido reconocida en diferentes textos legislativos que tienen por objeto configurar la organización y funcionamiento de los entes públicos. Así puede comprobarse en la Ley de Organización y Funcionamiento de la Administración General del Estado o, incluso, en la legislación de régimen local[22]. Todas estas entidades públicas pueden crear sociedades de economía mixta o sociedades públicas empresariales que deben concurrir con los privados en pie de igualdad, de modo que también deben someterse al Derecho de la competencia y al régimen jurídico-privado en sus relaciones con otras personas físicas o jurídicas que operan en el sector correspondiente.

La problemática en estos casos se deriva de la confusión de regímenes públicos y privados a los que deben sujetarse todos esos organismos y entes. En efecto, piénsese que las sociedades públicas mercantiles pueden estar gestionadas y dirigidas por un Consejo Rector cuyas decisiones deben ajustarse al Derecho administrativo. Asimismo, las aportaciones económicas públicas deben respetar la legalidad presupuestaria y cumplir los mecanismos de control del gasto que establecen las diferentes normativas para las Administraciones públicas. En otras palabras, siempre queda un ámbito irreductible de decisión y regulación que recae sobre la Administración, vinculada positivamente a la norma y obligada a tramitar un procedimiento para adoptar una decisión. A todo ello deben

[22] DA 12.ª Ley 6/1997, de Organización y Funcionamiento de la Administración General del Estado, y artículo 85 bis Ley 7/1985, de Bases del Régimen Local.

añadirse los privilegios de autotutela declarativa y ejecutiva que ampara la presunción de legalidad de los actos admnistrativos.

Por otra parte, las mismas Administraciones públicas que adoptan decisiones empresariales en el mercado pueden intervenir, aunque sea de un modo mediato, en un sector económico determinado, confundiéndose los reguladores y los regulados. La jurisprudencia comunitaria no estimó que constituyera, por sí misma y a priori, abuso de posición dominante esta confusión, obligando a las autoridades internas a analizar caso por caso si esa injerencia del poder público en el mercado y en la competencia otorgaba una determinada ventaja económica a uno o varios operadores en perjuicio del resto[23].

Como ejemplo de ello pueden señalarse aquí los casos en que algunos municipios constituían sus sociedades para desplegar infraestructuras de telecomunicaciones, un segmento de actividad plenamente liberalizado. Así, el municipio, como titular del dominio público, está facultado para otorgar las concesiones para la ocupación permanente del dominio público por parte de los operadores de redes de telecomunicación[24]. La decisión de discriminar a unas empresas del sector en la obtención de esos títulos puede ser un indicio suficiente para considerar que su actuación ha sido contraria a la libre competencia[25].

Las autoridades públicas podrían, asimismo, condicionar el acceso a la actividad, restringiendo consiguientemente la competencia en un segmento del mercado. Por ejemplo, podrían no conceder la autorización para la apertura de una clínica, invocando aspectos como la calidad del servicio y el cuidado de la salud de los pacientes. Siendo esto

[23] STJCE 13-12-1991, C-18/88, *GB Inno-BM*, ap. 25.

[24] J. V. GONZÁLEZ GARCÍA, *Infraestructuras de telecomunicaciones y corporaciones locales*, Aranzadi, Pamplona, 2003, págs. 59-73.

[25] E. MALARET I GARCÍA, «Servicio público, actividad económica y competencia. ¿Presenta especificidades en la esfera local?», *Revista de Estudios de la Administración Local y Autonómica*, 291, 2003, pág. 588.

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razonable, el Tribunal de Justicia de las Comunidades Europeas añadió el requisito de eficiencia económica, de modo que podrían implantarse más centros hospitalarios cuando ello contribuyera a reducir las cargas públicas asociadas a la prestación del servicio. Se suman a estos argumentos otros como el mantenimiento de precios constantes, debido al aumento de la oferta[26]. En los análisis caso por caso tampoco puede garantizarse con nitidez la dicotomía servicios públicos o sociales-empresa privada, pues se presenta un examen global que responde a parámetros diversos, como la estructura del mercado y la posición que ocupan en él los operadores.

A pesar de todo ello, no puede olvidarse que muchos sectores económicos, aun liberalizados y abiertos a la competencia, dotan a la ciudadanía de unos servicios y facilidades considerados en la actualidad prácticamente como de interés general y proveen verdaderos recursos esenciales para el desenvolvimiento en sociedad de las personas. Por ejemplo, algunos municipios de pocos habitantes precisan energía, comunicaciones electrónicas, mejor accesibilidad. Sin embargo, las compañías privadas evitan los enormes costes que conlleva implantar todo un trazado de infraestructuras en zonas de orografía complicada, por un lado, y escasamente habitadas, por otro. Entienden, con razón, que la escasa rentabilidad, dado el reducido número de clientes en esas zonas, no les permitiría amortizar las inversiones en infraestructuras que han realizado previamente[27]. Este vacío trata de cubrirlo la Administración, de modo que adopta medidas de intervención, como la designación de un operador obligado a proveer todas esas infraestructuras y servicios esenciales y la imposición de obligaciones específicas al mismo. En el caso del servicio universal, todas las compañías deberían asumir conjuntamente los costes adicionales que deba afrontar la compañía que ofrezca esos servicios esenciales en esas zonas no rentables, en proporción siempre a los beneficios que obtengan en la prestación de esos servicios.

[26] STJCE 10-3-2009, C-169/07, *Hartlauer Handelsgesellschaft mbH*, aps. 47-63.

[27] J. C. LAGUNA DE PAZ, «El servicio universal», en S. MUÑOZ MACHADO (Dir.), *Derecho de la Regulación Económica*, Iustel, 2009, págs. 390-432.

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Más allá del servicio universal o de otras fórmulas, denominadas también servicios obligatorios, las Administraciones pueden considerar que aquellos recursos o servicios considerados esenciales por la normativa no son suficientes para atender las demandas de la ciudadanía, debido a los avances tecnológicos o a la evolución socioeconómica de una comunidad. En otras palabras, las normas no siempre se adaptan a todos estos cambios y las Administraciones se ven obligadas a fomentar determinados servicios de interés general[28]. Esto ha sucedido con la puesta en marcha de ayudas públicas e, incluso, la constitución de empresas destinadas al despliegue definitivo de la banda ancha en municipios de escasa población o cuya perspectiva de rentabilidad para las compañías del sector era mínima. La introducción de una herramienta fundamental hoy día para encontrar empleo, acceder a contenidos culturales o, simplemente, para mantener informado al público resulta inevitable si se pretende la cohesión social y el desarrollo individual de las personas.

Todos aquellos fines de interés público o social pueden justificar la postergación de las normas relativas a la libre competencia en un determinado sector económico[29]. No puede afirmarse de forma categórica la primacía de aquellos fines, pero tampoco puede excluirse la necesidad de hacerlos efectivos en determinados supuestos debidamente justificados. La competitividad y el mercado, en ese caso, no pueden sustraerse a la voluntad política de promover unas condiciones de vida dignas para todas las personas sin exclusión.

2.3 Las ayudas públicas

[28] E. SZYSZACK, *The Regulation of the State in Competitive Markets in the European Union*, Oxford, 2007, pág. 119.

[29] J. MONÉGER, «Competition, regulation…», cit., pág. 283.

El Tratado de la Unión Europea establece la necesidad de excluir la aplicación de las normas de competencia cuando las ayudas se destinen a impulsar el desarrollo económico de regiones desfavorecidas que cuenten con un nivel de vida anormalmente bajo, a facilitar el desarrollo de determinadas actividades, a promover la cultura y la conservación del patrimonio, siempre que en estos últimos casos no se alteren las condiciones de los intercambios y la competencia en la Unión[30]. Se emplea por la jurisprudencia comunitaria el criterio del inversor privado para determinar si una ayuda es contraria o no a la libre competencia, de modo que genere o pueda generar una desventaja competitiva para el resto de compañías que no disfrutan de la ayuda. Así, solamente podrían considerarse conformes al Tratado las ayudas públicas cuando éstas consisten en inversiones cuyo riesgo de obtener ganancia es el mismo que el que asumiría un particular[31]. Se considera en este caso que la Administración actúa en pie de igualdad con los particulares y que no se produce discriminación alguna o abuso de posición dominante.

El Tribunal de Justicia de las Comunidades Europeas ha declarado ajustadas al Tratado de la Unión ayudas económicas a empresas que prestan servicios en actividades reservadas a la Administración y que no alteran la competencia en otros segmentos[32]. Por ejemplo, en el sector postal se considera actividad de servicio público el envío certificado que se presta en exclusiva y la compañía que lo provee percibe ayudas públicas, sin que éstas se destinen a financiar otro tipo de envíos, como los paquetes postales o envíos rápidos.

Las dotaciones económicas procedentes de entidades públicas a empresas privadas son conformes al Derecho comunitario de la competencia si cumplen los siguientes requisitos:

[30] Artículo 107 TFUE.

[31] STPI 6-2-2003, T-228/99 y 233/99, *Comisión contra Westdeutsche Landesbank Girozentrale*, ap. 245.

[32] STJCE 1-7-2008, C-341/06 y C-342/06, *Chronopost SA*, aps. 143-155.

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a) Los parámetros del cálculo de la ayuda deben establecerse de forma objetiva y transparente, de forma que pueda observarse claramente si la ayuda ha ocasionado una ventaja económica en relación con el resto de empresas.

b) La ayuda no puede superar el coste estimado por la prestación del servicio, teniendo en cuenta los ingresos y una ganancia razonable[33]. Todo ello permite conocer si la empresa que ha recibido la ayuda la destina a la provisión del servicio social como servicio de interés general[34].

c) Si se trata de una compañía contratada por la Administración, el nivel de la compensación no necesariamente se determina sobre la base de los costes de una empresa normal y eficientemente gestionada. Si la empresa encargada de prestar el servicio público no se ha elegido por un procedimiento de contratación, el nivel de compensación no puede exceder de los costes que asumiría una empresa bien gestionada y adecuadamente equipada[35]. Aunque la ayuda sea concedida, su cuantía debe justificarse y el beneficiario acreditar que se imputa a actividades destinadas a los servicios sociales, por ejemplo[36].

Sin embargo, no resulta tan sencillo determinar si se han vulnerado las normas en materia de libre competencia. Deben examinarse caso por caso ciertos factores que pueden

[33] STJCE 24-7-2003, C-280/00, *Altmark*, aps. 90-92.

[34] L. M. DÍEZ-PICAZO, «Los servicios de interés económico general en el ordenamiento comunitario», en S. MUÑOZ MACHADO y J. ESTEVE PARDO (Dirs.*), Derecho de la Regulación Económica*, Iustel, Madrid, 2009, pág. 418.

[35] *A sensu contrario*, STJCE 24-7-2003, *Altmark*, ap. 93.

36 S. ACIERNO y J. BAQUERO CRUZ, «La sentencia *Altmark* sobre ayudas de Estado y servicios públicos», *Revista Española de Derecho Europeo*, 9, 2004, pág. 185.

[36] D. ORDÓÑEZ SOLÍS, *Administraciones, Ayudas de Estado y Fondos Europeos*, Bosch, Barcelona, 2006, págs. 32-25.

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condicionar el otorgamiento de la ayuda. Por ejemplo, el mercado de referencia, la cuota de mercado del operador beneficiario de la ayuda, el coste de la actividad[37] y, fundamentalmente, el carácter político de la medida adoptada y los intereses generales en presencia, como el carácter esencial del recurso o el servicio para la ciudadanía, son algunas de las variables que debe evaluar la autoridad pública para determinar si esa ayuda no comporta dotarles de una ventaja injustificada a los beneficiarios[38].

Además de este control *ex ante*, debería realizarse un seguimiento pormenorizado respecto a los efectos que esa ayuda ha producido en el mercado y si ha resultado plenamente justificado su otorgamiento. No parece muy lógico, así, que las ayudas recibidas por entidades financieras tras la crisis bursátil produzcan unos beneficios desproporcionados el año siguiente a su obtención, porque significaría que aquellas entidades estaban en condiciones de recuperarse sin necesidad del apoyo público. En especial, debe tenerse en cuenta si la ayuda ha producido una ventaja a la empresa beneficiaria en comparación con el resto de competidores en el mercado. Por ejemplo, la aplicación a una compañía de un régimen específico para que los socios ejerzan su derecho de separación no comporta ningún trato de favor, pese a que dicha empresa recibe fondos públicos para su gestión[39].

El otorgamiento previo de ayudas, desde la perspectiva que interesa abordar aquí, requiere la tramitación de un procedimiento previo en dos vías: por un lado, la interna de la Administración concedente, que debe acreditar la correspondiente habilitación presupuestaria de ese gasto, lo que implica el sometimiento al Derecho administrativo. Por

[37] STJCE 20-11-2003, C-126/01, *Gemo*, ap. 34.

[38] S. ACIERNO y J. BAQUERO CRUZ, «La sentencia *Altmark* sobre ayudas de Estado y servicios públicos», *Revista Española de Derecho Europeo*, 9, 2004, pág. 185.

[39] STJCE 23-3-2006, C-237/04, *Enrisorse SpA*, ap. 47.

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otro, la autorización previa de esa ayuda por parte de la Comisión Europea con anterioridad al inicio del procedimiento para la adjudicación de la subvención.

Más allá del análisis de las ayudas de Estado desde la perspectiva de la jurisprudencia comunitaria, debe suscitarse la cuestión en torno a la necesidad y razonabilidad de las aportaciones públicas con fines de interés general. Ello aboca a plantearse cuestiones de indudable orden político, como las decisiones que deben adoptar los representantes democráticamente elegidos, excluyendo cualquier tipo de injerencia procedente de los principales operadores del mercado. Ha de considerarse la posibilidad de que el Derecho de la competencia no se aplique en el supuesto de que la Administración actúe, bien mediante medidas singulares, bien mediante la regulación de las actividades.

2.4 El ejercicio de la actividad en exclusiva y los servicios de interés general

A) La doctrina de los derechos especiales y exclusivos

De acuerdo con el Tratado sobre el Funcionamiento de la Unión Europea, se les prohíbe a los Estados miembros adoptar y mantener, respecto de las empresas públicas y aquellas empresas a las que concedan derechos especiales o exclusivos, medidas contrarias a las normas de los Tratados. Las empresas encargadas de la gestión de servicios de interés económico general o que tengan el carácter de monopolio fiscal se someten a las normas de los Tratados, en especial a las normas sobre competencia, en la medida en que la aplicación de dichas normas no impida, de hecho o de derecho, el cumplimiento de la misión específica a ellas confiada[40].

[40] Artículo 106.1 y 2 Tratado sobre el Funcionamiento de la Unión Europea, de 13-12-2007.

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Las autoridades públicas han considerado tradicionalmente indispensable reservar segmentos de actividad a la titularidad pública, e incluso financiar empresas, al objeto de alcanzar los clásicos objetivos del servicio público: la continuidad, la universalidad y la igualdad[41]. Advierte la necesidad de exonerar a ciertas empresas privadas de la obligación de respetar las normas de la competencia o les concede la posibilidad de evitarla[42]. Esas medidas, de corte intervencionista y con evidente repercusión en la libre competencia, se fundaban en la sospecha cierta de que las empresas privadas no estarían dispuestas a ofrecer sus servicios a personas que no fueran potenciales consumidores, es decir, aquellas que no ostentan la capacidad económica suficiente para pagar dichos bienes o servicios[43]. El Estado no puede soslayar la protección de los sectores sociales en situación de desamparo o marginalidad, ya que está obligado precisamente a garantizar su dignidad en un Estado democrático de Derecho.

La jurisprudencia comunitaria ha interpretado caso por caso la normativa comunitaria en materia de libre competencia, autorizando en algunos casos la regulación e, incluso, la intervención directa de los Estados en algunos sectores económicos, dados los intereses generales en juego y su debida ponderación respecto a las medidas o a las regulaciones que han ido adoptando aquéllos. Se trata, en último término, de que la regulación económica no comporte una desproporcionada restricción de los derechos de las empresas a ejercer libremente su iniciativa económica en cualquier sector[44]. Debe

[41] SZYSZACK, cit., pág. 120.

[42] M. WAELBROECK y A. FRIGNANI, *Derecho Europeo de la Competencia*, Bosch, Barcelona, 1998, pág. 383.

[43] G. GARCÍA HERRERO, «Los servicios sociales y la ley de promoción de la autonomía personal y atención a personas en situación de dependencia: ponencia», *Trabajo Social Hoy*, 48, 2006, pág. 71.

[44] STJCE 19-5-1993, C-320/91, *Corbeau*, ap. 17.

justificarse que cualquier injerencia por parte de los poderes públicos en materia económica se fundamenta en razones imperiosas de interés general[45].

En diferentes supuestos el Tribunal de Justicia de la Unión ha examinado la necesidad de la regulación, es decir, su tendencia a satisfacer los fines que la justifican, y, además, el perjuicio que podría causarles su implantación a los operadores obligados a cumplirla. Se ha aceptado que los Estados dispongan de un amplio margen de apreciación para constituir los derechos especiales o exclusivos en función de las necesidades y la situación actual de sus economías[46]. La ausencia de justificación en torno a la misión de interés general y a la naturaleza estatal de la actuación desemboca en una conducta prohibida, como el abuso de posición de dominio[47].

Se ha venido distinguiendo entre servicios mínimos o básicos, por un lado, y servicios de valor añadido, por otro. Los primeros deben prestarse de forma obligatoria, más allá del coste de su prestación. En todo caso, todos ellos deben respetar las garantías clásicas en materia de servicios públicos, como son la universalidad, la igualdad, la continuidad y el carácter asequible de las tarifas[48]. La concesión de derechos especiales o exclusivos en este segmento de la actividad, integrado por los servicios básicos o mínimos, podría venir justificada por la necesaria tutela que deben ejercer las autoridades administrativas para satisfacer los intereses generales[49]. ¿Quién define qué son servicios

[45] STJCE 11-4-1989, C-66/86, *Ahmed Saeed*, ap. 56.

[46] SZYSZACK, cit., pág. 230.

[47] STJCE 1-7-2008, C-49/07, *Motosykletistky Omospondia*, aps. 45-47.

[48] T. DE LA QUADRA-SALCEDO, *Liberalización de las telecomunicaciones, servicio público y constitución económica europea*, Centro de Estudios Constitucionales, Madrid, 1995, pág. 142.

[49] STJCE 17-5-1994, C-18/1993, *Merci Convenzionale Porto di Genova*, aps. 45-47. Véase al respecto L. CASÉS PALLARÉS, «Regulación públca y abuso de posición dominante», en S. MARTÍNEZ LAGE y A. PETITBÓ JUAN (Dirs.), *El abuso de posición de dominio*, Marcial Pons, Madrid, 2006, pág. 232.

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básicos? Debería tratarse de una decisión en la vía legislativa, dado que restringir la competencia podría lesionar el contenido esencial del derecho a la libertad de empresa, aspecto amparado por la reserva de ley. En todo caso, la decisión acerca del objeto del servicio básico debe venir motivada por una especial incidencia de esa prestación en las necesidades esenciales de la ciudadanía. Como ejemplos pueden señalarse la telefonía básica, el suministro eléctrico en una determinada potencia, la conexión a Internet a determinada velocidad, etc.

Respecto a la intervención de las autoridades administrativas en las actividades económicas, la jurisprudencia comunitaria ha puesto de manifiesto la necesidad de evitar la confusión entre los gestores y reguladores en un mismo segmento de la actividad económica. Ahora bien, debe concurrir un requisito adicional para prohibir que el ente regulador y el operador fueran la misma persona o, al menos, que estuviera subordinado a él: la existencia de abuso de posición dominante por parte de la empresa vinculada de algún modo al poder público[50].

El aspecto económico de la regulación aparece aquí como el principal fundamento para evaluar si la Administración ha perjudicado a una compañía sometida a una regulación determinada en el segmento de actividad de que se trate, es decir, si se ha vulnerado la libre competencia. El ente público podría adoptar medidas que tiendan a compensar el déficit económico que padecen ciertas empresas como consecuencia de una regulación tendente a paliar una necesidad de interés público[51]. Así, pueden aprobarse tarifas máximas más elevadas en diferentes servicios o conceder periodos transitorios para que las compañías se adapten al nuevo entorno regulador, mejorando su competitividad. Sin embargo, debe demostrar mediante sistemas transparentes de contabilidad de los costes que las tarifas

[50] SSTJCE 13-12-1991, C-18/88, *GB Inno-BM*, ap. 25, y 19-31991, C-202/88, *Comisión contra Francia,* ap. 51.

[51] STJCE 24-7-2003, C-280/2000, *Altmark*, ap. 87.

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fijadas o las ayudas recibidas están justificadas y son necesarias para la prestación del servicio público[52].

B) Los servicios de interés general

En el Tratado de Lisboa se adjuntó un protocolo relativo a este tipo de servicios, por el que se reconocen el papel esencial y la amplia discrecionalidad de las autoridades nacionales, regionales y locales en la prestación, encargo y organización de servicios de interés económico general que se adecuen lo más posible a las necesidades de los usuarios. Se pretende alcanzar un alto nivel de calidad, seguridad y asequibilidad, igualdad de trato y promoción del acceso universal y de los derechos de los usuarios. Las disposiciones de los Tratados no modifican en modo alguno la competencia de los Estados miembros para prestar, encargar y organizar servicios no económicos de interés general[53].

Al liberalizarse gran parte de las actividades económicas, las autoridades comunitarias debían replantearse la categoría del servicio público como actividad inherente a la intervención administrativa. Propusieron un concepto objetivo del servicio público, ligado al carácter de la prestación y no al organismo o ente que lo prestara[54]. Crearon la

[52] STJCE 17-5-2001, C-340/99, *TNT Traco SpA*, ap. 63. Véanse también SSTJCE 18-6-1998, C-266/96, *Corsica Ferries*, ap. 46, y 19-5-1993, C-320/91, *Corbeau*, ap. 19.

[53] Comunicación COM/725/2007, de 20 de noviembre, Comunicación de la Comisión que acompaña a la Comunicación «Un mercado único para la Europa del siglo veintiuno. Servicios de interés general, incluidos los sociales: un nuevo compromiso europeo».

[54] J. L. CARRO FERNÁNDEZ-VALMAYOR, «Servicio público e intervención pública. Una reflexión general sobre los servicios públicos de relevancia económica», en L. COSCULLUELA MONTANER (Coord.), *Estudios de Derecho Público Económico. Libro homenaje al profesor Sebastián Martín-Retortillo*, Civitas, Madrid, 2003, pág. 604.

categoría de servicios de interés general para definir aquellas actividades que, por su incidencia en las condiciones de vida de las personas, precisaban un control o regulación por parte de los poderes públicos, sin perjuicio de que pudieran ser ofrecidos por los particulares. Aquí cobra especial relevancia la intervención administrativa mediante la regulación, cuyo objeto estriba en corregir los desequilibrios que arroja el mercado, al objeto de evitar conductas contrarias a la competencia y procurar que toda la ciudadanía disfrute de unos servicios básicos a precios asequibles[55].

Cabe distinguir dos tipos de servicios económicos de interés general: por un lado, aquellos que exigen una contraprestación o cuyos prestadores persiguen un ánimo de lucro y, por otro, los servicios que no se prestan para la obtención de un beneficio económico o que no requieren una remuneración por los usuarios. Aquí se encuadran los servicios públicos de educación, sanidad, prestaciones sociales o la Administración, entre otros[56]. Los primeros se prestan en régimen de libre competencia, sin perjuicio de que los Estados contemplen unas prestaciones obligatorias, al objeto de satisfacer las necesidades básicas de los usuarios. Por lo que respecta a los segundos, los Estados pueden establecer que se presten por la Administración con exclusividad, de forma directa o indirecta, de acuerdo con su capacidad económica y sus peculiaridades, excluyendo la aplicación del Derecho de la competencia, tal y como se ha comentado en el anterior apartado.

El acceso a los servicios de interés económico general se reconoce como derecho en la Carta de los Derechos Fundamentales de la Unión Europea[57]. Las autoridades internas están obligadas, por tanto, a satisfacer determinadas prestaciones en las condiciones y con los mecanismos que establezcan los Estados de acuerdo con sus respectivos grados de

[55] SZYSZACK, cit., pág. 248.

[56] Libro Verde sobre los servicios de interés general, COM (2003) 270 final, pág. 16.

[57] Artículo 36 Carta de los Derechos Fundamentales de la Unión Europea, aprobada por Acuerdo del Consejo, la Comisión y el Parlamento Europeo el 7 de diciembre de 2000.

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desarrollo económico y social[58]. Pese a que se otorga un amplio margen de maniobra a las autoridades internas, algunas regulaciones sectoriales, dictadas en el ámbito europeo, ya han previsto ciertos servicios mínimos o básicos que se configuran como derechos de los usuarios en Europa. Así sucede cuando la legislación en materia de telecomunicaciones prevé la obligatoriedad del servicio telefónico básico para toda la ciudadanía de la Unión o una determinada conexión a Internet[59].

Las diversas comunicaciones emanadas de la Comisión Europea en torno a los servicios de interés general en Europa arrojan resultados diversos en torno a la posibilidad de que la Administración pueda ejercer una iniciativa económica en el mercado. Se han definido los servicios no económicos de interés general como aquellos cuya provisión no requiere a cambio una remuneración. En otras palabras, podría afirmarse que son actividades que pueden llevarse a cabo con pérdidas o sin ánimo de lucro[60]. La cuestión en estos casos estriba en aclarar si las compañías ligadas a la Administración o creadas por ella se someten o no al Derecho de la competencia. Con carácter general, podría afirmarse que la creación de dichos servicios en Europa tiene como finalidad trasladar al sector privado aquellos que se prestaban con exclusividad por parte de las autoridades administrativas. Sin embargo, en un sector liberalizado, como correos, la jurisprudencia ha excluido la posibilidad de aplicar el Derecho de la competencia a las empresas a las que se ha reservado la prestación del servicio universal en un segmento concreto del mercado, en este caso el envío de tarjetas postales al extranjero. La previa reserva de la actividad a una

[58] M. ROSS, «Article 16 EC and services of general interest, from derogation to obligation?», *European Law Review*, febrero 2000, pág. 35.

[59] Artículos 22.1 Ley 32/2003, General de Telecomunicaciones, y 29.4 Real Decreto 424/2005, de 15 de abril, por el que se aprueba el Reglamento de condiciones de prestación de los servicios de comunicaciones electrónicas y el servicio universal.

[60] Libro Verde sobre los servicios de interés general, 29-5-2003, COM (2003) 270 final, pág. 16. Al respecto, véase la STJCE 16-3-2004, C-264/01, C-306/01, C-354/01 y C-355/01, *AOK Bundesverband y otros*, ap. 51.

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empresa se muestra como necesaria para cumplir los fines establecidos para ese tipo de servicios[61].

Por lo que interesa a la iniciativa económica de la Administración en el mercado, cabe señalar aquí que la liberalización de la actividad de los servicios económicos de interés general no impide que sean los entes públicos los que presten directa o indirectamente el servicio, si bien salvaguardando algunas garantías en materia de libre competencia, tal y como se ha comentado anteriormente respecto a la necesidad de separar los entes reguladores y los gestores si se produce con ello un abuso de posición dominante. Por otro lado, tampoco cabría descartar la posibilidad de que los poderes públicos inyecten fondos para garantizar la prestación de ciertos servicios de carácter obligatorio. En ese sentido, ya se ha mencionado el sometimiento de esas ayudas públicas al Derecho de la competencia. En este contexto, próximo a las políticas públicas y a la decisión de las autoridades públicas, debe abordarse el debate en torno a qué actividad administrativa se encuentra o no exenta de la aplicación del Derecho interno de la competencia.

3. LA REGULACIÓN EN LA LEY DE DEFENSA DE LA COMPETENCIA Y LOS PROBLEMAS QUE PLANTEA

En Estados Unidos se suscitó la polémica en torno a la articulación entre la regulación económica y el Derecho de la competencia con motivo de la *State Action Inmunity*, que impedía enjuiciar la actividad de los poderes públicos de acuerdo con la legislación *antitrust*. El fundamento se halla en el federalismo, de modo que les corresponde a los Estados la regulación del mercado y la puesta en marcha de una política económica determinada[62]. Sería como considerar que les corresponde a las empresas o al

[61] STS 9-12-2008, RA 2009/348, FD 4.º y 5.º.

[62] *Eastern Railroad Presidents Conference v. Noerr Motors*, 365 US 127 (1961).

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Derecho de la competencia la regulación de cuestiones políticas. Las empresas estarían facultadas para la regulación de cuestiones políticas que estuvieran siempre conformes con el Derecho de la competencia. Aquéllas podrían mantener contactos con las autoridades al objeto de reducir la competencia, lo que no significa que sean las propias compañías las que adopten esas decisiones[63]. Una acción fundada en precios predatorios o de exclusión, fijados por la agencia, sería inoperante en una industria eléctrica sometida a regulación[64].

No obstante, aquella doctrina evolucionó hacia una interpretación de las normas desde la perspectiva del Derecho de la competencia, de modo que la Ley de telecomunicaciones, paradigma en este caso de la regulación sectorial, no modifica ni deroga la normativa *antitrust*, pues la existencia de un monopolio no sólo resulta legal, sino que constituye un elemento importante del libre mercado, pues ésa es la aspiración de todo operador que asume riesgos, contribuyendo con ello a la innovación y al crecimiento económico. La situación de monopolio no resulta ilegal, salvo que se haya obtenido mediante una conducta anticompetitiva. Únicamente podría aplicarse el Derecho de la competencia cuando la regulación no ordene determinados aspectos de la actividad económica o del sector en cuestión[65].

La intervención de las autoridades de la concurrencia debe ser inversamente proporcional a las obligaciones que pesan sobre un operador, en términos de comportamientos contrarios a la competencia. A mayor regulación, las autoridades de la competencia poseen menos facultades de vigilancia y castigo de las conductas contrarias a

[63] A. L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Intervenciones del Estado y libre competencia en la Unión Europea*, Colex, Madrid, 2001, pág. 57.

[64] *Town of Concord v. Boston Edison Co.* (915 F2d 17, 1er Cir., 1990). Véase al respecto S. NAUGÉS, «L'articulation entre droit commun de la concurrence et droit de la régulation sectorielle», *AJDA*, 13, 2007, págs. 673-677.

[65] *Verizon Communications inc. v. Law Offices of Curtis*, 02-682, 14-10-2003, 305 F3d 89, 540 US (2004).

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la competencia. Los jueces, en el control de ese grado de proporcionalidad, deben tener en cuenta los siguientes aspectos: los problemas técnicos que afecten al mercado en cuestión; la resolución de conflictos relacionados con la libre concurrencia mediante la regulación, y la posibilidad de que la autoridad de regulación imponga sanciones. Si estos tres criterios se observan acumulativamente, la autoridad de regulación puede cumplir las funciones que le corresponden a la autoridad de la competencia. Las mismas autoridades de regulación podrían aplicar directamente el Derecho común y la normativa *antitrust*[66]. En definitiva, las empresas se someten a las normas en materia de defensa de la competencia, salvo que las autoridades reguladoras traten de evitar comportamientos contrarios a la competencia mediante la fijación de tarifas o cualquier otra medida con los mismos fines[67].

La jurisprudencia estadounidense no reconoce expresamente que la regulación sectorial pueda someterse al control de los tribunales desde una perspectiva del Derecho *antitrust*. Se inclina únicamente por una convivencia pacífica entre la regulación y el Derecho de la competencia, una complementariedad que no distingue entre supuestos en que la regulación se formula por ley o por una orden de la agencia reguladora correspondiente. Se ignora que también las agencias reguladoras en el ejercicio de sus funciones deberían someterse al principio de *rule of law*, en este caso la *Sherman Act*.

En este apartado habrá ocasión de analizar las previsiones de la Ley de Defensa de la Competencia en los supuestos en que la Administración promueve la iniciativa económica y la regulación que pueda repercutir en el mercado. Aquel texto señala que las exenciones conforme a dicho texto legal se aplicarán «sin perjuicio del Derecho comunitario en materia de defensa de la competencia»[68]. Por tanto, con anterioridad a cualquier análisis en torno a la posibilidad de eximir una actuación administrativa de la Ley

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[66] *Bellsouth Corporation v. Covad Communications Company* (540 US 1147, 125 S. Ct. 1143, 2004).

[67] *Texas Commercial Energy, Inc.*, 423 Fd 503, 5th Cir., 2003.

[68] Artículo 4 LDC.

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de Defensa de la Competencia, es imprescindible examinar el Derecho europeo y su interpretación llevada a cabo por el Tribunal de Justicia de las Comunidades Europeas.

Por otro lado, la Ley de Defensa de la Competencia contempla dos supuestos en que las Administraciones públicas no se someten a sus preceptos: uno, en el caso de que lleven a cabo conductas que resulten de la aplicación de una ley; y dos, cuando la Administración ejerza sus potestades administrativas y los poderes públicos o empresas públicas actúen con dicho amparo legal. Recuérdese que las autoridades públicas dictan normas reguladoras de diversas actividades económicas. Trata de abordarse el modo en que la regulación administrativa y el Derecho de la competencia se articulan. En las siguientes líneas pretende abordarse esta tarea de arrojar algo de luz en torno a este tan polémico precepto[69].

3.1 La controversia en torno a la aplicación de la ley

La ya derogada Ley de Defensa de la Competencia de 1989 preveía como conductas exentas, además de las recomendaciones, prácticas y decisiones que resulten de la aplicación de la ley, los reglamentos dictados en aplicación de una ley. Además, no hacía referencia a cualquier conducta, excluyendo el abuso de posición de dominio. Si se compara con la regulación actual, podría concluirse que únicamente estarían amparados por la exención aquellos comportamientos contrarios a la competencia que estuvieran establecidos por ley. Cabe delimitar, no obstante, el alcance del término «aplicación de la ley».

Puede cuestionarse si el sentido de la palabra ley debe interpretarse de forma restrictiva, de modo que se trataría de disposiciones con ese rango, o bien si debe

[69] Artículo 4.1 y 2 Ley 15/2007, de 3 de julio, de Defensa de la Competencia (LDC).

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equipararse el concepto de ley al de norma en sentido general. Las actuaciones de la Administración, en cualquier caso, deben someterse a la ley y al Derecho, lo que permitiría concluir que la exención general contenida en ese artículo 4 resulta una tautología en sí misma. La Administración no puede actuar más allá de los límites que impone la legalidad. Aquélla podría dictar reglamentos o actos administrativos que tuvieran por objeto la aplicación automática de una norma con rango de ley. El problema estriba aquí en determinar si se aplica la Ley de Defensa de la Competencia en los supuestos en que la Administración disponga de un margen de apreciación más amplio y diverso de aquel que se refiere a la aplicación automática de una norma con rango de ley.

Así, el concepto de aplicación debería precisarse aún más, ya que la Administración, en el ejercicio de sus facultades de desarrollo de leyes, podría, sin contravenir el texto legal, añadir aspectos de la regulación de una materia no contenidos en la ley. Esto sucede habitualmente en la normativa técnica, que exige una especialización y un grado de capacitación alejados completamente de las posibilidades que ofrece un parlamento. No se olvide que la implantación de reglamentaciones que definan las características de productos o su composición puede ser objeto de conflictos vinculados a la libre competencia, en este caso en el mercado donde se comercializan dichos productos, por ejemplo. Asimismo, la Administración puede dictar actos administrativos en aplicación de una ley en sectores que exigen regulaciones sumamente coyunturales y estacionales, debido a los vaivenes del mercado. Así ocurre en sectores estratégicos en red, como las telecomunicaciones, el gas o los transportes.

La aprobación de tarifas, por ejemplo, depende de numerosos factores, asociados al coste del servicio y, fundamentalmente, a la necesidad de que sean asequibles para la prestación de servicios básicos y universales. En función de las innovaciones tecnológicas o, incluso, del poder de mercado de los operadores, la decisión en torno a la fijación de una u otra tarifa varía sustancialmente. Por ello, tampoco podría afirmarse en este caso que la Administración aplica automáticamente la ley reguladora de cualquiera de los sectores, sino que simplemente ejerce sus potestades de supervisión y vigilancia de los mercados, de acuerdo con los límites, parámetros y competencias que la ley prevé. Es más, podría suscitarse la paradoja de que se emita un acto, cuyo fin sea la promoción de la libre

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concurrencia y que sea considerado contrario a la misma por la autoridad de la competencia. ¿Se encuentra esta actuación sujeta a la normativa sobre defensa de la competencia, o únicamente debería comprobarse si se ajusta a los preceptos de la legislación sectorial?

3.2 La posición de la autoridad de defensa de la competencia

El ya extinto Tribunal de Defensa de la Competencia ha tenido la oportunidad de dirimir controversias en las que se cuestionaba la validez de la actuación administrativa desde la perspectiva del Derecho de la competencia. En los supuestos en que la Administración contrataba a una empresa para la prestación de unos determinados servicios públicos, la autoridad de la competencia puso de manifiesto su incompetencia, dadas las facultades de la Administración para gestionar sus servicios y ejercer sus competencias de acuerdo con la ley[70]. Así sucede, incluso al aplicarse la legislación en materia de contratos, para la concesión de créditos a entidades privadas por parte de la Administración[71] o la gestión de las instalaciones portuarias[72]. El contenido de estos pronunciamientos se ha reiterado, quedando el asunto en cuestión sin examinar. Se alega la falta de competencia para enjuiciar la actuación administrativa, sirviéndole al Tribunal como pretexto para no entrar en el fondo del asunto. En alguna ocasión procedió a estudiar si efectivamente el resto de compañías podría verse perjudicado por la decisión administrativa en materia de contratación[73]. En algún caso se ha sugerido a las Administraciones públicas que corrijan

[70] RTDC 10-4-2000, expte. R414/2000, Ayuntamiento de Villamartín, FD 2.º.

[71] RTDC 22-10-1998, expte. R298/1998, Ayuntamiento de Torrevieja, FD 2.º.

[72] RRTDC 23-7-1998, expte. R308/1998, FD 2.º, y 10-11-1998, expte. R325/1998, puerto deportivo Zumaia.

[73] RTDC 27-4-2001, expte. R447/2000, caso Piñas de Andalucía, FD 3.º.

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los pliegos de la contratación, sin entrar a enjuiciar su conformidad o no con las normas de la competencia[74].

Puede señalarse, asimismo, el ejemplo del otorgamiento de autorizaciones, clásico acto administrativo, cuya denegación podría suponer una restricción a la competencia[75]. Al respecto, la concesión para la ocupación y aprovechamiento del dominio público en un aeropuerto se configura como un acto administrativo que no es susceptible de ser enjuiciado por la autoridad de la competencia. Ésta estima que no puede situarse bajo las coordenadas de la competencia el valor que, inspirado en los intereses generales, el legislador le ha atribuido al suelo de los aeropuertos. Como puede apreciarse, la calificación de un bien como demanial no se sujeta a las normas sobre libre competencia[76].

Sin embargo, el ejercicio de una competencia administrativa de carácter obligatorio, con arreglo a la Ley de Bases del Régimen Local, no impide someter esa actividad a la normativa *antitrust*, más allá de que se lleve a cabo con objetivos puramente sociales y se hallen alejados de la lógica del mercado. Debe procederse a un análisis caso por caso, pues en función de la clientela, del mercado de referencia y del poder de mercado que pueda ostentar la Administración puede demostrarse la comisión del ilícito. En ese sentido, si se demuestra que la oferta de servicios deportivos por un precio sensiblemente inferior no supone una mejora en la cuenta de resultados, y que la finalidad de la entidad pública estriba en fomentar la actividad física y el deporte como una de sus competencias obligatorias, no podría considerarse contraria a la competencia[77]. La autoridad de la competencia en este caso no excluye la aplicación de la normativa *antitrust*, concluyendo

[74] RCNC 31-8-2010, expte. S/0272/10, Centro Internacional de Cultura Contemporánea, FD 3.º.

[75] RRTDC 24-4-1995, expte. 1143/1994, FD 4.º y 5.º, y 1-4-1996, expte. 1296/1995, FD 4.º.

[76] RTDC 14-3-2002, expte. 1718/97, AENA/ALDEASA, FD 2.º y 3.º.

[77] RTDC 7-11-2006, expte. R673/05, caso Deportes Valladolid, FD 3.º.

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del estudio de las circunstancias económicas que la Administración, estableciendo unos precios públicos de uso de las instalaciones deportivas, no incurría en abuso de posición dominante ni fijaba precios predatorios.

Los acuerdos adoptados por los colegios profesionales, por ejemplo, no pueden sustraerse a la Ley de Defensa de la Competencia, pues se trata de una asociación de empresas u operadores económicos. Llevan a cabo una actividad económica a cambio de remuneración en un determinado mercado[78]. En ese sentido, el Colegio de Arquitectos no puede discriminar a unos peritos para que intervengan en procesos judiciales[79]. Aun así, a los efectos de determinar si han incurrido en alguna conducta contraria a la libre competencia, debe examinarse caso por caso, de acuerdo con los estudios de mercado y las circunstancias concurrentes, si ese acuerdo de los colegios profesionales viene o no amparado por la Ley de Defensa de la Competencia.

3.3 Planteamientos doctrinales

Parecería desprenderse una contradicción de la interpretación de los dos párrafos de la Ley, según cuál sea el sentido del término «aplicación de la ley». Si se acepta que abarca regulaciones administrativas que desarrollan o precisan lo establecido en la Ley, podría considerarse que la Administración se sustrae a todo acto de control y vigilancia de la autoridad de defensa de la competencia. Si el vocablo «aplicación» significa cumplir automáticamente lo establecido por ley, se requeriría una norma con ese rango en el caso de que se pretenda sustraer a la Administración de la aplicación de las normas sobre defensa de la competencia. Se ha comentado que sólo el reglamento que pueda demostrar un enlace preciso y directo entre su exacto contenido y la definición legal de sustento podría quedar al

[78] Sentencia Audiencia Nacional 22-10-2003, RA 2004/858, FD 5.º y 6.º.

[79] RCNC 9-2-2009, expte. 637/08, Peritos/Arquitectos de la Comunidad Valenciana.

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margen de la normativa en materia de defensa de la competencia[80]. Todo ello lo han resumido algunos autores distinguiendo entre normas abiertas, dictadas tras llevar a cabo estudios de mercado, caracterizadas por una eficacia limitada en el tiempo, y cerradas, que no admiten un margen de apreciación por parte de las autoridades públicas[81].

Algunos autores se inclinan por conceder prioridad a la normativa sectorial en esos supuestos, debido a que entienden que les corresponde a ciertas entidades velar por el correcto funcionamiento de los mercados y por el desenvolvimiento de la libre competencia en ellos[82]. Sin embargo, piénsese que la mayor parte de las decisiones o las normas adoptadas por los organismos de regulación poseen rango reglamentario y técnicamente no podrían vulnerar una disposición de rango superior, como es la Ley de Defensa de la Competencia. Por ello debe partirse del presupuesto de que la Administración no queda exenta de la aplicación de la Ley de Defensa de la Competencia, quedando en manos de la jurisdicción contencioso-administrativa apreciar la validez o invalidez de los reglamentos o actos administrativos que restrinjan la concurrencia entre operadores del mercado. Más allá de que se trate de una legislación sectorial, general o destinada a castigar los comportamientos contrarios a la libre competencia, la Administración no podría actuar sin amparo legal. Algo que viene corroborado por el segundo párrafo del artículo 4, al señalar que se someterán a la ley las conductas que restrinjan la competencia y que se lleven a cabo sin amparo legal. Del segundo párrafo del artículo 4 de la Ley de Defensa de la Competencia se desprende que la Administración puede ejercer potestades administrativas que restrinjan la competencia, siempre que se dicten de acuerdo con la ley. Así, parece que el legislador trata de distinguir aquellas actuaciones administrativas que restringen la libre competencia y que no se ajustan a la ley de aquellas otras que, aun cumpliendo lo dispuesto

[80] J. E. SORIANO GARCÍA, *La Defensa de la Competencia*, Iustel, Madrid, 2007, pág. 51.

[81] M. SZDYLO, cit., págs. 268-272.

[82] LAGUNA DE PAZ, cit., pág. 97, y SZDYLO, cit., pág. 263.

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en la normativa, atentan contra la libre competencia. Estas últimas no quedarían sometidas a la legislación de la competencia. Ha de tenerse presente que tan sólo se persiguen aquellas conductas que produzcan un efecto sensible sobre la competencia, es decir, una eliminación, reducción y falseamiento apreciable de la misma[83].

De acuerdo con algunas posturas doctrinales, sólo sería admisible la restricción de la competencia si la autoridad pública ha empleado los medios menos restrictivos para alcanzar los fines públicos que se derivan de sus competencias[84]. El acuerdo contrario a la competencia debería cumplir todos y cada uno de los requisitos que, a tal fin, contenga la norma habilitante[85]. Por otro lado, el análisis de las actividades económicas de los poderes públicos desde el punto de vista del Derecho *antitrust* debería basarse en el carácter público o no de la actividad, debiendo interpretar de forma restrictiva los poderes exorbitantes de la Administración[86]. En ese sentido, podrían considerarse excluidas de la Ley de Defensa de la Competencia las actividades de una empresa a la que se le ha conferido el monopolio por la vía legal, con arreglo al artículo 128 de la Constitución[87].

[83] J. I. RUIZ PERIS, «Los acuerdos restrictivos de la competencia tras la nueva Ley de Defensa de la Competencia», en J. I. RUIZ PERIS (Dir.), *La Nueva Ley de Defensa de la Competencia*, Tirant lo Blanch, Valencia, 2008, pág. 46.

[84] J. M. BAÑO LEÓN, *Potestades administrativas y garantías de las empresas en el Derecho español de la competencia*, McGraw-Hill, Madrid, 1996, pág. 87.

[85] E. GALÁN CORONA, «Prohibición de prácticas colusorias. Visión general», en J. M. BENEYTO PÉREZ (Dir.) y J. MAILLO GONZÁLEZ ORUS (Coord.), *Tratado de Derecho de la Competencia*, Bosch, Barcelona, 2005.

[86] J. VICIANO PASTOR, *Libre competencia e intervención pública en la economía*, Tirant lo Blanch, Valencia, 1995, pág. 461.

[87] VICIANO PASTOR, cit., pág. 465.

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La Administración está obligada a preservar los fines de interés general. Si se aparta de estos fines, es decir, si actúa de forma desproporcionada, no se considerarán exentos de la aplicación de la Ley de Defensa de la Competencia[88]. El debate estriba en si la Ley de Defensa de la Competencia ha llevado a cabo una deslegalización, impidiendo que la Administración se someta a la normativa en materia de defensa de la competencia, siempre que dicte reglamentos o actos en una materia. Al respecto se afirma que la restricción puede derivar tácitamente de la previsión contenida en una norma con rango de ley[89]. Sin embargo, por el hecho de que las autoridades de la competencia no puedan anular la actividad administrativa, las entidades públicas no quedan al margen de la Ley de Defensa de la Competencia o inmunes a su control por la jurisdicción. Al objeto de que la Administración no quede exenta de la ley y el Derecho, debería examinarse caso por caso el impacto que su regulación ha producido en la competencia. De acuerdo con todo ello, únicamente las leyes o las normas con rango de ley podrían exonerar a la Administración de la normativa contraria a la competencia[90].

La Comisión Nacional de la Competencia no podrá anular las decisiones administrativas, dado que les ampara la presunción de legalidad, al margen de que las normas no le han conferido a aquélla una competencia de tal carácter. Todo ello no obsta a que la jurisdicción contencioso-administrativa pueda hacerlo en virtud de la normativa *antitrust*, pues en este caso no cabría invocar la imposibilidad de aplicar la Ley de Defensa de la Competencia. De hecho, la Ley le faculta a la Comisión Nacional de la Competencia

[88] VICIANO PASTOR, cit., pág. 500.

[89] F. MARCOS, «El tratamiento de las restricciones públicas a la competencia: la exención legal en la Ley 15/2007, de 3 de julio, de Defensa de la Competencia», *Diario La Ley*, núm. 6977, 2008.

[90] A. M. TOBÍO RIVAS, «Excepciones a las conductas prohibidas», en M. P. MARTÍN CRESPO y F. HERNÁNDEZ RODRÍGUEZ, *Derecho de la libre competencia comunitario y español*, Aranzadi, Pamplona, 2009, pág. 204.

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para la impugnación de actos y disposiciones de la Administración que incurran en conductas prohibidas[91].

Se ha planteado la posibilidad de que la autoridad de la competencia enjuicie si el reglamento se ajusta a la ley o el acto administrativo a la normativa antirust. Esa valoración puede desembocar simplemente en la interposición del correspondiente recurso ante la jurisdicción contencioso-administrativa, pues la Administración no puede investirse de facultades que, por ley, le corresponden al juez[92]. Se ha mencionado la posibilidad de que la autoridad de la competencia no aplique el reglamento o no tome en consideración el acto administrativo cuando la conducta infractora sea manifiesta[93]. Aun así, parece arriesgado confiar a un organismo público la interpretación sobre lo que se considera o no flagrante o manifiesto.

Las imprecisiones derivadas del precepto que se analiza abocan inevitablemente a la incertidumbre en muchos casos y, por tanto, a una falta de seguridad jurídica inadecuada para el crecimiento y dinamismo económicos. Por ello, la Ley de Defensa de la Competencia debería definir los conceptos «aplicación de una ley», en el sentido de si incluye o no en su ámbito de aplicación los reglamentos autónomos, los independientes o, simplemente, aquellos que añaden aspectos muy técnicos, cuyo desarrollo excede de la capacidad de los parlamentos. Asimismo, debería aclararse si se someten o no los actos administrativos y, si es así, qué tipo de actos, teniendo en cuenta que la regulación administrativa tiende, en ocasiones, a favorecer la libre competencia en un mercado determinado. Debe tenerse presente, en cualquier caso, que la deslegalización, al objeto de

[91] Artículo 12.3 LDC.

[92] BAÑO LEÓN, cit., pág. 92.

[93] J. E. SORIANO, cit., pág. 50.

eximirse de la aplicación de la Ley de Defensa de la Competencia, albergaría serias dudas respecto a su conformidad con la libertad de empresa[94].

3.4 El ejercicio de potestades administrativas que restringen la libre competencia

La actividad de las Administraciones públicas no siempre puede identificarse claramente. Por ejemplo, las empresas públicas están sometidas a un régimen distinto en función de la participación de las entidades públicas en su capital social. De acuerdo con la Ley de contratos del sector público, para que resulte aplicable aquella Ley es imprescindible que los entes públicos o dependientes de éstos hayan aportado más de la mitad del capital social[95]. Piénsese que si la Administración puede condicionar la toma de decisiones en el seno de una empresa, pues posee la mayoría del accionariado, debería considerarse un acto que procede de una o varias Administraciones y debería regirse por una normativa distinta a cualquier acto jurídico-privado.

Ahora bien, se plantea la cuestión en torno a qué régimen se aplica en los casos en que aquella empresa pública no pretende contratar con privados, sino que lleva a cabo determinados proyectos o fija precios, cuestiones que pueden afectar a la concurrencia en un segmento determinado del mercado. La Ley de contratos únicamente la somete a su régimen, no excluyéndolo en ningún momento de las normas sobre libre concurrencia[96]. Las adjudicaciones o el ejercicio de prerrogativas contractuales, ¿se configuran

94 F. MARCOS FERNÁNDEZ, cit.

95 Artículo 3.1.d) Ley 30/2007, de 30 de octubre, de Contratos del Sector Público.

96 F. URÍA FERNÁNDEZ, «Contratos de las administraciones públicas y defensa de la competencia», *Anuario de la Competencia*, 2002, pág. 140.

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propiamente como actos administrativos o bien se trata de acuerdos aprobados en el seno de una sociedad más? En este punto habría que precisar si la compañía actúa en el mercado como una empresa o si, por el contrario, no se ajusta a tal consideración de acuerdo con los criterios empleados por organismos comunitarios e internos de la competencia, así como por los tribunales de justicia, incluido el de la Unión Europea.

Con carácter general, se ha definido la empresa como aquella entidad que obtiene una remuneración como consecuencia de su actividad de producción de bienes o de prestación de servicios en un mercado de referencia determinado[97]. Las empresas encargadas de prestar servicios públicos o basados en el principio de solidaridad quedarían excluidas de esta definición[98]. La Comisión Nacional de la Competencia, por ejemplo, ha excluido al Consejo General del Poder Judicial de la definición de empresa[99]. Eso significa que cualquier sociedad mercantil y ente institucional que se ajuste a estos requisitos debería someterse a las normas sobre libre concurrencia, más allá del grado de participación de que disponga la Administración en su capital social.

No basta invocar el carácter de *imperium* de la actividad administrativa, tal y como han venido preconizando cierta doctrina[100] y alguna jurisprudencia[101], o la imposibilidad de fiscalizar su actuación por las autoridades de la competencia. Como único resquicio para la

[97] STJCE 11-7-2006, C-205/03, *Fenin*, ap. 26. Al respecto, véase D. ORDÓÑEZ SOLÍS, *Intervención pública, libre competencia y control jurisdiccional en el mercado único europeo*, Consejo General del Poder Judicial, Madrid, 2004, pág. 60.

[98] STJCE 23-4-1991, C-41/90, *Höfner y Elser*, ap. 21.

[99] RCNC 17-8-2009, S/0136/09, Consejo General del Poder Judicial, FD 3.º.

[100] F. MARCOS, «Artículo 4. Conductas exentas por ley», en J. MASSAGUER y J. M. SALA ARQUER (Dirs.), *Comentario a la Ley de Defensa de la Competencia*, Thomson-Civitas, Madrid, 2008, pág. 237.

[101] Sentencia Audiencia Nacional 27-6-2008, RA JUR/2008/337542, FD 4.º y 5.º. Véase también RTDC 28-1-1999, expte. 326/1998, FD 1.º.

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aplicación de la normativa anticoncurrencial se ha planteado la posibilidad de que la autoridad pública no regule algún aspecto de la actividad económica[102]. La regulación, sin embargo, debe someterse también a fiscalización, pues, de lo contrario, podrían encontrarse espacios de inmunidad para los poderes públicos, inadmisibles desde el prisma del Estado de Derecho. Es imprescindible examinar si el ejercicio de las competencias atribuidas a los entes públicos se ajusta a los fines de interés general previstos en la norma y si emplea los medios menos restrictivos posibles para el desarrollo de la actividad por parte del resto de competidores[103]. Ahora bien, el segundo párrafo del artículo 4 admite restricciones a la libre competencia, derivadas del ejercicio de potestades administrativas, siempre que encuentren amparo legal.

Parece colegirse implícitamente que la entidad pública se sujeta a la ley y al Derecho. Sin embargo, resulta una obviedad que aquélla se sujeta al principio de legalidad. ¿Qué se entiende aquí por legalidad, sólo las cuestiones de procedimiento o también aquellas que se refieren a la libre competencia? El precepto exige un desarrollo de más hondo y preciso calado. Las entidades públicas podrían actuar con arreglo a su conveniencia, favoreciendo los intereses de empresas patrocinadas y financiadas por ellas mismas, simplemente cumpliendo las formalidades propias del procedimiento administrativo y, en sectores económicos más complejos, la normativa técnica y las obligaciones propias del servicio público. No resulta una conclusión muy ajustada a principios como el de igualdad o a derechos como el de la libertad de empresa. Deben exponerse soluciones más matizadas.

En el Derecho comunitario la jurisprudencia se ha pronunciado en torno a la necesidad de preservar el efecto útil del Derecho europeo en materia de libre competencia.

[102] G. SOLANA GONZÁLEZ, «Administraciones públicas y defensa de la competencia», *Anuario de la Competencia*, 1, 2000, pág. 51.

[103] STJCE 26-3-2009, C-113/07, *Selex Sistemi Integrati SpA*, ap. 78.

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Se considera incompatible con el Tratado que un Estado imponga, mediante disposiciones legislativas o reglamentarias, unas tarifas que no se orientan a los costes reales de prestación del servicio[104]. La fijación de tarifas debe respetar los criterios de interés público definidos por la ley y los poderes públicos no pueden abandonar sus prerrogativas a manos de operadores económicos privados[105]. Se le permite al Estado determinar las bases mismas de la competencia, fijando cuotas de producción o precios de ciertos bienes o servicios[106]. El uso de los canales gubernamentales no conlleva por sí mismo la violación de las reglas de la competencia[107]. En todos esos supuestos es imprescindible llevar a cabo un estudio de mercado del que se desprenda si se ha producido algún tipo de ventaja a favor de determinados operadores como consecuencia de la fijación de esas tarifas.

La jurisprudencia comunitaria ha exigido que los acuerdos públicos destinados a la fijación de tarifas deben emanar de expertos independientes, no de comisiones específicas en las que participen representantes de las empresas[108]. Se retoma la clásica prohibición de confundir los agentes reguladores y regulados. En un sentido más preciso, debe mediar relación de causalidad entre la actuación de la compañía privada y la posterior regulación favorable a dicha compañía[109]. Se exceptúa de la aplicación del efecto útil de las directivas el supuesto en el que se pretende preservar el interés público o en supuestos en que se

[104] STJCE 1-10-1987, C-311/85, *Vereniging Van Clause Reisbureans*, ap. 35.

[105] STJCE 1-10-1998, C-38/1997, *Autotrasporti Librandi*, aps. 28-47. Véase al respecto también STJCE 19-2-2002, C-35/99, *Manuele Ardino*, ap. 40.

[106] STJCE 14-7-1988, C-254/87, *Syndicat des Librairies*, ap. 33.

[107] CALVO CARAVACA y CARRASCOSA GONZÁLEZ, cit., pág. 57.

[108] STJCE 17-11-1993, C-185/1991, *Reiff*, ap. 24.

[109] STJCE 17-1-1984, C-43 y 63/82, *VBVB v. Comisión*, ap. 38.

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ponen en marcha políticas sociales[110]. Aun así, tampoco parece sencillo determinar que la decisión procede de una autoridad pública o de un agente privado y en qué medida ha influido su participación[111].

Supóngase que un ayuntamiento ha financiado la creación de una compañía dedicada a instalar una red de telecomunicaciones *wi-fi* en el ámbito territorial de un municipio. Esa misma entidad está facultada para otorgar las correspondientes concesiones para la ocupación del dominio público al resto de operadores interesados en implantar una red de cable o inalámbrica que, en cualquier caso, son competidores en un mercado de referencia con el ayuntamiento. Más allá de la posible ilegalidad o no de las ayudas públicas a la empresa privada, el ayuntamiento puede condicionar el acceso al mercado de un operador de telecomunicaciones denegándole el título que le habilita para ocupar el dominio público necesario para instalar la red. El órgano municipal competente en esos casos debe emitir una resolución administrativa que afecta al derecho a la libre competencia de los operadores.

Deberían analizarse las circunstancias concurrentes, como la aplicación de la normativa en materia de patrimonio de las entidades locales o la imposibilidad de ocupar más suelo público por razones urbanísticas o medioambientales. Tampoco debería excluirse la aplicación de la normativa en materia de telecomunicaciones, que impone la coubicación de equipos e instalaciones o la puesta en marcha de políticas públicas que promuevan e incentiven el acceso de los ciudadanos a las tecnologías de la información. Como puede apreciarse, no podría impedirse, por una simple decisión administrativa, que otros operadores compitan con las compañías auspiciadas por los entes públicos, pues la

[110] M. EGAN, *Constructing european market*, Oxford University Press, 2001, pág. 26.

[111] CASSESE, cit., pág. 677.

denegación de la solicitud de ocupación podría no responder a argumentos razonables y justificados[112].

Para aplicar esta tesis igualmente deben tenerse en cuenta otros muchos factores, como el grado de desarrollo de los mercados, la capacidad de los Estados para atender las demandas o la capacidad económica de la ciudadanía a la que se dirigen las medidas de intervención. Así, en el caso de los acuerdos que pueden alcanzar empresas de consultoría con abogados, el Tribunal de Justicia permite que los Estados limiten o restrinjan dichas prácticas, ya que uno de los mercados de referencia, las consultorías y auditores, se halla concentrado, provocando conflictos de intereses no deseables desde el punto de vista del correcto ejercicio de la práctica profesional[113].

El Tribunal Supremo ordenó al Servicio de Defensa de la Competencia retomar la investigación acerca del acuerdo adoptado por un colegio de médicos que fijaba los honorarios mínimos que debían percibir los profesionales. Las compañías aseguradoras sospecharon acerca del posible consenso entre todos ellos para rescindir los contratos de arrendamiento previamente suscritos con ellas, o pretendían que se constatase si ostentaban posición de dominio colectiva[114]. Ello requiere un estudio de mercado, con las consecuencias que ello implica, es decir, un estudio de los datos sobre costes, clientes y profesionales. No es suficiente el hecho de que se haya dictado un acto administrativo por una corporación institucional, como el colegio de médicos. Esa actuación continúa sometida al Derecho de la competencia[115]. Se impone, por tanto, un análisis caso por caso,

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[112] I. SÁNCHEZ GARCÍA, «Los mercados sectoriales y la competencia», en VV.AA., *Crisis Económica y Política de la Competencia. III Jornadas Nacionales de Defensa de la Competencia*, Tirant lo Blanch, Valencia, 2009, pág. 46.

[113] STJCE 19-2-2002, C-309/99, *Wouters y otros*, ap. 53.

[114] STS 22-5-2002, RA 7412, FD 2.º.

[115] Véase al respecto RTDC 26-5-1997, *Zumaia Lantzen*, FD 5.º.

sin perjuicio de que el mismo legislador deba aclarar qué tipo de actuación debe someterse a la Ley de Defensa de la Competencia, al objeto de evitar arbitrariedades y discriminaciones no justificadas emanadas de los entes públicos[116]. La previsión de unos estándares o criterios que permitan definir el interés público en cada caso concreto impedirá una intervención administrativa completamente inmune a la legalidad y a las arbitrariedades de los poderes públicos que pudieran derivarse de todo ello[117].

El Tribunal de Defensa de la Competencia, en cambio, evitó pronunciarse acerca de actos administrativos, en este caso no vinculados directamente a la regulación de un sector, sino a la ordenación urbanística y ambiental de las ciudades, como es el otorgamiento de una licencia de actividad[118]. Se invoca nuevamente la competencia municipal atribuida por ley para la puesta en práctica de la planificación urbanística.

En definitiva, la actuación de los entes públicos o empresas derivada del ejercicio de potestades administrativas que ocasionen cualquier tipo de discriminación en el ejercicio del derecho a la libertad de empresa y de competir en un mercado debe someterse a cualquier tipo de norma, incluida la de defensa de la competencia, en virtud básicamente del principio de igualdad y aquel que prohíbe la arbitrariedad de los poderes públicos. La Administración no puede huir de cualquier tipo de fiscalización por parte de los tribunales de justicia en cuestiones esenciales, vinculadas a derechos fundamentales y principios constitucionales.

[116] EGAN, cit., pág. 52.

[117] EGAN, cit., pág. 53.

[118] RTD 25-10-1999, expte. R364/1999, FD 2.º.

3.5 Las políticas públicas: competencia administrativa y los intereses generales

Las autoridades públicas no pueden verse constreñidas en su intento de mejorar la calidad de vida de las personas mediante el impulso de medidas que pudieran resultar contrarias a la competencia. Evitar la discriminación es el eje sobre el que giran habitualmente estas intervenciones. Incluso esta tendencia se ha manifestado también en mercados estratégicos regulados por parte de las instituciones comunitarias, al introducir mecanismos de regulación asimétrica. Así, se imponen obligaciones de acceso e interconexión a los operadores con peso significativo en el mercado, o se les ordena la publicación de determinada información[119]. Estas medidas tienen por objeto facilitar que las compañías no dominantes o recientemente implantadas estén en condiciones de mejorar su posición en el mercado.

La jurisprudencia comunitaria ha reiterado la necesidad de salvaguardar las políticas públicas emprendidas por los Estados, atendiendo al principio de solidaridad y a la ausencia de cualquier ánimo de lucro en la actividad económica por parte de las empresas, sean públicas o privadas, que mantienen un especial vínculo con la Administración. En este sentido, no se consideran aplicables las normas en materia de libre competencia cuando se constituyen mecanismos de solidaridad social para el cobro de pensiones que no atiendan a la lógica mercantil, en cuanto a la ausencia de relación entre las primas que se pagan y los riesgos[120], o que tengan por objeto garantizar la continuidad de un fondo de reserva[121]. Alejarse de los parámetros del mercado y satisfacer las demandas de las personas más

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[119] D. GERADIN, «Efficiency claims in EC Competition Law and sector-specific regulation», en H. ULRICH (Coord.), cit., pág. 328.

[120] STJCE 5-3-2009, *Kattner Stahlbau*, C-350/07, aps. 59-68.

[121] STJCE 21-9-1999, C-219/1997, *Maatschppij Drivende*, ap. 64.

necesitadas por razones económicas o sociales se configuran como los fines que deben alcanzar las entidades en manos de la Administración o bajo su supervisión.

Ahora bien, todos aquellos requisitos han de ajustarse al principio de proporcionalidad, de modo que sólo podrán exonerarse del cumplimiento de las normas *antitrust* en el supuesto de que la prestación de los servicios de solidaridad sea estrictamente necesaria y el mercado no esté dispuesto a asumir las cargas que comporta[122]. Por otra parte, el efecto útil de las normas comunitarias *antitrust* tampoco puede desvirtuarse por el hecho de que se le concedan subvenciones a una fundación que, con posterioridad, interviene en la gestión de otra empresa que ofrece bienes y servicios en el mercado con ánimo de lucro. La creación de una entidad que también ha mostrado intereses en el mercado, participando en el capital social de otra compañía y controlando de algún modo sus decisiones, comporta su sometimiento al régimen propio de las ayudas de Estado, tal y como se configura en el Derecho europeo de la competencia[123].

De hecho, muchas empresas dedicadas a prestar servicios sociales no pueden considerarse empresas en sentido estricto, dada la ausencia económica de sus objetivos. A todo ello cabría oponer la necesidad de que mantengan un cierto nivel de eficiencia que les permita no depender en de los incentivos públicos y mejoren su competitividad y capacidad de innovación. La intervención pública proteccionista puede reducir la eficiencia de las compañías que resultan beneficiadas por regulaciones técnicas o en materia de precios[124]. Desde el momento en que una entidad participa en la actividad económica, produciendo o distribuyendo bienes o servicios, se halla sometida a las normas del Tratado de la Unión en

[122] STJCE 23-4-1991, C-41/90, *Höfner y Elser*, ap. 24.

[123] STJCE 10-1-2006, C-222/04, *Cassa di Risparmio di Firenze SpA*, aps. 111-127.

[124] D. GERADIN, cit., pág. 352.

materia de competencia, cualquiera que sea la naturaleza de los intereses que específicamente se le hayan confiado[125].

Al margen de todo ello, pueden plantearse supuestos en los que, lejos de considerarse una actividad reservada a la Administración, ésta compite teóricamente en pie de igualdad con los privados en el mismo segmento del mercado, bien directamente o mediante una empresa interpuesta que puede beneficiarse de la regulación y del ejercicio de potestades administrativas. Se suscita en este punto el debate en torno a la incidencia de la actividad administrativa en la vida de la ciudadanía, en su capacidad de encontrar empleo, de integrarse en la sociedad de la información o en la transmisión de valores culturales. Los poderes públicos asumen la prestación de todas esas facilidades, en un intento de mejorar las condiciones de vida de la ciudadanía. Así ha sucedido en los municipios que implantaron la banda ancha, de modo que los vecinos no pudieran verse excluidos de la sociedad de la información.

Resulta fundamental el concepto que emplea el Tribunal de Justicia respecto a la necesidad de que no exista otro medio para satisfacer las demandas, por parte de la ciudadanía, de un servicio determinado. Poco importa que la legislación haya liberalizado una actividad si, dadas las circunstancias y las características personales de aquellos a los que se destina, se exige una intervención pública, sea en la financiación mediante subvenciones o en la regulación mediante normas que garanticen la prestación efectiva. No puede privarse a la ciudadanía de algunos servicios esenciales para la mejora de sus condiciones de vida, de modo que las autoridades dispongan, más allá de lo establecido en la norma, de facultades discrecionales para dotar a la ciudadanía de los servicios y bienes esenciales para su existencia e integración en sociedad. Si los privados no pueden suministrar esos bienes y servicios esenciales, entonces las demandas de la ciudadanía puede satisfacerlas la Administración mediante sus fórmulas propias de iniciativa económica.

[125] WAELBROEK y FRIGNANI, cit., pág. 397.

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La cuestión que puede ocasionar alguna controversia se refiere básicamente al amplio margen de apreciación de que disponen los Estados y las Administraciones para exonerarse de las normas *antitrust*. Podrían invocar los principios de solidaridad o los títulos de intervención que les confieren las normas de cabecera. Los municipios, por ejemplo, se ven investidos de competencias reconocidas en la Ley de Bases del Régimen Local[126]. Muchas de ellas podrían asociarse a servicios liberalizados, lo que no impediría adoptar medidas específicas a ayuntamientos especialmente necesitados en el área de las redes de telecomunicaciones, los servicios sociales, el transporte o el deporte.

En ese último ámbito se consideraba que el ayuntamiento no podía fijar unos precios para la práctica deportiva en los gimnasios que fuera sensiblemente inferiores a aquellos que imponían el resto de operadores privados en ese mismo segmento del mercado. La conducta del ente público, estando sometida a la normativa en materia de defensa de la competencia, no incurre en ninguno de los comportamientos punibles contemplados por aquélla, debido a los fines sociales y educativos que pretendía alcanzar la institución pública. El objetivo estriba en que la ciudadanía practique deporte, orientando los precios a costes, teniendo en cuenta que la estructura de dichos costes es diferente a la que presenta un operador privado, dadas las externalidades a las que debe enfrentarse[127].

En materia de vivienda tampoco se consideró contraria a la competencia la cesión gratuita de suelos a una empresa pública participada íntegramente por el ayuntamiento cedente. Sin embargo, no se invocó únicamente el argumento relativo a las necesidades sociales, sino que se examinó la diferencia de precios entre una vivienda libre y otra protegida de las mismas características o, incluso, se declaró que previamente existía competencia en ese mercado[128]. Tal y como sucedió en el asunto mencionado, la autoridad

[126] Artículos 25 y 26 Ley 7/1985, de Bases del Régimen Local.

[127] TDC 4-4-2006, expte. R625/2004, caso centros deportivos Castellón, FD 4.º.

[128] RTDC 8-6-2004, expte. R574/2003, caso constructoras Las Palmas, FD 3.º-5.º.

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de la competencia no dudó en examinar el mercado de referencia, los precios fijados por los operadores y la posición que ocupan éstos. En ese caso debía resolver, aplicando la Ley de Defensa de la Competencia, si habían incurrido en alguna conducta prohibida.

Las Administraciones disponen del privilegio de autotutela, por lo que tan sólo la jurisdicción contencioso-administrativa podría invalidar los actos administrativos y reglamentos relacionados con el ejercicio de actividades económicas liberalizadas. Todo ello no significa que los ayuntamientos o cualquier Administración pública se eximan de la aplicación de la legislación en materia de libre competencia, sino que, a efectos procesales, el acto administrativo producirá efectos y será válido hasta que los jueces y tribunales no declaren lo contrario. Conllevaría un desplazamiento de las competencias de la Comisión Nacional de la Competencia, sin perjuicio de que intervenga en otro momento, una vez que efectivamente se ha demostrado que la conducta es contraria a las normas *antitrust*.

IV. CONCLUSIONES

Las Administraciones públicas, en el ejercicio de su iniciativa económica, deben competir en pie de igualdad con el resto de operadores económicos en un determinado segmento del mercado, pese a que disponen de prerrogativas de autotutela declarativa y ejecutiva. Pueden emplear el mecanismo de la regulación económica en los mercados intervenidos, recurrir a la fórmula de la reserva de actividades o adjudicar ayudas y subvenciones con cargo a los fondos públicos. En todos estos casos la Administración debe someterse a la normativa en materia de defensa de la competencia, impidiéndose que se otorgue, directa o indirectamente, una ventaja injustificada a las empresas financiadas por ella o en las que ejerce un control directivo.

Se parte de la premisa de que la Administración no puede sustraerse a la ley, ni siquiera a aquella que trata de disuadir de conductas contrarias a la concurrencia. No pueden crearse espacios de inmunidad que afecten a derechos fundamentales como la igualdad, ni facultar a la Administración para implantar medidas económicas a su capricho o que favorezcan determinados intereses. De ello se desprenden las siguientes conclusiones:

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a) La intervención mediante un reglamento o un acto administrativo en un sector económico no supone *per se* la exoneración de la normativa *antitrust*.

b) Aunque las autoridades de la competencia no puedan privar de eficacia a las actuaciones administrativas, siempre pueden impugnarlas ante la jurisdicción contencioso-administrativa, que podrá decidir si incurren en una conducta anticoncurrencial.

c) La exención a la normativa en materia de defensa de la competencia debe establecerse únicamente por una norma con rango de ley, que justifique debidamente los fines de interés público, incluidos los sociales, que pretende alcanzar la regulación administrativa. No cabría una deslegalización en blanco, en tanto se están vulnerando derechos fundamentales como el de libertad de empresa.

d) El control de la regulación administrativa debe llevarse a cabo tras realizar los correspondientes estudios de mercado que demuestren la proporcionalidad de las decisiones adoptadas y su observancia de la legislación de la competencia.

e) Invocar términos como «interés general», «servicios sociales», «ejercicio de competencias» o «potestades de *imperium*» no debe servir de justificación para quedar al margen de la legislación en materia de competencia. Es imprescindible un análisis *ex post* del mercado de referencia, la posición del operador, los precios o el impacto de la intervención administrativa para determinar si la intervención se ajusta a los fines que se han establecido para dictar esa regulación. Pueden consistir, por ejemplo, en promover la competencia o en facilitar a los usuarios más desfavorecidos el acceso a determinados servicios.

Debe distinguirse, por una parte, el régimen jurídico aplicable a cualquier actividad económica, en el que debe incluirse la Ley de Defensa de la Competencia, y, por otra, el carácter limitado de las facultades que atribuye la Ley a la autoridad de defensa de la competencia para hacer efectivo dicho régimen. Cualquier vulneración de la normativa *antitrust* puede ser fiscalizada por la jurisdicción contenciosoadministrativa, salvo que la autoridad pública aplique, sin ningún margen de apreciación o discrecionalidad y de forma automática, las disposiciones contenidas en una norma con rango de ley. Los jueces y tribunales podrán examinar caso por caso si la intervención es proporcionada al fin que la justifica, atendiendo a los intereses generales prevalentes. La Ley de Defensa de la Competencia debería mostrarse más explícita, fijando un sistema de controles como éste, que impida la captura del regulador por parte de compañías con peso significativo y que dote al mercado de mecanismos más democráticos en su regulación.

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LE STATUT DES AUTORITES DE REGULATION ET LA SEPARATION DES POUVOIRS[1]

par Quentin EPRON[2]

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La place des autorités de régulation dans l'organisation administrative française tient à la fois de l'évidence et du paradoxe[3]. Le succès remporté par cette forme particulière d'autorité administrative, dans un contexte marqué par l'intégration européenne et internationale, est incontestable: le gouvernement économique d'un État ne va plus sans

[1] Reproduction de l'étude paru sur la *Revue Française de Droit Administratif*, n. 5/2011, p. 1007 - 1018 - Rubrique *Organisation et Relations Administratives* sous la direction de: Jacqueline MORAND-DEVILLER.

[2] Maître de conférences de droit public à l'Université Panthéon-Assas Paris II

[3] Cette étude porte sur huit autorités administratives indépendantes dont le domaine de compétence est économique ou financier: l'Autorité des marchés financiers (AMF), la Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet (HADOPI), l'Autorité de régulation des activités ferroviaires (ARAF), l'Autorité de contrôle prudentiel (ACP), l'Autorité de la concurrence, la Commission de régulation de l'énergie (CRE), l'Autorité de régulation des communications électroniques et des postes (ARCEP), l'Autorité de régulation des jeux en ligne (ARJEL).

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l'instauration de ces instances dont le modèle original, venu d'outre-Atlantique, s'est diffusé largement. Pourtant, la question de leur statut semble demeurer toujours ouverte[4].

Il en va, de ce point de vue, des autorités de régulation comme il en va de tous les organes de l'État que l'on rattache, à titre principal, à l'une des trois fonctions étatiques : la définition de leur statut est intrinsèquement liée à l'architecture de la séparation des pouvoirs. Le rattachement des autorités de régulation à la fonction exécutive n'épuise cependant pas leur spécificité : celle-ci est en réalité triple.

La spécificité organique des autorités de régulation est la plus remarquable. Il est bien connu que ces institutions sont à la fois des autorités administratives et des autorités indépendantes, c'est-à-dire des autorités qui exercent un pouvoir de décision de manière autonome[5]. En tant qu'autorités administratives, elles échappent donc à l'emprise du pouvoir hiérarchique qui unifie l'appareil administratif sous la responsabilité du gouvernement. Le législateur a souhaité parfaire cette indépendance en accordant à certaines d'entre elles, qualifiées d'autorités publiques indépendantes, la personnalité morale. Cette attribution n'est pas cependant pas générale[6]. Pourvues ou non de la personnalité juridique, les autorités de régulation bénéficient d'une indépendance qui

[4] V., en dernier lieu, le Rapport d'information fait au nom du comité d'évaluation et de contrôle des politiques sur les autorités administratives indépendantes déposé le 28 octobre 2010 par MM. Christian Vanneste et René Dosière (disponible sur le site de l'Assemblée nationale) ; le colloque publié dans la RFDA 2010, n° 5 ; A. Antoine et J.-F. Calmette, La sanction administrative des pratiques anticoncurrentielles à la suite de l'affaire du cartel de l'acier, RFDA 2010. 1157 (spéc. 1160-1161).

[5] Sauf précision contraire, nous entendrons par « autorités administratives indépendantes » à la fois les autorités publiques indépendantes qui possèdent la personnalité morale, et les traditionnelles autorités administratives indépendantes qui, elles, ne la possèdent pas.

[6] La personnalité morale n'a pas été attribuée par le législateur selon un critère précis. Sur les huit autorités auxquelles cette étude est consacrée, seules la possèdent l'AMF (C. mon. fin., art. L. 621-1), la HADOPI (CPI, art. L. 331-12) et l'ARAF (art. 11, L. n° 2009-1503, 8 déc. 2009).

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demeure une singularité au regard de la séparation des pouvoirs et, en particulier, de l'article 20 de la Constitution qui attribue au Gouvernement la disposition de l'administration.

La spécificité fonctionnelle des autorités de régulation est d'un autre ordre. Elle vise la mission qui leur est impartie. Constituées par le législateur autour d'un domaine de compétence précis, requérant des connaissances techniques et spécialisées, les autorités de régulation assurent une mission qui les fait participer des trois fonctions de l'État. Par leur pouvoir de décision individuelle ou même, dans certains cas, par leur pouvoir réglementaire, elles participent au pouvoir exécutif. Mais, par les avis qu'elles donnent sur des projets de loi les concernant, par les instructions ou les recommandations, par l'ensemble de ce « droit mou » dont elles sont souvent productrices, elles participent également du pouvoir législatif; et par leur pouvoir de sanction, de médiation ou de transaction, elles participent du pouvoir juridictionnel.

Enfin, la spécificité contentieuse des autorités de régulation est également importante. Le contentieux qu'elles génèrent étant, en général, d'ordre administratif, il est normal que la juridiction administrative en reçoive la compétence. Mais le Conseil constitutionnel a admis, dans une décision célèbre, que par exception, et « dans l'intérêt d'une bonne administration de la justice », le législateur attribue cette compétence à l'autorité judiciaire[7].

Cette spécificité des autorités de régulation leur donne une place singulière au sein des institutions administratives françaises. Certes, la forme particulière d'exercice du pouvoir administratif qui leur correspond recueille un large assentiment; mais la forme juridique de l'autorité de régulation demeure instable. La place de ces autorités dans l'organisation de la séparation des pouvoirs suscite des interrogations: il peut leur être reproché tour à tour – et en raison même de leur statut – d'être trop ou trop peu des

[7] Cons. const., décis. n° 86-224-DC, 23 janv. 1987, Conseil de la concurrence, consid. 16.

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autorités gouvernementales, des juridictions ou encore, à travers les contours flous de la *soft law*, des quasi-législateurs. Par ailleurs, l'internationalisation des enjeux de la régulation et l'intégration européenne, ont, elles aussi, contribué – et contribuent – à remettre en cause le cadre de ces autorités en les plaçant à l'intersection d'exigences nationales et internationales.

Bref, au moment où ces autorités apparaissent comme un outil indispensable du gouvernement économique de la France, le constat que faisait Martine Lombard, en 2005, dans le court laps de temps qui a vu la Commission de régulation de l'énergie (CRE) investie de la personnalité morale[8], demeure d'une parfaite actualité: « l'une des questions auxquelles est aujourd'hui confrontée la France, comme nombre d'autres pays, est celle de la portée à venir de ce modèle des institutions indépendantes intervenant en matière économique »[9]. Cette interrogation est au cœur du rapport sur les autorités administratives indépendantes, rendu à la fin de l'année 2010, au nom du comité d'évaluation et de contrôle des politiques publiques, par MM. Vanneste et Dosière. L'étude détaillée qu'ont réalisée les deux députés leur a permis de formuler vingt-sept recommandations qui, pour certaines, ont été reprises par le gouvernement et, pour d'autres, ont fait l'objet d'amendements à des projets de lois[10].

L'analyse des deux rapporteurs cependant, conformément aux finalités de leur mission, est demeurée essentiellement pragmatique. Même si elle apporte une contribution de qualité à l'étude des autorités administratives indépendantes, elle ne parvient guère à leur donner un cadre juridique uniforme. Le rapport peut ainsi être lu à la fois comme

[8] La CRE s'est vue attribuer la personnalité morale par l'article 117 L. 30 déc. 2004 de finances rectificatives pour 2004 ; elle lui a été retirée par l'article 103, L. n° 2005-781, 13 juill. 2005.

[9] M. Lombard, Brèves remarques sur la personnalité morale des institutions de régulation, RJEP/CJEG, n° 619, avr. 2005, p. 128.

[10] V. le tableau sur le suivi des recommandations, mis à jour sur le site de l'Assemblée nationale.

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accentuant une certaine « crise » du statut des autorités de régulation – par exemple, en appelant à la création d'une Commission des sanctions au sein de l'Autorité de la concurrence[11] – ou comme engageant un retour de l'État dans ce domaine[12]. Certes, il serait illusoire de rechercher un modèle unique des autorités administratives indépendantes: le Conseil d'État l'avait remarqué en 2001 dans son Rapport public[13]. Il n'en demeure pas moins souhaitable dans le domaine plus restreint de la régulation, c'est-à-dire des autorités qui interviennent en matière économique et financière, de maintenir ou de renforcer l'unité d'une forme juridique par laquelle est exercé un pouvoir d'État. Dans ce contexte, il faut envisager la spécificité fonctionnelle et la spécificité organique du statut des autorités de régulation.

1. LA SPECIFICITE FONCTIONNELLE

La spécificité fonctionnelle des autorités de régulation se traduit par un cadre statutaire qui leur donne une place singulière dans l'architecture de la séparation des pouvoirs. En dépit – ou à cause – du succès des autorités de régulation, ce cadre est aujourd'hui fragilisé.

1.1. Le cadre statutaire de la régulation

Ce cadre statutaire peut être résumé en deux propositions: les autorités de régulation ont des pouvoirs qui participent aux trois fonctions étatiques; mais leur pouvoir est, fondamentalement, un pouvoir d'ordre administratif.

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[11] Rapport, t. 1, p. 120.

[12] V. l'analyse critique de M.-A. Frison-Roche, Autorités administratives incomprises (AAI), JCP Adm. 2010. 896.

[13] Réflexions sur les AAI, Rapport public 2001, EDCE n° 52, 2001, p. 251 s. ; v. égal. M.-J. Guédon, « L'hétérogénéité des données organiques », in N. Decoopman (dir.), Le désordre des autorités administratives indépendantes. L'exemple du secteur économique et financier, PUF, 2002, p. 77.

Un organe qui participe aux trois fonctions de l'État

La régulation implique un cumul des pouvoirs qui est justifié par la technicité du domaine concerné. L'unité de la régulation procède donc à la fois de son objet et de ses moyens.

Quant à son objet, la régulation se caractérise par la mission qui lui est impartie : procéder à l'organisation d'un marché qui ne parvient au meilleur de son fonctionnement qu'à travers un cadre institutionnel et réglementaire. Ainsi, la compétence des autorités de régulation n'est pas générale, elle est toujours définie dans un domaine particulier[14]. Quant à ses procédés, la fonction de régulation se caractérise par l'utilisation de toute une gamme d'outils qui va des moyens traditionnels de la puissance publique, comme le pouvoir réglementaire ou de sanction, à des procédés, formels ou informels, qui font la spécificité du droit économique, en amont des contraintes directes du contentieux ou de la réglementation. À ce titre, les autorités de régulation ont des pouvoirs qui peuvent relever des trois fonctions étatiques.

La participation des autorités de régulation à la fonction législative passe par l'adoption de mesures, d'actes, d'avis qui accompagnent le processus législatif ou la loi elle-même, une fois votée. Ces autorités sont tout d'abord fréquemment associées à la préparation de textes législatifs qui concernent leur domaine de compétence. Elles peuvent proposer des modifications de la loi soit d'elles-mêmes, soit à la demande du gouvernement ou du Parlement[15]. Une fois la loi votée, la compétence des autorités de régulation devrait se limiter à l'exécution du texte législatif; mais la nature du droit économique les incite à

[14] AMF: C. mon. fin., art. L. 621-1; ACP: C. mon. fin., art. L. 612-1 I; Autorité de la concurrence: C. com., art. L. 461-1; CRE: C. énergie., art. L. 131-1 s.

[15] AMF: C. mon. fin., art. L. 621-19; HADOPI : CPI, art. L. 331-13; Autorité de la concurrence : C. com., art. L. 462-1 ; CRE : C. énergie., art. L. 131-2, al. 2 et L. 134-14 ; ARCEP : CPCE, art. L. 5 et L. 36-5 ; ARJEL : art. 34, L. n° 2010-476, 12 mai 2010.

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dépasser ce cadre restreint pour assurer une fonction normatrice qui passe par des instructions, des recommandations, des avis.

La participation des autorités de régulation à la fonction exécutive est particulièrement manifeste lorsqu'elles se voient attribuer un pouvoir réglementaire. Le Conseil constitutionnel a à la fois rendu licite et encadré cette attribution[16]. Toutes les autorités de régulation cependant ne disposent pas d'un tel pouvoir: seules la CRE[17], l'AMF[18], l'ARCEP[19], la HADOPI[20] et l'ARAF[21] en bénéficient. Indépendamment de ce pouvoir, les autorités de régulation peuvent être consultées par le gouvernement sur l'adoption de mesures réglementaires[22]. De manière générale, il appartient à ces autorités de préciser les conditions d'application des textes législatifs et réglementaires par des avis, des recommandations ou des décisions individuelles. Il faut également attribuer à cette fonction exécutive l'ensemble des pouvoirs de « police administrative » qui sont conférés aux

[16] Cons. const., décis. n° 86-217-DC, 18 sept. 1989 (à propos de la CNCL) et n° 88-248-DC, 17 janv. 1989 (à propos du CSA).

[17] C. énergie., art. L. 134-1 et L. 134-2.

[18] C. mon. fin., art. L. 621-6 ; v. T. Bonneau et F. Drummond, *Droit des marchés financiers*, 3e éd., Economica, 2010, p. 362-376.

[19] CPCE, art. L. 36-6 (pouvoir soumis à homologation) ; d'autres articles du même code attribuent à l'ARCEP un pouvoir réglementaire qui n'est pas soumis à homologation : ainsi les art. L. 34-8-I, L. 36-7-8, L. 44-I, L. 37-I ; enfin certains textes réglementaires accordent à l'ARCEP un pouvoir réglementaire limité : R. 20-37, D. 99-6 et 8, D. 406-19-IV, D. 288.

[20] CPI, art. L. 331-23, al. 2, (v. Cons. const., décis. n° 2009-580-DC, 10 juin 2009, consid. 32-34).

[21] Art. 14, L. n° 2009-1503, 8 déc. 2009.

[22] HADOPI: CPI, art. L. 331-13; ARAF : art. 15 VIII, L. n° 2009-1503 ; Autorité de la concurrence : C. com., art. L. 462-1 et -2 ; CRE : C. énergie., art. L. 134- 10; ARCEP : CPCE, art. L. 5 et L. 36-5 ; ARJEL : art. 34, L. n° 2010-476.

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autorités de régulation: pouvoirs de contrôle, d'agrément, d'autorisation, qui leur sont fréquemment reconnus.

Enfin, les autorités de régulation participent à la fonction juridictionnelle même si elles ne sont pas des juridictions. À titre secondaire, en effet, la loi peut leur reconnaître des pouvoirs qui sont caractéristiques de cette fonction. Il en est ainsi du pouvoir de sanction qui les amène à exercer une fonction répressive, proche de celle confiée au juge pénal. Ce pouvoir est certes rarement accordé aux autorités administratives indépendantes, prises dans leur ensemble. Mais il est significatif que toutes les autorités de régulation dans le domaine économique et financier le possèdent. C'est le cas de l'ARCEP[23], de la CRE[24], de l'AMF[25], de l'Autorité de la concurrence[26], de l'ACP[27], de l'ARJEL[28], de l'ARAF[29] et de la HADOPI[30]. D'autres pouvoirs accordés ponctuellement à des autorités de régulation sont également révélateurs de leur participation à la fonction juridictionnelle : ainsi, le pouvoir

[23] CPCE, art. L. 36-11, L. 5-3.

[24] C. énergie., art. L. 134-25 s.

[25] C. mon. fin., Art. L. 621-15 s. V. T. Bonneau et F. Drummond, *op. cit*., p. 403-434.

[26] C. com., art. L. 462-6, L. 464-2 et L. 464-3.

[27] C. mon. fin., art. L. 612-1-II.

[28] Art. 43 et 44, L. n° 2010-476.

[29] Art. 17, L. n° 2009-1503.

[30] CPI, art. L. 331-32.

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d'homologuer un procès-verbal de conciliation qui lui donne force exécutoire[31], le pouvoir d'adresser des injonctions[32] ou encore de prendre des mesures conservatoires[33].

Un pouvoir qui demeure d'ordre administratif

Dire le droit, l'exécuter, rendre la justice: les compétences accordées aux autorités de régulation impliquent une certaine « confusion » des pouvoirs[34]. Encore faut-il bien comprendre l'esprit de cette « confusion », ses conditions et ses limites. La régulation des activités économiques implique en effet l'usage d'outils juridiques qui, par leur nature, appartiennent aux trois fonctions de l'État, mais dans un domaine restreint et d'une manière qui les uniformise et les place tous au même niveau. Du point de vue du régulateur, il ne s'agit pas d'exercer un pouvoir « législatif », « exécutif » ou « juridictionnel »: il s'agit d'utiliser des compétences données par la loi ou le règlement, dans un domaine particulier, marqué par une forte technicité. La position du régulateur est moins celle d'un législateur, d'un gouvernement ou d'un juge que celle d'un médecin. C'est en ce sens qu'il y a, entre ses mains, une certaine confusion des pouvoirs: une confusion qui n'est pas tant un cumul de « pouvoirs » qu'un rassemblement d'outils pour répondre, au cas par cas, à des enjeux techniques dans un domaine donné.

[31] Ce pouvoir est reconnu à la HADOPI par CPI, art. L. 331-35.

[32] AMF: C. mon. fin., art. L. 621-14 I ; ACP: C. mon. fin., art. L. 612-25; HADOPI: CPI, art. L. 331-32 et L. 331-35 ; Autorité de la concurrence : C. com., art. L462-6, L464-1 et -2 ; ARJEL : art. 61, L. n° 2010-476.

[33] ACP: C. mon. fin., art. L612-33 à 35 ; Autorité de la concurrence : C. com., art. L464-1 ; CRE : C. énergie., art. L. 134-22; ARCEP : CPCE, art. L. 36-8 I, L. 36- 11, L. 36-8.

[34] P. Sabourin, « Les autorités administratives indépendantes dans l'État », in C.-A. Colliard et G. Timsit (dir.), *Les autorités administratives indépendantes*, PUF, 1988, p. 103-106.

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Le pouvoir des autorités de régulation est par conséquent fondamentalement un pouvoir d'ordre administratif. La compétence juridictionnelle peut appartenir à l'ordre judiciaire, la nature même du contentieux ne change pas[35].

Il ne fait aucun doute que les autorités de régulation sont des organes administratifs. L'AMF, la HADOPI et l'ARAF sont désignées par la loi comme des autorités publiques indépendantes[36].

L'ACP, l'Autorité de la concurrence et l'ARJEL sont, quant à elles, désignées comme des autorités administratives indépendantes[37]. L'ARCEP et la CRE ne bénéficient certes pas d'une qualification législative expresse; mais l'ARCEP a succédé à l'Autorité de régulation des télécommunications (ART) qui fut qualifiée d'autorité administrative indépendante par le Conseil constitutionnel[38]. La CRE, pour sa part, assume les missions autrefois attribuées à la Commission de régulation de l'électricité considérée, en 2001, comme une autorité administrative indépendante par le Conseil d'État[39].

La nature des actes des autorités de régulation pourrait sembler plus douteuse; mais le contentieux agit ici comme un révélateur : une fois passées les portes de la juridiction administrative, ces actes sont des décisions administratives ou ne le sont pas[40].

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[35] P. Delvolvé « La cour d'appel de Paris, juridiction administrative », *Études offertes à Jean-Marie Auby*, Dalloz, 1992, p. 54-58.

[36] AMF: C. mon. fin., art. L. 621-1 ; HADOPI : CPI, art. L. 331-12; ARAF : art. 11, L. n° 2009-1503.

[37] ACP: C. mon. fin., art. L. 612-1-I ; Autorité de la concurrence : C. com., art. L. 461-1-I ; ARJEL : art. 34-I, L. n° 2010-476.

[38] Cons. const., décis. n° 96-378-DC, 23 juill. 1996.

[39] Réflexions sur les AAI, Rapport public 2001, EDCE n° 52, 2001, p. 304.

[40] Y. Gaudemet, *Traité de droit administratif*, t. 1, LGDJ, 1999, 15e éd., p. 97, § 87 et Les actions administratives informelles, RID comp. 1994. 653-654. V. par ex. CE 29 avr. 2009, M. Bernard A., req. n° 293673 (à propos de la

Lorsqu'ils le sont, le juge leur applique le régime ordinaire de contrôle contentieux des actes administratifs[41].

Ainsi, les autorités de régulation exercent un service public de « police économique »[42] en utilisant des moyens qui ressortissent de la puissance publique: le pouvoir réglementaire, le pouvoir de sanction, les pouvoirs de contrôle et d'enquête, le pouvoir d'injonction.

Si ces outils relèvent des trois fonctions de l'État, ils sont néanmoins mis au service d'une tâche qui est administrative. Les larges compétences accordées aux autorités de régulation ont cette limite fondamentale d'être purement fonctionnelles. La régulation va avec la spécialité[43]. Elle permet d'offrir une solution rapide et pragmatique – mais d'ordre administratif – à des litiges techniques qui sont souvent réglés avant même toute phase contentieuse[44].

COB); CE 30 déc. 2003, *Caisse de refinancement de l'habitat*, req. n° 230947 (à propos de la Commission bancaire); V., dans le cas de la HALDE, CE 13 juill. 2007 (3 arrêts), Société Éditions Tissot, req. n° 294195; SARL Riviera, req. n° 295761; *Mme Ghilaisne Abric*, req. n° 297742; Lebon p. 335; AJDA 2007. 2145, concl. L. Derepas.

[41] M. Collet, *Le contrôle juridictionnel des actes des autorités administratives indépendantes*, LGDJ, 2003.

[42] P. Delvolvé, art. préc., p. 57.

[43] À l'inverse, réunir des domaines de compétence divers sous l'autorité d'une seule autorité de régulation, c'est prendre le risque de créer un pouvoir ministériel sans ministre.

[44] T. Tuot, L'autorité de la CRE en tant qu'autorité de règlement des différends 2003/2004, RJEP/CJEG, n° 616, janv. 2005, p. 5.

1.2. La fragilisation de ce cadre

Les autorités de régulation sont à la fois des experts et des gendarmes. Or la singularité de leur statut semble aujourd'hui fragilisée.

L'avènement d'un droit processuel de la régulation

Il est bien connu que, depuis l'arrêt d'assemblée Didier du 3 décembre 1999, le Conseil d'État accepte de soumettre les autorités administratives indépendantes aux exigences de la Convention sur le procès équitable[45]. La jurisprudence a progressivement tiré les conséquences de cette application de l'article 6-1[46] et le Parlement a été amené, par répercussion, à modifier largement les statuts des autorités de régulation. Ce « rattrapage » législatif des statuts a débuté par la réforme de 2003, qui a fusionné la Commission des opérations de bourse (COB), le Conseil des marchés financiers et le Conseil de discipline de la gestion financière, au sein d'une instance unique, l'AMF[47]. Il est devenu, depuis, une préoccupation constante du législateur qui intervient dans la révision ou la création des institutions de la régulation. Ce fut le cas lors de l'introduction d'une procédure de récusation des membres de la commission des sanctions de l'AMF par la loi n° 2007-1774 du 17 décembre 2007[48]. Ce fut encore le cas lors de la création de l'Autorité de la

[45] CE, ass., 3 déc. 1999, Didier, Lebon p. 399; Grands arrêts, 18e éd., 2011, n° 102; AJDA 2000. 172, chron. M. Guyomar et P. Collin; JCP 2000. II. 10267, note F. Sudre; RD publ. 2000. 349, note C. Guettier; RFDA 2000. 584, concl. A. Seban.

[46] V. le bilan effectué par G. Eveillard, L'application de l'article 6 de la Convention européenne des droits de l'homme à la procédure administrative non contentieuse, AJDA 2010. 531.

[47] Loi de sécurité financière n° 2003-706, 1er août 2003 qui a été notamment provoquée par l'arrêt de la cour d'appel de Paris, 7 mars 2000, *K. P. M. G. Fiduciaire de France*, JCP 2000. II. 10408, note R. Drago.

[48] C. mon. fin., art. L. 621-15, III, bis et art. 1er, D, décr. n° 2008-893, 2 sept. 2008 relatif à la Commission des sanctions de l'AMF. L'absence d'une telle procédure avait été condamnée par l'arrêt CE 26 juill. 2007, M. P., n° 293908, AJDA 2007. 1947.

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concurrence par la loi de modernisation de l'économie du 4 août 2008[49]; ou lors de la création de l'Autorité de contrôle prudentiel, en 2010, qui répond directement à la condamnation de la procédure applicable devant la Commission bancaire par la Cour européenne des droits de l'homme[50].

L'application des exigences de l'article 6-1 de la Convention européenne des droits de l'homme aux autorités de régulation ne fait pourtant pas de celles-ci des juridictions au sens du droit interne. La jurisprudence *Didier* a au contraire permis le croisement des interprétations du Conseil d'État et de la Cour européenne. D'un côté, la Cour fait en effet prévaloir un raisonnement matériel sur un raisonnement organique: comme elle n'est pas liée par les qualifications nationales, elle considère que les autorités de régulation prononçant des sanctions sont des juridictions au sens de la Convention. À ce titre, elle leur applique les conditions du procès équitable qui sont attachées à l'article 6-1. D'un autre côté, le Conseil d'État tend à donner la priorité à un raisonnement organique: les autorités de régulation sont des autorités administratives qui se voient soumises partiellement aux exigences de l'article 6-1, comme elles le sont, par ailleurs et depuis plus longtemps, aux principes traditionnels de la procédure administrative non contentieuse[51].

[49] L. n° 2008-776, 4 août 2008 de modernisation de l'économie. V. le commentaire de S. Nicinski, L'autorité de la concurrence, RFDA 2009. 1237. Sur le fondement de cette loi a été adoptée l'ord. n° 2008-1161, 13 nov. 2008 qui a permis d'intégrer à la procédure devant l'Autorité de la concurrence des exigences de la Cour européenne des droits de l'homme.

[50] Ord. n° 2010-76, 21 janv. 2010 portant fusion des autorités d'agrément et de contrôle de la banque et de l'assurance, JO 22 janv. 2010, n° 0018, p. 1392. La Cour européenne des droits de l'homme avait condamné la procédure applicable devant la Commission bancaire au titre de la violation de l'impartialité objective : CEDH 11 juin 2009, req. n° 5242/04, *Société Dubus* ; D. 2009. 2247; Gaz. Pal., 5 déc. 2009, n° 339, p. 41, note P. Houédanou ; AJ pénal 2009. 354, note J. Lasserre-Capdeville.

[51] Comme le soulignent les auteurs des Grands arrêts (18e édit., 2011, p. 757), l'impartialité est un principe « à la fois antérieur et extérieur à l'article 6-1 ». Le principe d'impartialité peut être appliqué en raison, soit des exigences convergentes du droit interne et de l'article 6-1, soit des seules exigences du droit interne.

La décision de sanction prononcée par une autorité de régulation apparaît donc, du point de vue européen, comme un acte *juridictionnel*, et du point de vue interne, comme un acte *administratif*.

Cette double lecture a amené le Conseil d'État, comme il l'avait annoncé dans l'arrêt *Didier*, à faire un tri dans les exigences de la Convention européenne des droits de l'homme. Toutes ne s'appliquent pas aux procédures des autorités de régulation. Seules s'appliquent les garanties nécessaires au bon accomplissement de l'office du juge qui serait saisi ultérieurement de la décision de l'autorité. « Ce qui compte, observe Gweltaz Eveillard, n'est pas que l'administration fonctionne comme un tribunal, mais qu'elle n'empêche pas la juridiction de statuer comme un tribunal »[52]. Le Conseil d'État considère en effet que l'application partielle des exigences de l'article 6-1 est compensée par le contrôle de pleine juridiction exercé, le cas échéant, en aval de la procédure administrative non contentieuse[53]. Or le recours de plein contentieux est devenu le recours de droit commun contre les décisions de sanction des autorités de régulation: il s'agit du recours ouvert contre les sanctions prises par l'Autorité des marchés financiers[54], par l'Autorité de contrôle prudentiel[55], par l'ARCEP[56], par la CRE[57], par l'ARAF[58], par l'ARJEL[59], sans

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[52] G. Eveillard, art. cit.

[53] V. les arrêts CE, ass., 3 déc. 1999, *Didier*, préc. ; CE, sect., 27 oct. 2006, Parent, Lebon p. 454; LPA déc. 2006, concl. Guyomar ; AJ 2007. 80, note Collet ; RD publ. 2007. 670, comm. Guettier ; CE 23 avr. 2009, *Compagnie Blue Line*, req. n° 314918, GP 2009, n° 339, p. 38, note P. Houédanou.

[54] C. mon. fin., art. R. 621-45.

[55] C. mon. fin., art. L. 612-6-IV.

[56] CPCE, art. L. 5-3 et L. 36-11.

[57] C. énergie., art. L. 134-34

[58] Art. 17-II, L. n° 2009-1503.

compter les recours ouverts devant le juge judiciaire contre les sanctions de l'Autorité de la concurrence[60] ou de la HADOPI[61].

La généralisation du recours de pleine juridiction est une répercussion, dans l'ordre juridique interne, des exigences de la Cour européenne des droits de l'homme relatives à la « matière pénale »[62]. L'application sélective de ces exigences permet tout à la fois de tenir compte de la spécificité des procédures administratives – qui répondent traditionnellement au principe d'impartialité et à la garantie des droits de la défense – et des garanties complètes qui sont offertes lors du procès ouvert devant un juge. Le recours de plein contentieux permet au juge de statuer sur l'ensemble des circonstances de fait et de droit établies à la date de sa décision si, du moins, il est en mesure de la substituer à celle de l'administration, c'est-à-dire de s'appuyer sur les éléments d'une procédure administrative régulière[63]. Lorsque toutes les formalités n'ont pas été remplies, ou lorsqu'elles ont été remplies de manière inadéquate, il ne peut qu'annuler la décision. À l'inverse, la validation de la procédure administrative devant l'autorité de régulation lui permet d'exercer pleinement, au regard de la Convention européenne, son « pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur »[64].

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[59] Art. 44-II, L. n° 2010-476.

[60] C. com., art. L. 464-8.

[61] Art. L. 331-32 C. p. i.

[62] CEDH 23 oct. 1995, *Schmautzer c. Autriche*, A. 328-A, § 36, qui exige un « pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur » ; v. R. Tinière, La notion de « pleine juridiction » au sens de la CEDH et l'office du juge administratif, RFDA 2009. 729.

[63] Y. Gaudemet, Le pouvoir de réformation de la cour d'appel de Paris dans le contentieux des décisions du Conseil de la concurrence, JCP G 1999. I. 188, n° 50, p. 2241-225.

[64] CEDH 23 oct. 1995, *Schmautzer c. Autriche*, préc.

La croissance continue des pouvoirs reconnus aux autorités de régulation est donc accompagnée par une augmentation parallèle des garanties offertes aux personnes visées. C'est un véritable droit processuel de la régulation qui voit ainsi le jour. Les enquêtes administratives que mènent les autorités de régulation ne sont pas des procédures juridictionnelles, mais elles leur ressemblent: les pouvoirs dont elles disposent sont en effet de même nature que ceux attribués au juge d'instruction dans le cadre de la procédure pénale. Dans un domaine plus restreint, ils permettent à l'autorité ou à ses agents d'obtenir toute information, d'avoir communication et copie de pièces ou de documents, de se transporter sur place et de procéder à des auditions[65]. Certaines autorités peuvent même étendre leurs investigations dans des lieux qui ne sont plus professionnels, notamment des domiciles, sur autorisation du juge des libertés et de la détention[66].

Les autorités de régulation se « juridictionnalisent »[67]. Il est sans doute possible tour à tour de déplorer la croissance excessive d'enquêtes administratives[68] – dont il n'est pas certain qu'elles soient, en elles-mêmes, un progrès du droit – et de se réjouir de leur

[65] AMF: C. mon. fin., art. L. 621-10, L. 621-12; ACP: C. mon. fin., art. L. 612- 23, L. 612-24, al. 2 et 4, art. L. 612-26; HADOPI : CPI, art. L. 331-21, L. 331- 21-1 ; ARAF : art. 17, 22 et 23, L. n° 2009-1503 ; Autorité de la concurrence : C. com., art. L. 450-1 s., L. 463-7 ; CRE : C. énergie., art. L. 135-4 et L. 135-5 ; ARCEP: CPCE, art. L. 5-6, L. 5-9, L. 5-9-1, art. L. 32-4 ; ARJEL : art. 42, L. n° 2010-476.

[66] AMF: C. mon. fin., art. L. 621-12; Autorité de la concurrence : C. com., art. L. 450-4 ; ARAF : art. 23 I, L. n° 2009-1503; CRE : C. énergie., art. L. 135-5 ; ARCEP: CPCE, art. L. 5-9-1.

[67] D. Costa, L'Autorité des marchés financiers: juridiction ? quasi-juridiction? pseudo-juridiction ? À propos de l'arrêt du Conseil d'État du 4 février 2005, *Société GSD et M. YX*, RFDA 2005. 1174 et les remarques de P. Delvolvé, dans la préface de la thèse de J.-J. Menuret, Le contentieux du conseil de la concurrence, Presses universitaires de la Faculté de droit de Clermont-Ferrand, 2002, p. xvi-xvii.

[68] S. Thomasset-Pierre, « L'Autorité des marchés financiers: une autorité publique ambivalente », in H. de Vauplane et J.-J. Daigre (dir.), *Mélanges Association européenne de droit bancaire et financier – France. Droit bancaire et financier*, 2004, p. 427-428 et, de manière plus générale, dans sa thèse, *L'autorité de régulation boursière face aux garanties processuelles fondamentales*, LGDJ, 2003, spéc. p. 439-442.

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soumission de plus en plus grande aux exigences du procès équitable. Une certaine hésitation du législateur est d'ailleurs perceptible. En effet, la détermination des éléments qui sont indispensables au caractère équitable de la procédure, dès son commencement, est un exercice difficile[69]. La tendance est alors à l'octroi de garanties qui, non seulement correspondent aux exigences de l'article 6-1, mais vont même parfois au-delà.

L'avènement du dualisme organique

L'une des manifestations les plus nettes de cette « juridictionnalisation » des autorités de régulation réside dans la séparation organique – et non pas simplement fonctionnelle – des pouvoirs de poursuite, d'instruction et de sanction.

L'ancienne Commission des opérations de bourse (COB) connaissait déjà une séparation fonctionnelle: l'enquête était confiée au directeur général de la Commission; l'instruction et la notification des griefs étaient assurées par un rapporteur qui était nommé par le président de la Commission; le pouvoir de sanction, enfin, était exercé par le collège plénier de la Commission, qui statuait en l'absence du rapporteur[70]. Mais la loi du 1er août 2003 de sécurité financière a été la première à créer, au sein de l'AMF, une séparation organique entre le collège de l'autorité de régulation et la commission des sanctions. Désormais, les contrôles et enquêtes sont de la compétence des services de l'AMF, qui peuvent être aidés d'enquêteurs habilités appartenant à des corps extérieurs. Dans un deuxième temps, la décision d'engager des poursuites est prise, sur la base du rapport établi par les services, par le collège de l'autorité. Cette décision est notifiée à la personne concernée et à la commission des sanctions, qui désigne un rapporteur parmi ses membres. La Commission des sanctions a seule le pouvoir de prononcer une sanction, après une

[69] G. Eveillard, art. cit., qui relève quelques « surprises » dans la liste des éléments non substantiels : ainsi, l'absence de lecture publique de la décision (CE 10 mai 2004, *Crédit du Nord*, Lebon T. p. 692), le droit à être entendu (CE 23 avr. 2009, *Compagnie Blue Line*, préc.)…

[70] Cette séparation avait été introduite par deux décrets du 1er août 2000 (n° 2000-720 et 2000-721).

procédure contradictoire et une délibération à laquelle ni le rapporteur, ni le commissaire du gouvernement ne participent[71].

Ce dualisme organique n'est pas en lui-même une exigence de la Cour européenne des droits de l'homme[72]. Mis en place en 2003 pour l'AMF[73], il a depuis lors été transposé dans la structure de plusieurs autorités de régulation: la HADOPI[74], l'ACP[75], la CRE[76], l'ARJEL[77]. L'ARAF, l'Autorité de la concurrence et l'ARCEP, par contre, possèdent toujours un collège unique.

Les autorités de régulation qui ne possèdent pas une structure dualiste n'ignorent pas une certaine séparation fonctionnelle des pouvoirs de poursuite, d'instruction et de sanction; mais elles demeurent conformes à un cadre général qui est celui de l'enquête administrative. Ainsi, devant l'Autorité de la concurrence, l'instruction est confiée au rapporteur général ou à l'un de ses adjoints (C. com., art. L. 461-4). C'est ce rapporteur qui notifie les griefs aux intéressés et au commissaire du Gouvernement (C. com., art. L. 463-2). C'est encore le rapporteur général qui décide de faire appel à des experts, sur demande formulée par le rapporteur en charge du dossier ou une partie (C. com., art. L. 463-8). Cependant, lorsque le collège de l'Autorité délibère, le rôle du rapporteur général est réduit : il assiste au délibéré mais ne participe pas au vote (C. com., art. L. 463-7). Le pouvoir de

[71] C. mon. fin., art. L. 621-2, IV, L. 621-3 I, L. 621-15, II et IV.

[72] L. Milano, *Le droit à un tribunal au sens de la Convention européenne des droits de l'homme*, Dalloz, 2006.

[73] C. mon. fin., art. L. 621-2.

[74] CPI, art. L. 331-15.

[75] C. mon. fin., art. L. 612-4.

[76] C. énergie., art. L. 132-1.

[77] Art. 35-I, L. n° 2010-476.

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sanction de l'Autorité (C. com., art. L. 462-6) est donc exercé indépendamment de celui qui a dirigé l'instruction. Le même constat peut être fait pour l'ARAF: l'article 17 de la loi du 8 décembre 2009 prévoit en effet que « le collège délibère sur les affaires dont il est saisi hors la présence des agents ayant constaté les manquements et de ceux ayant établi le dossier d'instruction ». S'il n'est pas de disposition semblable dans le Code des postes et des communications électroniques à propos de l'ARCEP, il y est néanmoins prévu que la phase d'enquête est menée par des fonctionnaires et agents du ministère chargé des postes et de l'ARCEP (CPCE, art. L. 5- 9 et L. 32-4), le pouvoir de sanction étant exercé par le collège de l'Autorité (CPCE, art. L. 5-3 et L. 36-11).

Les autorités qui possèdent une structure dualiste réalisent une séparation organique des fonctions de poursuite, d'instruction et de sanction. Les missions générales de l'autorité sont exercées par le collège et le pouvoir de sanction est attribué à une commission indépendante[78]. Les contrôles et enquêtes sont assurés par les agents de l'autorité. La saisine de la Commission des sanctions est une compétence du collège pour l'AMF[79], l'ACP[80] et l'ARJEL[81]. La Commission de protection des droits de la HADOPI peut se saisir elle-même sur la base d'informations transmises par le procureur de la République ou peut être saisie par des agents assermentés[82]. Le comité de règlement des différends et des sanctions de la CRE, quant à lui, peut être saisi, selon l'objet du litige, par

[78] Les fonctions de membre de la commission des sanctions sont incompatibles avec celles de membre du collège : AMF (C. mon. fin., art. L. 621-2, IV) ; ACP (C. mon. fin., art. L. 612-9) ; HADOPI (CPI, art. L. 331-17) ; CRE (C. énergie., art. L. 132-4) ; ARJEL (art. 41, L. n° 2010-476).

[79] C. mon. fin., art. L. 621-15, I.

[80] C. mon. fin., art. L. 612-38.

[81] Art. 43, I, L. n° 2010-476.

[82] CPI, art. L. 331-24.

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les gestionnaires ou les utilisateurs des réseaux publics[83], par le ministre, une organisation professionnelle ou une association d'utilisateur, par toute personne concernée, ou se saisir de lui-même[84]. Enfin, la sanction, s'il y a lieu, est prononcée par la commission des sanctions (AMF, ACP, ARJEL), la commission de protection des droits (HADOPI), le comité de règlement des différends et des sanctions (CRE).

Le dualisme organique qui structure désormais la majorité des autorités de régulation a un caractère paradoxal. Il réintroduit une séparation organique des pouvoirs là où l'inspiration initiale de la régulation semblait l'avoir exclue. Certes, la commission qui exerce le pouvoir répressif est interne à l'autorité administrative[85], mais elle assume cette compétence dans des conditions qui lui garantissent une parfaite indépendance à l'égard du collège. Cette évolution ne peut guère faire l'objet de critiques, tant le rôle et le poids des sanctions administratives, dans le domaine économique et financier, a augmenté ces dernières années. Ses conséquences sont indéniablement positives pour les personnes mises en cause, qui ont vu leurs droits consolidés de manière substantielle. Il n'en demeure pas moins qu'elle produit une certaine incohérence dans les statuts des autorités de régulation.

Le dualisme organique a en effet pour conséquence directe de rendre possibles des divergences d'appréciation entre le collège et la commission des sanctions. Cette brèche dans l'unité du pouvoir de l'autorité de régulation a été illustrée par l'affaire EADS, dans laquelle la commission des sanctions de l'AMF a adopté une position différente de celle attendue par le collège. Cette divergence d'appréciation a été d'autant plus sensible que, parallèlement, une action pénale s'est développée dont – il est vrai – l'issue n'est pas

[83] C. énergie., art. L. 134-19.

[84] C. énergie., art. L. 134-25.

[85] Ainsi, dans sa décis. n° 2009-580-DC, 10 juin 2009, consid. 16, le Conseil constitutionnel mentionne explicitement que la commission de protection des droits de la HADOPI « n'est pas une juridiction » mais une « autorité administrative ».

encore connue. Il serait bien entendu peu pertinent de reprocher à la commission des sanctions de statuer en toute indépendance. La question qui est posée est en réalité différente: en quelle mesure le dualisme organique est-il compatible avec l'objectif initial de la régulation, qui était de voir trancher rapidement par le régulateur les différends susceptibles d'apparaître[86] ?

La dynamique de « juridictionnalisation » des autorités de régulation a diminué l'unité de leur pouvoir administratif. Il est ainsi frappant de voir la facilité avec laquelle le Parlement a ouvert au président du collège de l'AMF, à la suite de l'affaire EADS, la possibilité de former un recours contre la décision de la Commission des sanctions[87]. Une telle possibilité fut d'abord reconnue aux présidents de l'ACP[88] et de l'ARJEL[89] au sein de leurs autorités respectives. Il semble tout d'abord incohérent de voir, dans une même personne morale, un organe former un recours contre la décision d'un autre organe. Le cas n'est pas unique en droit public, mais il est peu fréquent[90]. Il est ici d'autant plus curieux qu'il intervient dans l'organisation d'une autorité administrative qui est censée pouvoir trancher des litiges techniques avec célérité. Cependant, la raison d'être de ce recours apparaît dans le rapprochement de la procédure suivie par les autorités de régulation avec la procédure pénale. En effet, ce droit recours est une conséquence logique de la séparation qui a été instaurée entre les fonctions de poursuite et de sanction: le collège ayant

[86] V. les remarques de T. Tuot, art. préc., p. 5-6.

[87] Ce droit de recours du président de l'AMF contre la décision de la commission des sanctions a été introduit par la loi n° 2010-1249, 22 octobre 2010 à l'article L. 621-30 du code monétaire et financier.

[88] C. mon. fin., art. L. 612-16, IV.

[89] Art. 44 II, L. n° 2010-476.

[90] B. Delcros, *L'unité de la personnalité juridique de l'État : étude sur les services non personnalisés de l'État*, LGDJ, 1976, p. 130-144.

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l'initiative des poursuites[91], il est naturel qu'il puisse former un recours contre la décision de la Commission des sanctions. Il s'agit d'une transposition, dans le domaine de la régulation, du droit d'appel du procureur général à l'égard des jugements rendus par les cours d'assise[92], les tribunaux correctionnels, les tribunaux de police et les juridictions de proximité[93].

L'assimilation implicite des commissions de sanction à des juridictions sépare ce qui était uni. La forme juridique – ou plutôt : une certaine forme juridique – de l'autorité de régulation est paradoxalement aujourd'hui moins comprise et moins admise qu'elle ne le fut jadis. Son succès n'en est pas moins grand; et c'est sous-estimer la spécificité et la technicité du contentieux traité par les autorités de régulation que d'appeler à un transfert de leurs compétences au profit du juge judiciaire[94]. Attribuer aux commissions des sanctions, par une qualification législative, le statut de juridiction – comme autrefois la Commission bancaire statuant en matière disciplinaire[95] – ne semble guère plus pertinent: une telle réforme risquerait de priver les justiciables d'un degré de juridiction[96]. Sauf à imaginer la création d'une juridiction spécialisée – mais le projet, parfois évoqué, a été constamment rejeté[97] –, la forme de l'autorité de régulation semble encore la plus adaptée.

[91] C. mon. fin., art. L. 621-15, I. (AMF) ; C. mon. fin., art. L. 612-38 (ACP) ; art. 43, II, L. n° 2010-476 (ARJEL).

[92] C. pr. pén., art. 380-2.

[93] C. pr. pén., art. 497 et 546.

[94] V. la thèse de S. Thomasset-Pierre, *L'autorité de régulation boursière*…, op. cit., p. 428-432.

[95] La loi bancaire du 24 janvier 1984 (art. 48) lui avait, en effet, donné une double nature : autorité administrative dans l'exercice de sa mission de surveillance, elle devenait une juridiction administrative dans l'exercice de son pouvoir de sanction.

[96] Les décisions de la Commission bancaire en matière disciplinaire n'étaient susceptibles que d'un recours en cassation.

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La consolidation de ces autorités, pour autant qu'elles répondent à une nécessité[98], ne peut cependant occulter leur spécificité fonctionnelle dans le cadre général de la séparation des pouvoirs : celle d'un pouvoir administratif qui participe des trois fonctions de l'État.

2. LA SPECIFICITE ORGANIQUE

La spécificité organique des autorités de régulation est d'être des autorités administratives indépendantes qui ne sont soumises ni au pouvoir hiérarchique ni à la tutelle des ministres ou de leurs subordonnés. Cependant, l'indépendance de ces autorités ne modifie pas la nature du pouvoir qu'elles exercent, qui est un pouvoir d'État. À ce titre, le statut des autorités de régulation n'échappe pas aux voies de la légitimité démocratique, déterminées par la Constitution.

2.1. L'exercice d'un pouvoir d'État

L'attribution de la personnalité morale à certaines autorités de régulation ne semble pas avoir emporté une réelle novation de leur pouvoir. Dotées ou non de cette personnalité, les autorités de régulation apparaissent comme des autorités dans l'État[99].

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[97] L'idée d'une « cour de justice économique », étrangère à la tradition française, avait été défendue par Jean Foyer, en 1977, à l'occasion du débat parlementaire qui devait aboutir à la création de la Commission de la concurrence. Le gouvernement, par la voix de Mme Christiane Scrivener, lui avait opposé une fin de non-recevoir « car la création d'une nouvelle juridiction aurait compliqué encore l'organisation de notre système judiciaire, risqué de susciter des conflits de compétence et entraîné des incertitudes pour les entreprises » (JO Débats, AN 9 juin 1977, p. 3615 et 3623).

[98] V. les remarques de MM. Vanneste et Dosière, Rapport, t. 1, p. 60 s.

[99] P. Sabourin, art. préc., p. 95.

Personnalité morale et indépendance

L'attribution de la personnalité morale aux autorités publiques indépendantes (AMF, HADOPI, ARAF) constitue, indéniablement, un degré supplémentaire dans l'autonomie reconnue aux autorités de régulation[100]. Correspond-t-elle, pour autant, à une indépendance complète à l'égard de l'État?

Les effets de la personnalité juridique accordée à une autorité publique indépendante se manifestent essentiellement dans la gestion administrative et budgétaire de l'autorité[101]: avec la personnalité juridique vont la jouissance d'un patrimoine, la possibilité d'arrêter son budget, de passer des contrats, de recouvrer une ressource fiscale, d'ester en justice, d'employer des personnels de droit public comme de droit privé… Certains de ces avantages ont pu être accordés à des autorités administratives indépendantes démunies de personnalité propre[102]; mais la personnalité réunit et accorde en bloc ce qui est délégué ponctuellement aux traditionnelles autorités administratives indépendantes.

Plus que l'attribution de la personnalité morale, c'est l'autonomie budgétaire qui apparaît révélatrice du lien entre les autorités de régulation et l'institution étatique. Cette autonomie se manifeste tout d'abord par l'attribution de la qualité d'ordonnateur des dépenses à l'un des organes de l'autorité. Cette attribution est indéniablement un élément objectif en faveur de l'indépendance; mais elle n'est aucunement conditionnée par la possession de la personnalité juridique. Plusieurs autorités administratives indépendantes sont, de ce point de vue, dans la même situation que les autorités publiques

[100] M. Degoffe, Les autorités publiques indépendantes, AJDA 2008. 622.

[101] T. Bonneau et F. Drummond, op. cit., p. 349-350.

[102] Ainsi l'Autorité de contrôle prudentiel qui dispose, selon l'art. C. mon. fin., L. 612-18, de l'« autonomie financière ».

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indépendantes[103]. À un niveau supérieur, l'autonomie budgétaire de l'autorité repose sur l'affectation de ressources propres[104]. L'indépendance est en effet mieux assurée par des taxes affectées que par des crédits budgétaires qui nécessitent une négociation avec le ministère et un vote du Parlement. Parmi les autorités de régulation économique, toutes ne bénéficient pas cependant d'un financement par taxes affectées: l'AMF[105], l'ACP[106], l'ARAF[107], l'ARCEP[108] en bénéficient mais ni l'Autorité de la concurrence[109], ni la CRE[110], ni l'ARJEL[111], ni même la HADOPI[112], n'en jouissent.

[103] C'est le cas de l'ACP (C. mon. fin., art. L. 612-19, I : le secrétaire général), de l'Autorité de la concurrence (C. com., art. L. 461-4, al. 7 : le président de l'Autorité), de la CRE (C. énergie., art. L. 133-5, al. 5 : le président de la Commission), de l'ARJEL (art. 37, III, L. 2010-476: le président de l'Autorité), de l'ARCEP (CPCE, art. L. 133).

[104] Le statut d'autorité publique indépendante ne garantit pas un financement autonome. Ainsi, la HADOPI – qui possède la personnalité morale – est financée par des crédits budgétaires (CPI, art. L. 331-19, al. 6). À l'inverse, l'Autorité de contrôle prudentiel – qui ne possède pas la personnalité morale – bénéficie « du produit de la contribution mentionnée à l'article L. 612-20 » (C. mon. fin., art. L. 612-18, al. 1). Mais il est vrai que son budget « constitue un budget annexe de la Banque de France » (C. mon. fin., art. L. 612-18, al. 2) et la Banque de France est elle-même un personne publique sui generis.

[105] C. mon. fin., art. L. 621-5-3 et D. 621-27 s.

[106] C. mon. fin., art. L. 612-20.

[107] Art. 21, L. n° 2009-1503.

[108] CPCE, art. L. 133. Les ressources de l'ARCEP reposent cependant essentiellement sur les crédits budgétaires : v. le Rapport de MM. Vanneste et Dosière, t. 1, p. 107, et les appréciations du président de l'ARCEP sur cette question, t. 2, p. 186-187.

[109] C. com., art. L. 461-4, al. 6.

[110] C. énergie., art. L. 133-5, al. 4 et 5.

[111] Art. 37, III, L. n° 2010-476.

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Le financement par crédits budgétaires parle de lui-même: avec lui, tout procède de l'État[113]. Le financement par ressources propres peut sembler plus ambivalent. La création par le législateur de droits ou de contributions pour frais de contrôle au profit d'une autorité de régulation joue en effet en faveur de l'autonomie. Mais si l'on tient compte des conditions de fixation du montant de ces droits ou contributions, le pouvoir ministériel apparaît de nouveau déterminant. Il en va ainsi des droits perçus par l'AMF: l'article L. 621-5-3 du code monétaire et financier précise que leurs taux sont fixés par décret « après avis du collège de l'Autorité des marchés financiers ». Il s'agit par conséquent d'une compétence du Premier ministre[114]. Il en va de même pour l'ARAF, dont le financement est partagé entre des rémunérations pour services rendus et un droit fixe dû par les entreprises contrôlées. « Le montant de ce droit, précise l'article 21 II de la loi du 8 décembre 2009, est fixé par les ministres chargés des transports et du budget sur proposition de l'autorité. » Il en va encore de la même manière de l'ACP dont les ressources sont assurées par une contribution pour frais de contrôle prévue à l'article L. 612-20 du Code monétaire et financier. Lorsque cette contribution est forfaitaire, elle est déterminée dans son montant « par arrêté du ministre chargé de l'économie » (art. L. 612-20 II C 1°)[115] ; lorsqu'elle est variable, son taux est fixé « par arrêté du ministre chargé de l'économie, après un avis

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[112] CPI, art. L. 331-19, al. 6.

[113] Sur l'intégration des autorités administratives indépendantes à la procédure budgétaire, v. le rapport de MM. Vanneste et Dosière, t. 1, p. 147 s.

[114] C. mon. fin., art. D. 621-27.

[115] Dans le cas de l'art. L. 612-20, II, C, 2°, il s'agit d'un arrêté des ministres chargés de l'économie, de la mutualité et de la sécurité sociale.

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consultatif du collège de l'Autorité de contrôle prudentiel en formation plénière » (art. L. 612-20 III 1°)[116].

Ainsi, les autorités de régulation qui bénéficient de ressources propres – l'ACP, certes, par l'intermédiaire de la Banque de France – voient le montant de ces ressources déterminé, de manière indirecte, par la décision d'un ministre ou du Premier ministre. Ce constat ne diminue pas les conséquences qui s'attachent à l'attribution de la personnalité morale: si la responsabilité de l'AMF ou de l'ARAF devait être mise en jeu, ce sont bien les patrimoines de ces autorités – et non celui de l'État – qui répondraient de leurs actes. Mais la responsabilité de l'État ne serait pas pourtant totalement écartée. L'une des leçons de l'avis du Conseil d'État du 8 septembre 2005, rendu à propos de l'ancienne Commission de contrôle des assurances, des mutuelles et des institutions de prévoyance[117], réapparaît ici: dans la mesure où l'État n'aurait pas fixé la contribution à un niveau permettant à l'autorité de régulation de constituer des réserves, il pourrait voir sa responsabilité engagée à titre subsidiaire. L'État aurait alors à répondre des actes accomplis par les autorités publiques indépendantes, non pas au titre d'une « garantie » générale, mais parce qu'il est bien l'autorité compétente pour fixer le taux de la ressource fiscale affectée aux autorités de régulation[118].

En somme, si l'on devait juger de l'indépendance des autorités de régulation sur leurs modes de financement, aucune ne pourrait être considérée comme étant indépendante.

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[116] L'art. L. 612-20, III, 2°, prévoit que le taux est fixé « par arrêté des ministres chargés de l'économie, de la mutualité et de la sécurité sociale après un avis consultatif du collège de l'Autorité de contrôle prudentiel en formation plénière ».

[117] CE, avis, 8 sept. 2005, n° 371558, Grands avis, 3e éd., 2008, n° 47, p. 569-578. La commission a depuis été intégrée à l'Autorité de contrôle des assurances et des mutuelles qui, elle-même, a été intégrée dans l'Autorité de contrôle prudentiel.

[118] D. Labetoulle, La responsabilité des AAI dotées de la personnalité morale : coup d'arrêt à l'idée de « garantie de l'État ». À propos de l'avis du Conseil d'État du 8 septembre 2005, RJEP/CJEG, n° 635, oct. 2006, p. 361-362.

Les autorités de régulation sont sans doute « indépendantes » à l'égard du pouvoir politique; mais de l'État, elles ne le sont nullement. Elles sont encore l'État; qu'elles aient ou non la personnalité, elles exercent un pouvoir d'État[119].

Pouvoir gouvernemental et fonction de régulation

Le gouvernement est historiquement la première autorité de régulation[120]. S'il n'apparaît plus comme l'organe principal de cette fonction, il demeure du moins une autorité essentielle. Ses pouvoirs sont de deux ordres : ils interviennent dans la constitution de l'autorité puis dans l'accomplissement de la fonction de régulation.

Dans la constitution de l'autorité, le pouvoir gouvernemental est essentiellement un pouvoir de nomination. Certes, ce pouvoir est largement partagé avec d'autres autorités étatiques ou des organes des secteurs professionnels concernés; mais il demeure important. Qu'il s'agisse du collège[121] ou de la Commission des sanctions[122] de l'AMF, du collège[123] ou de la Commission des sanctions[124] de l'ACP, du collège de l'ARJEL[125], de l'ARAF[126],

[119] D. Truchet, « Avons-nous encore besoin du droit administratif ? », *Mélanges en l'honneur de J.-F. Lachaume*, LGDJ, 2007, p. 1043.

[120] J. Massot, Les fondements des pouvoirs régaliens de l'État sur les marchés, LPA 17 sept. 2001, n° 185, p. 6-9.

[121] C. mon. fin., art. L. 621-2, II.

[122] C. mon. fin., art. L. 621-2, IV.

[123] C. mon. fin., art. L. 612-5.

[124] C. mon. fin., art. L. 612-9.

[125] Art. 35, II, L. n° 2010-476

[126] Art. 12, I, L. n° 2009-1503.

de l'Autorité de la concurrence[127] ou de l'ARCEP[128], le pouvoir exécutif possède une prérogative importante dans la désignation des membres des autorités de régulation. L'autonomie de gestion des autorités ne fait pas obstacle, par ailleurs, au pouvoir de nomination du ministre à l'intérieur même de leurs services: c'est ainsi, en général, à ce dernier qu'appartient la désignation du responsable des services de l'autorité[129] 127 et, dans certains cas, l'agrément de ses agents[130].

Dans l'accomplissement de la fonction de régulation, la loi continue de reconnaître au gouvernement des pouvoirs importants, même lorsqu'une instance de régulation a été créée. En réalité, la constitution d'une autorité de régulation dans un domaine donné ne dessaisit jamais totalement le ministre responsable[131]. Le pouvoir ministériel et le pouvoir de l'autorité de régulation sont largement imbriqués, la fonction de régulation étant partagée entre eux.

Ainsi la nécessité d'une intervention urgente légitime l'action gouvernementale en cas de carence de l'Autorité des marchés financiers. Ce pouvoir de substitution d'action, dans des circonstances exceptionnelles, est exercé par décret, après mise en demeure du ministre chargé de l'économie[132]. L'hypothèse des circonstances exceptionnelles est également visée par l'article L. 612-14 II du code des marchés financiers, à propos de

[127] C. com., art. L. 461-1, II.

[128] CPCE, art. L. 130

[129] AMF: C. mon. fin., art. L. 621-5-1; ACP: C. mon. fin., art. L. 612-15; Autorité de la concurrence: C. com., art. L. 461-4; ARJEL: art. 37, II, L. n° 2010-476.

[130] HADOPI: CPI, art. L. 343-3 ; ARCEP : CPCE, art. L. 5-9

[131] C. Chauvet, La personnalité contentieuse des autorités administratives indépendantes, RD publ. 2007. 394.

[132] C. mon. fin., art. L. 621-7-2.

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l'Autorité de contrôle prudentiel, mais dans un cadre sensiblement différent. Cet article habilite le président de l'Autorité, « lorsque des circonstances exceptionnelles le justifient », à « prendre des décisions, sauf en matière de sanctions, relevant de la compétence des formations de l'Autorité ». Que se passerait-il en cas de carence du président de l'Autorité? Le code des marchés financiers ne répond pas à cette question; il est néanmoins possible de considérer que le Premier ministre aurait alors la possibilité d'intervenir, comme une sorte d'ultime recours, en prenant par décret les mesures pertinentes. Ce pouvoir lui a été reconnu même sans texte, par le Conseil d'État, dans une affaire qui concernait la suspension des cours sur le marché international des sucres blancs de la Bourse de Paris[133].

En période normale, les liens entre le gouvernement et l'autorité de régulation sont plus ou moins institutionnalisés. Ils passent parfois par l'institution d'un commissaire du gouvernement: il en va ainsi de l'AMF[134], de l'ACP[135], de la CRE[136] et de l'Autorité de la concurrence[137]. Cependant, le principe d'une telle représentation n'est pas général. Le Conseil d'État en 2001 et MM. Vanneste et Dosière, plus récemment, l'ont déploré: il manque trop souvent aux autorités administratives indépendantes une représentation permanente du gouvernement[138]. Ainsi, comme de nombreuses autorités, ni l'ARCEP, ni la HADOPI, ni l'ARAF, n'en bénéficient.

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[133] CE, ass., 20 juin 1975, Soc. Acli International Commodity Services Ltd et a., Lebon p. 374; P. Delvolvé, La Bourse de commerce de Paris et la crise du marché international des sucres blancs, JCP 1977. I. 2847 (spéc. § 20 à 22) et Droit public de l'économie, Dalloz, 1998, p. 466, § 393

[134] C. mon. fin., art. L. 621-3, I.

[135] C. mon. fin., art. L. 612-11.

[136] C. énergie., art. L. 133-4.

[137] C. com., art. L. 461-2.

[138] Rapport, t. 1, p. 101-102. La quatorzième recommandation des parlementaires consiste à généraliser la présence d'un commissaire du gouvernement auprès des autorités administratives indépendantes.

Le lien entre le pouvoir ministériel – ou, de manière plus générale, le pouvoir gouvernemental – et le pouvoir de l'autorité de régulation se manifeste cependant en présence comme en l'absence d'un commissaire du gouvernement. Le pouvoir d'homologation du ministre, à défaut d'être, lui aussi, général[139], est un élément important d'encadrement du pouvoir réglementaire délégué aux autorités de régulation. Il joue ainsi ce rôle auprès de l'AMF[140] et de l'ARCEP[141]. Il faut aussi mentionner toutes les possibilités ouvertes au ministre de saisir l'autorité de régulation[142].

Enfin, c'est le pouvoir du ministre de déférer au juge les décisions des autorités de régulation qui apparaît comme un élément essentiel de leur intégration étatique[143]. Ce droit de recours a un rôle crucial car, en cas de divergence entre le ministre et l'autorité de régulation, il permet au juge de rétablir l'unité de la volonté de l'État[144]. La possibilité pour le ministre de déclencher le contrôle de légalité est la contrepartie de la disparition du pouvoir hiérarchique sur l'autorité de régulation[145]. Ce pouvoir devrait alors être reconnu

[139] MM. Vanneste et Dosière préconisent également un renforcement de ce pouvoir d'homologation, malgré les réticences exprimées par certaines autorités de régulation (Rapport, t. 1, p. 52).

[140] C. mon. fin., art. L. 621-6, al. 1.

[141] CPCE, art. L. 4 et L. 36-6

[142] V. pour la CRE : C. énergie., art. L. 134-25; pour l'Autorité de la concurrence : C. com., art. L. 462-5, L. 464-1 et R. 464-9-3 ; pour l'ARCEP : CPCE, art. L. 4, L. 5-3 et L. 36-11..

[143] C. Teitgen-Coly, Les instances de régulation et la Constitution, RD publ. 1990. 249 s. V. Cons. const., n° 86-217-DC, 18 sept. 1986, consid. 23 ; et n° 93-333-DC, 21 janv. 1994, consid. 14.

[144] C. Chauvet, art. cit., p. 395-400.

[145] (143) R. Chapus, Droit administratif général, Montchrestien, 2001, 15e éd., n° 297 p. 230. V. à propos du recours exercé par le ministre des Armées contre la décision d'un conseil de révision, CE 3 déc. 1968, Ministre des Armées c. Ruffin, RD publ. 1969. 700, concl. Rigaud et comm. de B. Delcros, L'unité de la personnalité juridique de l'État (Étude sur les services non personnalisés de l'État), LGDJ, 1976, p. 140-143.

comme existant même sans texte, au moins pour les actes de portée réglementaire[146], car il est attaché à la qualité de ministre, et non au texte législatif qui crée ou encadre une autorité de régulation[147].

2.2 La recherche d'une légitimité démocratique

Le statut des autorités de régulation est la principale garantie de leur indépendance. Celle-ci néanmoins, dans un régime libéral, ne saurait être absolue, tout pouvoir étant lié à l'exercice d'une responsabilité. L'exigence d'indépendance doit par conséquent être soumise à la Constitution, en particulier à son article 20, qui rattache les autorités administratives à la responsabilité politique du gouvernement.

Interprétations constitutionnelle et européenne de l'indépendance

La conformité à la Constitution des autorités administratives indépendantes a été reconnue par le Conseil constitutionnel à de nombreuses reprises[148]. Mais le traitement qu'il réserve à ces institutions n'est pas sans réticences. Si le Conseil admet en effet le principe de leur indépendance, c'est au prix d'un encadrement strict de leurs pouvoirs. Ainsi, le pouvoir réglementaire dont elles peuvent bénéficier ne doit concerner « que des mesures de portée limitée tant par leur champ d'application que par leur contenu »[149] ; leur pouvoir de sanction « est assorti par la loi de mesures destinées à sauvegarder les droits et libertés

[146] C'est d'ailleurs une proposition faite par MM. Vanneste et Dosière, Rapport, t. 1, p. 56-57.

[147] (145) Ce pouvoir de déféré qui appartient au ministre a été mentionné par le Conseil constitutionnel dans sa décision n° 86-217-DC sur la CNCL.

[148] V. notamment Cons. const., décis. n° 86-217-DC, 18 sept. 1986, Loi relative à la liberté de communication, consid. 96.

[149] Cons. const., décis. n° 88-248-DC, 17 janv. 1989, consid. 15.

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constitutionnellement garantis » et ne peut comporter aucune peine privative de liberté[150]. Le principe même de l'indépendance est reconnu, mais dans une acception réduite qui porte en réalité sur l'exercice des pouvoirs délégués et non sur le statut de l'autorité en cause[151]. Par « autorité indépendante », remarquent les auteurs des *Grandes décisions*, le Conseil entend surtout « autorité impartiale »[152]. Or l'impartialité n'est aucunement le propre des autorités administratives indépendantes: elle est un principe général du droit qui concerne toutes les autorités administratives[153]. La jurisprudence du Conseil constitutionnel privilégie donc une conception étroite de l'« indépendance ». Solidement campée sur la séparation des pouvoirs, elle reconnaît au législateur la possibilité de créer des autorités administratives autonomes[154] – toutefois dans un cadre qui ne remet pas en cause leur qualité d'autorités administratives[155].

L'arrêt de la Cour de justice de l'Union européenne du 9 mars 2010, *Commission c. Allemagne*[156] a esquissé les premiers éléments d'une conception européenne de

[150] (148) V. notamment, Con. const., décis. n° 89-260-DC, 28 juill. 1989 (consid. 6) et n° 88-248-DC, 17 janv. 1989 (consid. 35 et 36)

[151] C. Teitgen-Colly parle d'une « indépendance minimisée » (art. préc. p. 233) et d'« une conception minimale de l'indépendance » (art. préc. p. 238).

[152] Les Grandes décisions, 15e éd., 2009, n° 33, § 19, p. 568.

[153] CE 27 oct. 1999, Fédération française de football, JCP 2000, n° 10376, note R. Piastra ; CE 7 juill. 1965, Fédération nationale des transporteurs routiers, Lebon p. 413 (v. R. Chapus, Droit administratif général, op. cit., vol. 1, n° 128 et 1305-3°).

[154] G. Braibant, « Droit d'accès et droit à l'information », Service public et libertés. Mélanges offerts au professeur Robert-Édouard Charlier, 1981, p. 708-709..

[155] Le Conseil constitutionnel souligne fréquemment la nature administrative de ces autorités : M. Collet, Le contrôle juridictionnel…, p. 15-19.

[156] CJUE 9 mars 2010, Commission c. Allemagne, aff. C-518/07 ; v. F. Kauff- Gazin, Vers une conception européenne de l'indépendance des autorités de régulation ? À propos de l'affaire C-518/07, Commission c.

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l'indépendance des autorités de régulation. En l'espèce, la Commission reprochait à l'Allemagne d'avoir transposé de façon erronée la directive 95/46 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel. Cette directive requiert notamment de chaque État membre l'instauration d'une ou plusieurs autorités publiques chargées de surveiller l'application sur son territoire, des dispositions adoptées; elle précise également que ces autorités, pourvues de différents pouvoirs d'intervention, « exercent en toute indépendance les missions dont elles sont investies. »[157].

La divergence d'interprétation entre l'Allemagne et la Commission portait sur l'interprétation de cette notion d'indépendance. En effet, le système allemand de protection des données à caractère personnel comprenait, au niveau du droit des *Länder*, des autorités de contrôle soumises à la tutelle de l'État. Or, la Commission considérait que l'indépendance visée par la directive garantissait à l'autorité de contrôle un exercice de ses missions à l'abri de toute influence, tant celle de personnes privées que de l'État et de toute personne publique. L'Allemagne au contraire soutenait que la notion d'indépendance ne concernait ici qu'une indépendance fonctionnelle, c'est-à-dire limitée aux relations entre l'autorité de contrôle et les personnes soumises à ses investigations.

La Cour de justice a non seulement donné tort à l'Allemagne en rendant un arrêt en manquement[158], mais elle a développé, dans sa décision, une conception de l'indépendance largement antinomique avec celle soutenue par l'État membre. L'Allemagne avait en effet eu l'habileté d'appuyer son argumentation sur une analyse de

Allemagne, Europe juill. 2010, n° 7, étude 9 ; V. égal. CJUE 3 déc. 2009, qui a opposé les mêmes parties, aff. C-424/07 et le comm. de J. Ziller, Les autorités administratives indépendantes entre droit interne et droit de l'Union européenne, RFDA 2010. 901.

[157] Art. 28 de la directive 95/46

[158] On remarquera que l'arrêt a été rendu en Grande chambre, sur conclusions partiellement contraires de l'avocat général J. Mazak.

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son régime politique, les autorités de régulation ne pouvant échapper aux règles de la vie démocratique. Or le principe de démocratie, soutenait l'Allemagne, consacré non seulement dans la Constitution allemande mais aussi à l'article 6, paragraphe 1, du traité sur l'Union européenne, exige une soumission de l'administration aux instructions du gouvernement, responsable devant le Parlement. L'indépendance des autorités de régulation comporte donc une limite *constitutionnelle* : il est contraire à la nature du régime parlementaire de concevoir un organe administratif bénéficiant d'une complète indépendance à l'égard du gouvernement.

Dans sa réponse, la Cour reconnaît le principe de démocratie comme l'un des « fondements de l'Union européenne », mais elle ajoute que ce principe ne s'oppose pas à l'existence « d'autorités publiques situées en dehors de l'administration hiérarchique classique et plus ou moins indépendantes du gouvernement. »[159]

Cette indépendance relative va de pair avec un encadrement législatif assez étroit qui consiste à définir « les conditions de fonctionnement » (§ 42) et les « compétences » (§ 44) des autorités; elle est également conciliable avec un pouvoir de nomination aux fonctions de direction attribué au parlement ou au gouvernement (§ 44). Le contrôle parlementaire peut, quant à lui, comporter l'obligation pour les autorités de régulation de rendre compte de leurs activités par un rapport établi à intervalles réguliers (§ 45). Enfin, le contrôle juridictionnel apparaît comme un élément central de l'encadrement des pouvoirs reconnus aux autorités publiques indépendantes (§ 42).

Indépendance et régime parlementaire

L'argumentation de l'Allemagne repose sur la compréhension traditionnelle, « horizontale », de la séparation des pouvoirs. L'indépendance des autorités de contrôle a pour limite constitutionnelle l'organisation du régime parlementaire qui concentre la

[159] (157) CJUE 9 mars 2010, préc., § 42

responsabilité politique dans l'organe gouvernemental. Cet argument relie le statut des autorités de régulation à la définition du régime politique et, en ce sens, il a une portée générale: dans un régime parlementaire, il n'est pas concevable qu'un organe administratif bénéficie d'une complète indépendance.

La jurisprudence du Conseil constitutionnel elle-même n'ignore pas ce raisonnement: dans sa décision n° 86-217 DC, le Conseil avait en effet remarqué que « dans l'exercice de ses compétences, la Commission nationale de la communication et des libertés sera, à l'instar de toute autorité administrative, soumise à un contrôle de légalité qui pourra être mis en œuvre tant par le Gouvernement, qui est responsable devant le Parlement de l'activité des administrations de l'État, que par toute personne qui y aurait intérêt »[160]. Cette formule n'a pas été reprise dans les décisions ultérieures du Conseil, mais il n'est pas sans signification que ce dernier ait moins orienté sa jurisprudence sur l'indépendance des autorités de régulation que sur leurs pouvoirs[161]. Cette réserve du Conseil à l'égard de l'« indépendance » témoigne, à sa manière, en faveur du principe de responsabilité – et de contrôle – du gouvernement des activités de l'administration. La nature du régime politique n'apparaît donc pas comme une limite constitutionnelle explicite dans la jurisprudence du Conseil constitutionnel, mais elle y est présumée. De ce point de vue, l'argument soulevé par l'Allemagne – même si la tutelle qui était reprochée à la législation allemande n'a pas d'équivalent dans l'organisation des autorités de régulation françaises – pourrait être invoqué également par la France.

Pourtant, l'argumentation de l'Allemagne n'a pas convaincu la Cour et, probablement, à juste titre. Les prémisses d'un raisonnement peuvent être justes et ses conclusions erronées. Ainsi, dans sa généralité, le principe de démocratie selon lequel est exigée « une soumission de l'administration aux instructions du gouvernement, responsable

[160] Cons. const., n° 86-217-DC, 18 sept. 1986, consid. 23 (nous soulignons).

[161] C. Teitgen-Colly, art. préc., p. 233-243.

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devant le parlement » (§ 40) ne saurait, dans un régime parlementaire, souffrir d'exception. Mais la généralité de cette prémisse implique d'interroger la *consequentia*. Or le raisonnement de l'Allemagne oppose une situation de parfaite dépendance, exprimée par une tutelle, à une situation de parfaite indépendance, qui violerait le principe de démocratie, laissant de côté les différentes modalités d'une indépendance relative, au sein de laquelle se situent à la fois la Cour de justice de l'Union et le Conseil constitutionnel français. En réalité, la solution préconisée par la Cour, comme l'a noté un commentateur[162], rejoint en grande partie l'organisation française des autorités de régulation. « L'absence de toute influence parlementaire sur ces autorités, note la Cour, ne saurait se concevoir » (§ 43) ; mais cela ne veut pas dire pour autant qu'afin de se conformer au principe de démocratie, il est nécessaire d'établir une tutelle sur les autorités de régulation.

La question de la légitimité démocratique de ces autorités ne pouvait – et ne pourrait – être traitée intégralement par la Cour. Plus contournée qu'effectivement dépassée, elle réapparaît dans la contradiction partielle que recèle la décision en énonçant à la fois que les autorités de régulation « doivent être soustraites à l'influence politique » (§ 42) et qu'un contrôle parlementaire est nécessaire (§ 43). Entre ces deux énoncés, l'indépendance visée par la Cour n'apparaît plus seulement comme une garantie nationale offerte aux autorités de régulation mais comme l'un des facteurs de la dynamique européenne d'intégration qui coordonne les autorités entre elles, les relie à un socle commun d'autonomie[163]. Croisant le statut de l'autorité allemande, tel qu'il était défini par la directive, et celui du Contrôleur européen de la protection des données[164], la Cour relève qu'ils sont fondés sur un « même concept général » d'indépendance et qu'il convient de les interpréter « de manière homogène, de sorte que non seulement l'indépendance du CEPD,

[162] F. Kauff-Gazin, art. préc., § 23.

[163] M. Blanquet, « Agences de l'Union et gouvernance européenne », in J.-F. Couzinet, Les agences de l'Union Européenne. Recherche sur les organismes communautaires décentralisés, Toulouse, 2002, pp. 41-78..

[164] qui soutenait la Commission européenne dans sa requête.

mais aussi celle des autorités nationales, impliquent l'absence de toute instruction relative à l'exercice de leurs missions » (§ 28).

L'intégration des autorités de régulation au contexte européen ou international est visible de multiples manières[165]. Mais cette intégration change-t-elle fondamentalement les vecteurs de leur légitimité ? Tant que le cadre d'exercice de la démocratie restera essentiellement national, il est peu probable que l'on puisse dissocier ces autorités de la structure du régime parlementaire. Si l'exercice des pouvoirs qui leur sont accordés semble bien cumuler une séparation « horizontale » et une séparation « verticale » des pouvoirs – dans la mesure où l'exigence d'indépendance procède tant de sources internes que de sources internationales –, leur légitimité démocratique cependant demeure attachée principalement aux autorités politiques nationales[166]. Les situations de crise ont d'ailleurs toujours tendance à faire réapparaître le lien entre les autorités de régulation et le pouvoir ministériel: la recherche d'une imputation des actes concernés à une autorité politique ne peut en effet jouer qu'en faveur du ministre[167] .

Comment le gouvernement peut-il alors être tenu pour responsable d'autorités sur lesquelles il n'a pas ou, du moins, n'a que peu de pouvoirs? Il semble en effet paradoxal

[165] V. par ex. les pouvoirs prévus par la loi : AMF et ACP: C. mon. fin., art. L. 632-1 s., L. 621-1 (AMF), L. 612-1 III (ACP) ; ARAF : art. 11, al. 6, L. n° 2009- 1503; Autorité de la concurrence : C. com., art. L. 461-1 I, L. 462-9 et L. 450- 1; ARCEP : CPCE, art. L. 5 et L. 36-5 ; ARJEL : art. 34, V, L. n° 2010-476 ; CRE : C. énergie., art. L. 134-12 et L. 134-13.

[166] La légitimité par l'impartialité, analysée par P. Rosanvallon (La légitimité démocratique. Impartialité, réflexivité et proximité, Seuil, 2008), peut être complémentaire de la responsabilité politique, mais elle ne saurait s'y substituer. V. les réflexions de P. Magnette, Contrôler l'Europe. Pouvoirs et responsabilité dans l'Union européenne, éd. de l'Université de Bruxelles, 2003.

[167] C'est ce qu'a montré récemment l'affaire du Médiator, même si l'Agence française de sécurité sanitaire des produits de santé (Afssaps) est un établissement public.

que la responsabilité du gouvernement soit complète, alors que son contrôle est partiel[168]. Cette singularité de la responsabilité politique attachée aux autorités de régulation peut s'expliquer de plusieurs manières. Sans doute, il ne faut pas négliger, même s'ils sont restreints, les pouvoirs gouvernementaux sur les autorités de régulation: le pouvoir de nomination, le pouvoir de déféré, notamment, manifestent la qualité d'autorité de régulation *originaire* que possède le gouvernement. Au-delà, l'analyse de la légitimité démocratique des autorités de régulation doit tenir compte de la spécificité des régimes parlementaires modernes qui instaurent, comme l'avait relevé Walter Bagehot[169], moins une séparation qu'une « fusion » des pouvoirs législatif et exécutif autour d'une politique menée par le gouvernement et soutenue par le Parlement. Le gouvernement exerce en effet à la fois des fonctions exécutive et législative. Par son droit d'initiative, mais aussi plus largement par le soutien politique de sa majorité, le gouvernement conduit et, dans une large mesure, dirige les travaux du Parlement. Son action ne se limite pas au dépôt de projets de loi, prérogative certes essentielle mais qui pourrait être utilisée de manière toute extérieure ; elle va, au gré des conjonctures politiques, jusqu'à déterminer la conduite des députés ou des sénateurs[170].

[168] Il est certain que la difficulté de définir l'indépendance des autorités de régulation est liée, en amont, à la transposition en France, d'un modèle d'autorité administrative – les independent agencies – qui s'est initialement développé dans le cadre du régime présidentiel américain. Or, comme l'a montré E. Zoller (Les agences fédérales américaines, la régulation et la démocratie, RFDA 2004. 757), l'indépendance dont ces agences bénéficient aux États-Unis est toute relative. V. également Peter L. Strauss, The place of agencies in government: separation of powers and the fourth branch, Columbia Law Review, 1984, vol. 84, p. 573-669 et les réflexions de M. Lombard, Institutions de régulation économique et démocratie politique, AJDA 2005. 530 qui parle d'un « modèle américain imité, amplifié, déformé ».

[169] W. Bagehot, The English Constitution, Cambridge University Press, 2001 (1re éd., 1867), p. 8-9..

[170] Cette logique de la séparation des pouvoirs dans les régimes parlementaires modernes a été parfaitement analysée par A. Le Divellec, dans sa thèse, Le gouvernement parlementaire en Allemagne. Contribution à une théorie générale, LGDJ, 2004, spéc. p. 567-573.

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Dans ce contexte, la légitimité démocratique des autorités de régulation passe effectivement par la responsabilité politique du gouvernement devant le Parlement. Encore faut-il cependant donner à cette responsabilité son sens précis. Du côté du gouvernement, elle ne se manifeste pas par l'exercice d'un pouvoir hiérarchique ou d'une tutelle mais par la capacité d'adapter la législation aux enjeux de la régulation. À la suite d'une crise particulière, ou en suivant les conclusions d'un rapport, le gouvernement a charge de trouver et de faire adopter par le Parlement les dispositions législatives nécessaires[171]. Grâce à son droit d'initiative et surtout grâce à l'appui de sa majorité, le gouvernement a la possibilité d'agir sur les autorités de régulation – à cette réserve près, néanmoins, qu'il doit obtenir un consensus au Parlement et faire ainsi concrètement l'expérience de la séparation des pouvoirs[172]. Du côté du Parlement, la responsabilité politique du gouvernement, dans le domaine de la régulation, se traduit par la possibilité de rejeter un projet de loi ou un amendement d'origine gouvernementale[173] ; d'exercer le droit d'amendement sur les projets ou propositions de loi ; de contrôler les autorités de régulation par l'intermédiaire d'une

[171] S. Braconnier, La régulation des services publics, RFDA 2001. 54. La séquence politique qui a succédé au dépôt du rapport de MM. Vanneste et Dosière est, de ce point de vue, significative puisque le gouvernement a endossé une partie des propositions faites par les deux députés – l'un de la majorité, l'autre de l'opposition – et enclenché le processus législatif permettant de donner des traductions concrètes aux propositions faites.

[172] C'est, en effet, au Parlement de prendre les décisions politiques qui relèvent du domaine de la loi et concernent la régulation ex ante. Ni le juge, ni l'autorité de régulation ne peuvent assumer ces choix et il est ainsi essentiel que le législateur leur donne un cadre suffisamment précis. V. les réflexions convergentes de J.-J. Daigre, L'inversion des sources formelles en droit des marchés financiers, RTDF 2006. 105-106 ; et R. Noguellou, Le Conseil d'État et la régulation des télécommunications. À propos des arrêts du Conseil d'État du 27 avril 2009, Société Bouygues Télécom et du 24 juillet 2009, Société Orange France et Société française de radiotéléphonie, RD publ. 2010. 825.

[173] Comme l'a montré récemment le rejet par le Sénat de l'amendement d'origine gouvernementale visant à introduire un commissaire du gouvernement au sein du collège de l'ARCEP (Le Monde des 8 et 16 févr. 2011).

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commission parlementaire[174]; et, en dernier lieu, de voter une motion de censure dans les conditions de l'article 49 de la Constitution. La censure du gouvernement, cependant, dans une telle hypothèse, ne porterait pas sur l'exercice par ce dernier d'un pouvoir hiérarchique ou d'une tutelle, mais sur l'exercice des pouvoirs qu'il conserve et, plus largement, sur son incapacité à adapter le droit aux enjeux de la régulation.

[174] La nécessité de renforcer le contrôle parlementaire sur les autorités administratives indépendantes a été longuement exposée par le rapport de MM. Vanneste et Dosière. Le relatif succès de la commission d'évaluation législative dirigée par les deux députés montre suffisamment les virtualités que possède ce contrôle.

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EXPROPRIATION, TAKINGS

ANNUAL REPORT – 2011 - GERMANY

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Dr. Athanasios GROMITSARIS

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1. PROPERTY GUARANTEE AND ITS CONSTITUTIONAL CONTEXT

Article 14 of the Basic Law

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
(2) Property entails obligations. Its use shall also serve the public good.
(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.[1]

1.1 The Components of the Article 14of the German Basic Law

1.1.1 Protection of the right to property

The guarantee of property "protects the concrete existence of assets against unjustified encroachments by public authority. A general value guarantee of asset legal positions does not follow from Article 14.1 of the Basic Law".[2] Article 14 does not guarantee merely the monetary value or equivalent of property, its main aim is not to prevent the taking of

[1] Basic Law for the Federal Republic of Germany, Translated by:Professor Christian Tomuschat and Professor David P. Currie Translation revised by: Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag. https://www.btg-bestellservice.de/pdf/80201000.pdf.

[2] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 39 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

property without compensation but, rather, to secure the maintenance and protection of existing property relationships themselves, of existing ownership itself in the hands of the owner.

1.1.2 Institutional guarantee

The property guarantee in Article 14.1 sentence 1 is further understood as comprehending an institutional guarantee which recognises private property as a legal institution. Article 14.1 sentence 1 of the Basic Law “guarantees the legal institute of private property whose essential characteristics are its private benefit and the right to dispose of the owned object”.[3] The constitutional “guarantee of the legal institute ensures a basic repertoire of standards which must exist so that the right may be regarded as `private property´”.[4] As far as the details are concerned, the Federal Constitutional Court has repeatedly pointed out that “it is the legislator's task to define appropriate standards when establishing the contents of the right to property pursuant to Art. 14.1 sentence 2 of the Basic Law which ensure that its use and adequate exploitation correspond to the nature and the social importance of this right”.[5] The "institutional guarantee of property" prohibits the legislature from impairing the essence and subsistence of the sphere of freedom that is based on the private laws of property. The constitutional positive guarantee of property as an institution is, therefore, a limit on limiting the right to property, i.e. a limit on both its legislative determination and expropriation.

1.1.3 Legislative determination of property rights

[3] See BVerfGE 24, 367 <389-390>; 26, 215 <222>; 31, 229 <240>).

[4] BVerfGE 21, 150 (155); 24, 367 (389); 91, 294 (308).

[5] See for example BVerfGE 31, 229 <240-241>.

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Under Article 14.1 sentence 2 of the Basic Law, the legislature has the power to define the contents and limits of property. The legislature may also empower the executive to determine the content and limits of the legal position of property rights owners. On the one side, the legislature may not impinge upon the right to property in a disproportionate manner, but on the other side, the legislature may not totally or disproportionately disregard social restrictions on individual property.

1.1.4 Social obligation and public good

Pursuant to Article 14.2 of the Basic Law, private ownership is socially tied, it entails social obligations. The "social obligation"-concept is a "summary" and "token" of the permissible limits that the legislature may set on the scope of protection of the right to property pursuant to Article 14. 1 sentence 2 of the Basic Law.[6] Article 14.2 sentence 1, "property entails obligations", highlights the constitutional requirement (in Article 14.1 sentence 2) of the specific enactment of a statute and a provision intended to determine the content and limits of property.[7] Given the social "ties" associated with a property asset in modern society, the constitutional protection of property does not contain the protection of a right to use the asset for exclusively individualistic market-based maximisation of private

[6] *Walter Leisner*, Eigentum, in: Isensee/Kirchhof (eds), Handbuch des Staatsrechts, 3. Auflage, Band VIII, C.F. Müller, Heidelberg 2010, p. 358, para 143.

[7] *Leisner,* p. 358-9, para 143, 145. The social obligation clause has been the research subject of very instructive and interesting comparative works in English: *A. J. Van der Walt*, Constitutional property clauses: a comparative analysis,Juta, 1999. *Hanri Moster*, The constitutional protection and regulation of property and its influence on the reform of private law ownership in South Africa and Germany: A comparative analysis, Berlin, Springer, 2002; Alexander, Gregory S., Property as a Fundamental Constitutional Right? The German Example (2003), Cornell Law Faculty Working Papers. Paper 4. http://scholarship.law.cornell.edu/clsops_papers/4; *Rebecca Lubens*, The social obligation of property ownership: A comparison of German and U.S. Law, Arizona Journal of International & Comparative Law, Vol. 24, 2007, 389-449; *Gregory Alexander*, The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence, Chicago: The University of Chicago Press, 2006; Idem, The social-obligation norm in American property law, Cornell Law Review, Vol. 94, 2009, 745-819.

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preferences and wealth without any regard to public interest. The core purpose of the fundamental freedom to property under Article 14 of the Basic Law is not the maximisation of individual wealth and freedom. The social obligation of ownership does not simply encompass the negative dimension of the minimal duty not to interfere with the legal interests of others or not to create a public nuisance, while benefiting from one´s ownership. It also expresses the idea that property rights are reasonably subordinate to the public interest.

1.1.5 Expropriation

The Federal Constitutional Court draws a clear cut distinction between regulation and expropriation. An individual´s property rights must be completely or partially removed in a concrete and specific manner. For the purposes of Article 14.3 of the Basic Law the Federal Constitutional Court defines expropriation narrowly as a legal measure that takes concrete (not abstract) and indivualised (not general) aim at property interests which are covered by Article 14.1 sentence 1 of the Basic Law and results in total or partial removal of specific subjective property rights from the hands of the owner (the owner does not keep the title to the property). Even if there is no formal transfer of the title to the property, the property must at least be used for the purpose of carrying out and implementing a specific and concrete policy project in the public interest. Expropriation is limited to the cases in which, according to the classical expropriation concept, goods are procured by the state (*Güterbeschaffungsvorgang*) and are used for the realisation of a specific project in the public interest.[8] Expropriation must take place through a legal measure. Factual measures do not constitute a valid expropriation in the constitutional sense even if they are aimed at the taking of specific assets.

1.2 The constitutional context of the property guarantee

1.2.1 Democratic and social federal state

[8] BVerfGE 102, 1 (15); Baulandumlegung 104, 1 (9) ; BVerfG, 1 BvL 8/07 vom 21.7.2010, Absatz-Nr. (1 - 108), para 87 http://www.bverfg.de/entscheidungen/ls20100721_1bvl000807.html

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Article 20.1 of the German Basic Law defines the Federal Republic of Germany as a democratic and social federal state. These are principles and goals for the public authorities to pursue through legislation and regulation. Article 20.1 of the Basic Law does not create subjective rights for the citizens. Pursuant to Article 28.1 sentence 1 of the Basic Law the constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law. This does not mean that the German Basic Law is not neutral regarding particular economic ideas, principles or systems, but, although the Basic Law is silent on economic matters, it does create a general framework not only for a legal order governed by the rule of law but also for a social legal state that develops a sense of responsibility and feels concerned with the question whether basic needs of its citizens are provided.

1.2.2 Human dignity and image of man

Additionally, Article 20.1 is to be interpreted in association with Article 1 of the Basic Law which guarantees the respect and protection of human dignity: "Human dignity shall be inviolable. To respect and safeguard it shall be the duty of all state authority". The commitment to a social welfare state has to be understood in close connection with the commitment of public authorities to ensure an adequate level of human dignity. Additionally, pursuant to Article 2.1 of the Basic Law every person has the right to free development of her/his personality "insofar as she/he does not violate the rights of others or offend against the constitutional order or the moral law". The right "to free development of the personality" is not independent of community. In fact, the image of man in the German Basic Law is rooted in the link between individual and social order. The Basic Law´s commitment to the social state principle, to the principle of human dignity and to the image of man as a member of community is important for the property guarantee in Article 14 of the Basic Law.

1.2.3 Property, personal autonomy, and legal system

The Federal Constitutional Court understands property in connection with the protection of personal liberty of the holder of this fundamental right and human dignity. The Court states that "(t)he guarantee of property is to ensure the holders of the fundamental right a degree of freedom under property law and hence to enable them to lead their lives on their own responsibility."[9] The property guarantee enables the holder of property rights to lead a self-governed life and to develop his/her personality as a responsible and autonomous member of society. In the case of the property rights of forced labourers during the Second World War the Federal Constitutional Court noted that "(i)t is hard to imagine property claims with a stronger personal connection than the settlement claims of persons who literally had to work for dear life."[10]

The connection of property with personal liberty is also emphasised in the "East German expropriation case". The Court states: "The right of ownership, in addition to the institutional guarantee, has an aspect directed to actual exercise of freedom in a period of time. A person who is excluded by a foreign sovereign power from disposing over his or her property in the long term, where this exclusion is legitimate under public international law, loses his or her legal position as owner. If the use of the property is excluded for a long period as the result of measures relating to it by a state power that is foreign but that has territorial jurisdiction, there is no connecting factor giving rise to the fundamental right to property in Article 14 of the Basic Law."[11]

[9] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 39 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

[10] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 55 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

[11] BVerfG, 2 BvR 955/00 of 10/26/2004, paragraphs No. (1 - 162), at para 74, http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html.

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Additionally, property is deemed to "remain(n) dependent on an existing legal system that structures and guarantees it". [12] A radical change of a legal system can destroy reliance on continuity and set aside the principle of non-retroactivity. In a period of transition from one legal system (the socialist GDR regime) to another (to a free market economy), according to the Court, the property owners could not rely on the continuity of their legal title.[13] The importance of the connection of the right to property with human dignity becomes, for example, apparent in the interpretation of the Article 143.3 of the Basic Law, which governs the claims to restitution of what are known as the former owners (*Alteigentümer*) for the expropriations by corporate bodies of the German Democratic Republic, by providing "for the irreversibility of interferences with property" in that territory (the former Soviet occupation zone): In her dissenting opinion a judge of the Federal Constitutional Court drew attention precisely to the dimension of human dignity underpinning the protection of human rights. The judge thought that "(i)t was necessary to examine whether the exclusion of restitution laid down in Article 143.3 of the Basic Law and the associated acceptance of the changes in ownership that took place violated the core of human dignity of fundamental rights of the complainants, which under Article 79.3 of the Basic Law may not be violated even by a statute amending the constitution."[14]

The right of inheritance as a legal institution and as an individual right is also important for this conception of property and its link to personal autonomy. According to the

[12] BVerfG, 2 BvR 955/00 of 10/26/2004, paragraphs No. (1 - 162), paras 74-75 http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html

[13] See for a critical analysis *Ulrike Deutsch*, Expropriation without Compensation – the European Court of Human Rights sanctions German Legislation expropriating the Heirs of "New Farmers", German Law Journal, Vol 6, 2005, 1367-1380, 1370-72; *Thomas Gertner*, Pending property issues in the new federal states of Germany - cause of the phenomenon of "sleeping owners", Eur J Law Econ Vol. 27, 2009, 1-13.

[14] BVerfG, 2 BvR 955/00 of 10/26/2004, paragraphs No. (1 - 162), para 154 http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html

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Federal Constitutional Court "its function is to prevent private property, as the basis of a self-determined lifestyle, coming to an end on the death of the owner, and to ensure its continuation by means of legal succession."[15]

1.2.4 Concepts of property

There are three concepts of property in German law: private law, fiscal law, and constitutional law property. Fiscal law operates with a concept of economic or beneficial ownership. Pursuant to Section 39.2 of the Fiscal Code of Germany (*Abgabenordnung*), where a person other than the owner exercises effective control over an economic good in such a way that she/he can, as a rule, economically exclude the owner from affecting the economic good during the normal period of its useful life, the economic good is attributable to this person. Further for fiscal aims, in the case of fiduciary relationships, the economic goods are attributable to the beneficiary, in the case of transferred ownerships for security purposes to the security provider, and in the case of proprietary possessions to the proprietary possessor.

Legal ownership under private law is the right by which an asset belongs to the owner to the exclusion of all other persons. The legal owner of a thing may, pursuant to section 803 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. As far as property in a constitutional sense is concerned, the sources of property interests protected under Article 14 of the Basic Law are not limited to those interests that civil law defines as property.

[15] BVerfG, 1 BvR 1644/00 of 04/19/2005, paragraph No. (62), http://www.bverfg.de/entscheidungen/rs20050419_1bvr164400en.html

1.2.5 Property in a constitutional sense

1.2.5.1 A broad meaning

Property in a constitutional sense has a broader meaning than it has for private law purposes within the framework of the German Civil Code. The property guarantee under Article 14.1 sentence 1 includes a negative individual guarantee in the form of a fundamental subjective and enforceable right shielding the individual property owner against interferences by public authorities. Protected are property rights granted by the legal order. That includes share ownership.[16] It also includes the free use of property as well as the power and capability to dispose of and let third parties make use of it upon payment. The property guarantee protects not just “physically tangible things” but also “monetary receivables” as long as they have the “nature of an exclusive right”, they are “based on the (right holder´s) efforts and serving as the material basis for personal freedom”. “Money is coined freedom; it can be freely exchanged for things”.[17] A distinction is drawn between property (*Eigentum*) that pertains to particular objects, and assets in general (*Vermögen*). Assets in general are not protected by the right to property.

1.2.5.2 Private law rights and claims

Basic Law’s protection of property includes private-law rights and claims. The Federal Constitutional Court points out that in the private-law field, the protection of property basically extends to all rights having the value of an asset which the legal system allocates to the party entitled so that she/he may exercise the attached powers, however she/he

[16] BVerfGE 5, 290 (351).

[17] BVerfG, 2 BvR 1877/97 of 03/31/1998, paragraphs No. (1 - 109), para 92 http://www.bverfg.de/entscheidungen/rs19980331_2bvr187797en.html

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wishes, for her/his own private use.[18] Thus, according to the Court, the property guarantee does not just protect a person's rights *in rem* or her/his rights against all other persons claiming an interest in the property; it also protects an individual's rights under the law of obligations.[19] The Constitutional Court noted likewise that "rights under the law of obligations which seek to compensate a person for reductions in his or her quality of life enjoy to a particularly high degree the security and protection afforded by the property guarantee."[20] In its ruling on the constitutionality of the exclusion of claims of forced labourers during the Second World War pursuant to the Act on the Creation of a Foundation "Remembrance, Responsibility and Future" (*Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"*), the Federal Constitutional Court held that the actions for damages for pain and suffering which the complainants derived from being forced labourers were claims under the law of obligations based on tort law and the law of unjust enrichment. In accordance with its case law the Court found that these claims are covered by the guarantee of property in Article 14.1 sentence 1 of the Basic Law.[21]

1.2.5.3 Public law rights

Basic Law's protection of property also extends to rights under public law "that individuals may assert and that have the value of assets". However, rights under public law only fall under the scope of protection of Article 14.1 of the Basic Law "if the individual who asserts such right has obtained a legal position that corresponds to the position of an owner". The Federal Constitutional Court stresses that "the legal position must be so strong

[18] See BVerfGE 83, 201 (209); 101, 239 (258); BVerfG, 1st Chamber of the First Senate, Order of 25 April 2001 – 1 BvR 132/01 –, NJW 2001, p. 2159 (2159).

[19] See BVerfGE 42, 263 (293); 45, 142 (179); 83, 201 (208).

[20] See BVerfGE 42, 263 (293).

[21] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 45 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

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that the entire concretisation of its content, and the rule-of-law content of the Basic Law, preclude its being revoked without compensation". The Court considers as "the decisive standard for assessing whether a right may be regarded as a property" the question as "to what extent the right proves to be an equivalent of the holder's own achievement or to what extent it is merely based on its being granted by the state". At any rate, the constitutional protection of property is denied by the Court "to any claims under public law in which the fact that they are granted unilaterally by the state is not complemented by an achievement of the holder that justifies the protection of property".[22] The Court found that the scope of protection provided by the property guarantee can be extended to legal positions under a public law regulation that establishes "a legal framework for situations and types of behaviour in an economic context" in the following cases: When "(1) the content of legal positions that have, as yet, already fallen under the scope of protection provided by Article 14 of the Basic Law is reorganised; or (2) a legal position that has been created by the new regulation constitutes a specific compensation for a novel obligation or burden that is imposed at the same time".[23]

1.2.5.4 Patent right

The word property as used in the context of expropriation, refers to every legally protected position of monetary value regardless of whether it is of a corporeal or incorporeal character, also covering limited rights in a thing (servitudes, usufruct, mortgage, lien, interest of a pledge) or a chose in action (for ex. a claim for the delivery of a thing or for the payment of a sum of money). For instance, the constituting elements of copyright as prop-

[22] See for all quotations BVerfG, 1 BvR 2337/00 of 07/03/2001, paragraphs No. (1 - 45), para 21 http://www.bverfg.de/entscheidungen/rk20010703_1bvr233700en.html where the Court quotes: Decisions of the Federal Constitutional Court 18, p. 392 (at p. 397); 45, p. 142 (at p. 170); 48, p. 403 (at pp. 412-413).

[23] BVerfG, 1 BvR 2337/00 of 07/03/2001, paragraphs No. (1 - 45), para 22 http://www.bverfg.de/entscheidungen/rk20010703_1bvr233700en.html with reference to BVerfGE 45, p. 142 (at pp. 170-171).

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erty within the meaning of the constitution include the axiomatic allocation of the proceeds of creative activity to the author by way of the provisions of private law, and the author's freedom to dispose of his/her rights in his/her own responsibility.[24] It is settled case law of the Federal Constitutional Court “that the work created by the author and the performance it embodies are property in the sense of Art 14.1 sentence 1 of the Basic Law” and “that the author's constitutional ownership guarantee results in his obligation to commercially exploit this `intellectual´ property”.[25] The Court states that “one of the constituent characteristics of the patent right as property in the constitutional sense is the principle of the association of the valuable result of the creative activity to the patentee by way of private law standardisation and the patentee's freedom to dispose of this result at his own discretion”.[26] This is what constitutes the core of the patent right which is protected by the Basic Law.

1.2.5.5 Future earnings and expectations

Future earnings and mere expectations are not covered by the property guarantee. The statutory possibility of receiving subsidies, for example, is no property under the terms of Article 14.1 of the Basic Law.[27] Article 14 of the Basic Law only protects legal positions assigned by statute. The property guarantee does not cover “the result of situative assessments on the part of the market players, even if these have major economic conse-

[24] BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1 - 69), para 60 http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.htm

[25] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 13 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.html

[26] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 21 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.htm

[27] See BVerfGE 97, p. 67 [at p. 83] with reference to BVerfGE 18, p. 392 [at p. 397].

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quences".[28] The scope of protection of the property right covers only what has already been acquired or accomplished through one´s own individual effort and toil or capital investment. In the words of the Federal Constitutional Court: "Article 14.1 of the Basic Law only covers legal positions to which a legal subject is already entitled, but not opportunities or potential earnings still to come".[29] Therefore, in the "Glycol warning case", the provision of market-related information by the state was not found to impair the property right guaranteed by Article 14.1 of the Basic Law. The publication by the Federal Government of a list of wines in which diethylene glycol had been found for the information of consumers only impaired the sales potential of the wine sellers affected: "Whilst the legal entitlement to offer articles for sale is included in the acquired status quo which is protected via Article 14.1 of the Basic Law, the actual potential sale is not part of what has already been acquired, but falls under profit-making activities."[30] And "even if the mere turnover and profit opportunities or actual circumstances are of considerable significance" to the operation of the wine seller´s established, practised commercial enterprises, "in terms of property law, they are not assigned by the Basic Law to the protected status quo of the individual enterprise". The same applies, according to the Court, to the reputation of the enterprise, "at least where it refers to changes and favourable opportunities", as the reputation of the enterprise "continually re-establishes itself on the market by virtue of its services and by its self-portrayal, as well as through the evaluation by the market participants, and is hence subject to constant change".[31]

[28] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 42 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

[29] See for example BVerfGE 68, 193 (222) with further references.

[30] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 40 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html

[31] BVerfG, 1 BvR 558/91 vom 26.6.2002, Absatz-Nr. (1 - 44), para 41-42 http://www.bverfg.de/entscheidungen/rs20020626_1bvr055891en.html with reference to BVerfGE 68, 193 (222-

2. Legislative determination of the content and limits of property

Pursuant to Article 14.2, "Property imposes obligations. Its use shall simultaneously serve the commonweal". The restriction on property´s free use, disposal or exploitation by the legislature is known as legislative "determination of the substance of ownership and its limitations" (*Inhalts- und Schrankenbestimmung*). For example, by assenting to the Monetary Union the German legislature determined the content and limits of monetary property within the meaning of Art. 14.1, sentence 2, Basic Law.[32]

2.1 Requirements of Article 14.1 sentence 2 of the Basic Law

2.1.1 Proportionality, Equality, and the principle of consistency in practice

Property regulations are legitimate only when they are introduced by the legislature itself or by public authorities empowered by the legislature. Such restrictions are justifiable in as much as they observe the principle of equality and the principle of proportionality. The legislature must put the interests of those involved and the public interest "in a just equilibrium and a well-balanced relationship".[33] This includes the following elements: The legislature must pursue legitimate public-interest aims. In view of the broad latitude which

223); 77, 84 (118); 81, 208 (227-228); 51, 193 (221-222); 68, 193 (222-223) and to the open "question of whether and to what degree the operation of an established, practised commercial enterprise is separately covered by the property guarantee as the actual summary of the articles and rights belonging to the assets of an enterprise".

[32] BVerfG, 2 BvR 1877/97 of 03/31/1998, paragraphs No. (1 - 109), para 97 http://www.bverfg.de/entscheidungen/rs19980331_2bvr187797en.ht

[33] see BVerfGE 87, 114 (138); 95, 48 (58); 98, 17 (37); 101, 239 (259); 102, 1 (17).

Article 14.1 sentence 2 of the Basic Law gives the legislature in determining the content and limits of property,[34] the concrete legislative enactment must be suitable and necessary to achieve the public interest aims pursued by the Act. Nor should be any equally suitable but less burdensome means apparent which the legislature could have chosen. Finally, the legislative enactment must be an appropriate and well-balanced adjustment of the conflicting interests.[35]

The interpretation of a legislative determination of content and limits of property rights must be based on the following standards: In cases where the interpretation and application of non-constitutional law allow for more than one interpretation, the Federal Constitutional Court emphasises that courts must give preference to the one which corresponds to the values enshrined in the constitution[36] and which grants the fundamental rights of all persons involved the broadest possible effect. The Federal Constitutional Court requires in this context that the application of the legal enactment take place "in keeping with the principle of consistency in practice (*Praktische Konkordanz*)". In this regard, respect for the legislature (Article 20.2 of the Basic Law: All State authority "shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies") requires an interpretation in conformity with the Basic Law which is consistent with the wording of the statute and preserves the fundamental aim of the legislature.[37] According to the Constitutional Court, the interpretation may not lead to an essential element of the legislative purpose being missed or distorted.[38]

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[34] see BVerfGE 53, 257 (293).

[35] See the application of this test in BVerfG, 1 BvF 2/05 vom 24.11.2010, Absatz-Nr. (1 - 298), http://www.bverfg.de/entscheidungen/fs20101124_1bvf000205en.html

[36] See BVerfGE 8, 210 (220-221); 88, 145 (166).

[37] See BVerfGE 86, 288 (320).

[38] See BVerfGE 8, 28 (34); 54, 277 (299-300).

2.1.2 Protection of the existing legal status of property, and protection of property use

Article 14 of the Basic Law contains, apart from the institutional guarantee, on the one hand a guarantee that existing property rights will be preserved and will continue to exist against state interventionism (*Bestandsgarantie*), and on the other hand, a guarantee that a property owner is entitled to use and enjoy her/his property holdings (*Nutzungsgarantie*). Still, these two guarantees, i.e. the protection guarantee of the existing legal status of property rights and the guarantee of their use and enjoyment by the owner, are not of equivalent significance with regard to the limitations on property rights.[39] Whereas a violation of the first guarantee, i.e. a purposeful deprivation of property rights in the public interest, is normally deemed to be an expropriation, limitations on the use of property are considered as expression of a social obligation of the right to property. The use of property takes place to the benefit of the owner, but it must at the same time (*zugleich*), albeit not exclusively, serve the common good. When property use limitations are so intrusive as to give property a new quality, if property use by the owner becomes an altruistic, non-profit activity promoting charity, the public welfare or a specific task of the state, then the impact and intensity of the particular restriction is comparable to a deprivation of property rights. Use restrictions of this type would never be in line with the constitution without equalising payments or non-pecuniary mitigating arrangements. In such cases, an unpermitted alienation of the purpose of the right to property (*Zweckentfremdung*) takes place insofar as the owner is forced to use her/his property for a purpose other than that authorised by the constitution.

2.1.3 Specific nature of the affected asset

[39] Papier, Maunz/Dürig, Grundgesetz Juli 2010 Lfg. 59, at para 375.

The legislature must take into account the specific nature of the affected asset or right. For example, land is a non-extendable and indispensable good, increasing the responsibility of land owners with regard to public interest and society in general. The legislature must, further, take into account the importance and significance of the good or right for the owner. When property operates as a factor safeguarding the personal liberty of the individual, it enjoys a special status and protection. The ownership of means of production which gives the owner power over third parties has a clear social component that opens up a considerable leeway for legislative action and regulation. The police measures taken against the legal owner of a dangerous object can be considered as an unreasonable interference with the owner´s property right, if the danger to be averted stems from an uncontrollable natural phenomenon or from the public at large or from third parties, and the elimination of the danger would consume a substantial portion of the owner´s assets.

2.1.4 Personal dimension, social circumstances

The German Constitutional Court restricts the margin of appreciation of the legislature in as much as it requires a serious consideration of a range of aspects. The legislature has to realise a particular social model composed on the one side of the constitution´s guarantee of private property and on the other side of the social dimension of property use. For example, the Federal Constitutional Court maintained “that unlimited protection of the patent pursuant to the principles of freedom of research and of the social obligations connected with property is not justified in cases in which this hinders technical development”.[40] The Federal Constitutional Court has, further, stated repeatedly that “the question of how far the legislature is entitled to go in determining the content and limits of a person´s legal position if it falls within the property guarantee cannot be answered without looking at the reasons that led to the person being in that legal position and looking at whether there is a personal

[40] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 30 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.html

or social connection".[41] The Court holds that "the limits on parliament's legislative powers are not the same", "for all areas". It considers that the "legislature's discretion is influenced in particular by the social and political circumstances that determine the content and limits on property".[42] "In connection with reparations and how to deal with damage and consequential damage caused by the war", the Court "has repeatedly emphasised the breadth of the legislature's discretion to make its own assessments and to legislate".[43]

To set a limit on the regulation of ownership, the Federal Constitutional Court ponders not only the economic impact of regulation on the owner´s individual freedom but also its consequence on her/his self-governed personality development, self realisation and dignity as a participating and contributing member of community in the context of social and ecological interdependence that characterises contemporary society. In particular, this will apply, as the Federal Constitutional Court points out, if the land property constitutes an essential portion of substantially all of the assets of the aggrieved owner as well as the fundamental basis for the owner´s and her/his family´s private lifestyle.[44] Given the fact that tenants often associate intimate aspects of self and personhood with their home and attach value and importance to it, the Federal Constitutional Court held that this attachment approximates a protectable property interest and recognised ownership rights in tenancy.

[41] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 55 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html quoting established case-law: BVerfGE 53, 257 (292); 102, 1 (17).

[42] See BVerfGE 101, 54 (76).

[43] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 57 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html quoting BVerfGE 13, 31 (36); 13, 39 (42-43); 27, 253 (284-285); 102, 254 (298).

[44] BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), para 40 http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html

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2.1.5 Mitigating the impact of property determination by or pursuant to law

The legislature defines the content and limits of property if it determines in a general and abstract manner the rights and duties of the owners. The task of the legislator "does not only consist in securing individual interests but also in establishing limits to individual rights and authorisations which are necessary in the interest of the public good; the legislator must achieve an equitable balance between the sphere of the individual and the concerns of the public good".[45] In determining the balance between the content of the right to property and its limitations the legislature will not only have to weigh the private usability against the common good. In addition, the law must clarify under which conditions certain compensatory measures might be taken in order to mitigate the limitation on the property use. These prerequisites must be laid down in advance in the applicable law itself, they may not be specified just in the future by the court in which an action might be brought by the affected owner. In the event that the law contains merely a general clause authorising compensatory measures under conditions that are not specified sufficiently precisely the law is not in line with the constitution.

2.1.5.1 Non-pecuniary and pecuniary mitigating measures

When the individual owner is disproportionately burdened by the property regulation, a payment of compensation or non-pecuniary alleviating measures are necessary. In its Mandatory Sample decision the Federal Constitutional Court noted that some property regulations would only be proportionate if they provided for mitigating measures to soften excessive burdens on the property owner. The measure at issue obliged all publishers, including publishers of high-quality expensive art books printed to small editions, to provide

[45] See for instance BVerfGE 31, 229 (241-242).

at no cost one copy of each of their publications to the central library. The Court declared the regulation unconstitutional because, when applied to small editions of highly expensive books, the regulation violated the principles of proportionality and equality. Restrictions on the use of property stemming from legislation must be accompanied by mitigating measures when an otherwise constitutional enactment would cause a disproportionate sternness if applied to a specific owner or category of property owners. Payments provided for in such a mitigating provision are aimed at reducing the burden of the individual property holder. However, the measures equalising the disproportionate harshness of the impairment of a specific owner´s property rights must not necessarily be monetary. They encompass provisions for exemptions, transition periods, grandfathering clauses, or variances. When an equalisation payment is made, the amount of money paid is aimed at rendering proportionate and reasonable the interference with the property right. The provisions alleviating the regulatory measures must be provided for in the legislative rule itself in order to save the rule from invalidation. If the regulatory measure does not provide for a softening of the regulatory impact on the use of property, the property holder may attack the validity of the enactment on grounds of disproportionate burden. The legislature must foresee the possibility of disproportionate burden and provide for alleviating non-pecuniary and monetary measures that will have to be applied administratively ad hoc.[46]

2.1.5.2 Hierarchy of the mitigating measures

According to the Federal Constitutional Court the Article 14.1 sentence 2 of the Basic Law does not contain any general value guarantee of property rights.[47] Actually, there is a hierarchy of the measures mitigating the impact on property. The legislature´s top priority is to avoid any disproportionate interference with property, and particularly, any exces-

[46] BVerfGE 58, 137 (*Pflichtexemplar*).

[47] BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), para 38, http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html

sive limitation on the private usability of property assets. The guarantee of protection of the right holder against state interference (*Bestandsgarantie*) under Article 14.1 sentence 1 of the Basic Law requires first and foremost that a disproportionate impingement on property is avoided by means of transitional provisions, exemption clauses, derogations or variances. Pecuniary measures are only admissible when non-pecuniary mitigating measures are not possible or would only be possible with an unreasonable amount of effort and time. Apart from compensatory payments, pecuniary measures also include providing for the possibility to give the owner the right to require a takeover of the property holdings on the part of the state at their fair value.[48] On top of that, it is necessary to supplement the substantive clauses concerning the measures alleviating the impact on property with procedural provisions ensuring that the owner will really be able to choose between challenging a ruling of an administrative authority that implements the legal enactment, and accepting that ruling on the grounds that it is connected with a reasonable compensatory measure. The law must make such a choice procedurally possible.

Safeguarding (or validity protective) clauses (*salvatorische Klauseln*) that make it possible to escape the invalidity of a property regulation measure by paying a sum of money, do not constitute a linking clause in the sense of article 14.3 of the Basic Law. A compensation provision is compatible with the spirit and purpose of the linking clause only when the conditions under which such compensation could be paid are explicitly determined. However, norm validity safeguarding compensatory clauses can be interpreted (in conformity with the Article 14.1 sentence 2 of the Basic Law) as measures associating the determination of the content and limits of the right to property with the introduction of a claim for an equalisation payment for disproportionately aggrieved parties.[49]

[48] BVerfGE 100, 226, para 101.

[49] Papier, Maunz/Dürig, Grundgesetz Juli 2010 Lfg. 59, at para 378 c.

2.1.5.3 The private use test

The legislature has the duty to protect individual property holdings (Article 14.1 sentence 1) with regard to the public interest (Article 14.2). The legislature has sole competence under Article 14.1 sentence 2 to define the contents and limits of ownership, but pursuant to Article 19.2 of the Basic Law, in no case may the essence of a fundamental right be affected, and it is the Constitutional Court that, at the end of the day, defines the essence of the constitutionally protected property right. What must be still present after the legislative definition of the content and limits of the individual owner´s property rights is understood as the constitutionally safeguarded core field of the fundamental right of property that is deemed inviolable and may not be regulated away by the legislature. The essential core of property entails assets and legal positions that can be recognised as an object of property rights, as long as they are necessary to sustain a livelihood level, they have been acquired by means of the owner´s own labour and money, and they establish the expectation of continuous use in the future on the part of a reasonable owner and objective observer.[50]

The German Federal Constitutional Court developed in this context the concept of the "private usefulness and serviceability" (*Privatnützigkeit*) of the remaining core field of property rights, after the occurrence of legislative regulation.[51] The substance of the right to property finds its expression in the preeminent power to dispose and the private utility of property as the foundation of private initiative. From that point of view property is of importance for the safeguarding of the personal freedom of the owner. As long as the property of companies lacks this personal dimension the regulatory powers of the legislature are more extensive.[52] The private use-test, meaning that property must still remain privately usable after use restriction, is central for distinguishing between permissible and not permissible regula-

[50] BVerfGE 100, 226; 91, 294 (308).

[51] BVerfGE 100, 226 (241-2.)

[52] BVerfGE 102, 1 (17).

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tions. This said, some vital property uses for the private owner must remain for a legal position to still deserve the name of private property. The owner must be able to select one, albeit not necessarily the most profitable use among various possible uses and to derive some, albeit not necessarily the maximum utility from his property. The private owner of a protected historical building may not be forced to take out part of the money she has been saving in order to ensure that she will bear the cost for preservation and maintenance of the property without having any benefit or receiving any emolument in exchange. The designation of a building as a monument creates an obligation for the owner to preserve and maintain that property and to obtain permits for any modified use, modification, restoration or repair.[53] Preservation requirements are proportional insofar as the expenses for them are coverable by the revenue of the property itself.

However, the private use test is not a panacea. In particular it is an open question that can only be decided ad hoc, whether what remains of the property after use restriction must refer to the private profitability of the property as a whole or to the remaining private profitability of a specific use the property has been put to.[54] This question can only be answered on a case by case basis. The answer turns practically on the point whether and what kind of pecuniary or non-pecuniary equalising measures are necessary in order to balance the burden, impact and intensity of a particular use restriction with the interests of the state or society.

2.1.5.4 Reducing property to an empty shell

Property becomes a "bare name" and it is reduced to an empty shell, when the owner can no longer obtain any reasonably estimable and worthy private use out of it. It is important to note, however, that against the backdrop of the formal expropriation concept

[53] BVerfGE 100, 226, 244 f.

[54] Papier, Maunz/Dürig, Grundgesetz Juli 2010 Lfg. 59, at para 377.

of the Federal Constitutional Court, if what is left from the right to property is a *nudum ius*, this is no longer per se an argument in favour of expropriation. The purpose of the dispossessing legal measure and the question whether the asset taken is actually used for the implementation of a specific public task are – at the latest since the decision[55] of the Federal Constitutional Court on the protection of private law-type pre-emptive rights - constitutive elements of the concept of expropriation. Therefore, in the absence of formal expropriation, if a legal measure reduces property to an empty shell, this is a problem of drawing the line between a legitimate and an illegitimate determination of the content and limits of the property right. Even though there is no formal expropriation, the level of protection granted by Article 14.3 of the Basic law in cases of formal expropriation must be taken into account, if the legislative content determination is to be held proportionate.[56] If the exposure of a land plot to noise is enhanced in such a way that it no longer meets the minimum quality and living standards for the owner, a legislative provision granting the owner a right to claim, if he so wishes, transference of property by means of expropriation and payment of compensation, would be a proportionate and appropriate response.[57]

[55] BVerfGE 83, 201 (1991).

[56] „Auch wenn eine verfassungswidrige Inhaltsbestimmung des "Eigentums nicht zugleich eine Enteignung nach Art. 14 Abs. 3 GG darstellt und wegen des unterschiedlichen Regelungsgehalts von Inhaltsbestimmung und Enteignung nicht in eine solche umgedeutet werden kann, ist das in Art. 14 Abs. 3 GG zum Ausdruck kommende Gewicht des Eigentumsschutzes bei der nach Art. 14 Abs. 1 GG vorzunehmenden Abwägung zu beachten" (quotations omitted). BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), at para 44, http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html.

[57] BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html; Bundesverwaltungsgericht (Federal Highest Administrative Court), BVerwGE 129, 83 (89); 125, 116 (249); 87, 332 (383). See the planning approval decision providing for a right to be expropriated for specific landowners particularly exposed to aircraft noise: http://www.mil.brandenburg.de/cms/detail.php/bb1.c.155576.de and http://static.ludwigsfelde.info/content/wirtschaft/bbi/Planfeststellungsbeschluss.pdf

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The problem of regulating property to nothing, is also to be seen within the context of the German system of remedies against public authorities: Firstly, it is settled case law since 1981 ("*Nassauskiesungsbeschluss*", Watershed Gravel Mining Decision of the Federal Constitutional Court) that any legislative determination of the content and limits of property pursuant to Article 14.1 sentence 2 of the Basic Law must be compatible with the principles of equality and proportionality.[58] Secondly, compensation for expropriation has no longer the function it used to have under the Article 153 of the Constitution of the Weimar Republic (*Weimarer Reichsverfassung*) as well as within the context of the case law developed first by the High Court of the Weimar Republic (*Reichsgericht*) and then by the Federal Supreme Court after the Second World War: Over that period of time claims of compensation for expropriation were practically the only legal remedy against legislative encroachments upon the right to property. Things are different now. Since legal protection for the affected owner is no longer restricted to monetary compensation, and since a legislative content determination that violates the proportionality or equality principle can be annulled by the Federal Constitutional Court, an extensive concept of expropriation is no longer necessary in order to guarantee the legal protection of the affected owner.

2.1.5.5 The right to be expropriated

The "right to be expropriated" or "claim to transference" is a legal instrument mainly in cases of partial expropriation, in the field of planning law and noise protection, and in historic preservation cases.[59] It constitutes a transfer of title claim of a landowner

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[58] See on this point BVerfGE 58, 137 (147 et sequ.).

[59] See the case law of the Federal Constitutional Court with an analysis of the relevant case of the Federal Administrative Court (*Bundesverwaltungsgericht, BVerWG*): BVerfG, 1 BvR 3474/08 vom 15.10.2009, Absatz-Nr. (1 - 72), paras 50-52; http://www.bverfg.de/entscheidungen/rk20091015_1bvr347408.html; BVerfG, 1 BvR 1606/08 vom 29.7.2009, Absatz-Nr. (1 - 38), http://www.bverfg.de/entscheidungen/rk20090729_1bvr160608.html; BVerfG, 1 BvL 7/91 vom 2.3.1999, Absatz-Nr. (1 - 109), http://www.bverfg.de/entscheidungen/ls19990302_1bvl000791.html; BVerfG, 1 BvR 2736/08 vom 23.2.2010, Absatz-Nr. (1 - 65), http://www.bverfg.de/entscheidungen/rk20100223_1bvr273608.html; BVerfG, 1 BvR

who can oblige the public authority to take over the title to the land and to pay compensation under application of the expropriation regulations. The Federal Administrative Court (BVerwG) coined the term of "constitutionally acceptable noise nuisance impact level" ("*verfassungsrechtliche Zumutbarkeitsschwelle*"), in determining the threshold above which the aircraft noise impact constitutes an insurmountable and untolerable disadvantage for the owner that can only be equalized, if the owner is given a right to be expropriated and the possibility to exercise it, if he/she so wishes.[60] In the event of a partial land expropriation the landowner is given the possibility to ask the expropriating authority to take over the whole of the land if the remainder after the expropriation cannot be used in an economic manner. Pursuant to section 92.3 of the Federal Building Code (*Baugesetzbuch, BauGB*)[61] the expropriation in part must pertain to a plot or a physically or economically cohesive property. The owner may demand that expropriation be broadened to cover the rest of the plot or the rest of the property where this is no longer capable of being put to building or economic use.

In planning law, when a binding land-use plan re-designates for public use a plot of land with an already existing and permitted private-type land-use, the owner may claim a transfer of title to the public authority (the municipality) as long as the re-designation leaves to her/him no reasonable economic use of the property. The owner that sees her private property rezoned for public purposes such as community use, green spaces, transport or utilities infrastructures or creation of spaces for measures for the protection, conservation and development of soil, of the natural environment and the landscape, has the possibility to claim transfer of title to these spaces to the extent that the designations make it unreasonable in

2232/10 vom 15.9.2011, Absatz-Nr. (1 - 55), http://www.bverfg.de/entscheidungen/rk20110915_1bvr223210.html.

[60] BVerwGE 125, 116.

[61] Available in english at http://www.iuscomp.org/gla/statutes/BauGB.htm.

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economic terms for the owner to retain the property, or to continue to use it in the previous or some other permissible manner. This applies equally in cases where development projects are not permitted because they concern areas that are re-designated by a legally binding land-use plan for future public land-use. The rationale behind this is that, although the new public use will not be implemented immediately in the near future, it brings about a significant reduction or even the termination of the previous private-type use of the respective physical structure. Till the implementation of the new designated public use the landowner may not carry out investments that increase the value of the property unless the public authority agrees and the owner renounces in writing any rights to reparation for these investments. The land owner must show that the future implementation of the public land-use makes it economically inacceptable to continue the existing use (Section 40.2 Federal Building Code).[62]

The Federal Constitutional Court had to deal recently[63] with the question as to whether a land owner in cases of Section 40.1 of the Federal Building Code has – apart of a claim to be expropriated pursuant to Section 43.3 sentence 3 of the Federal Building Code – also a claim to compensation in money pursuant to Section 42 of the Federal Building Code following the withdrawal of a permitted use for the period until the implementation of the new building plan providing for public use spaces or until the transfer of property to the public use spaces. The Court found that the wording and purpose of Section 43.3 sentence 1 of the Federal Building Code are unambiguous. It sees the purpose in avoiding that land owners who see their land property rezoned for public purposes try to retain their land plots until

[62] Some examples: Verwaltungsgerichtshof Baden-Württemberg 23.05.2011, 8 S 282/11: claim of transference because of serious unfairness and excessive burden due to an easement; see on section 145. 5 sentence 1 of the Federal Building Code: exercise of the claim for transference of property only after denial of a development permit applying a by-law, KG Berlin Senat für Baulandsachen 09.04.2010, 9U 1/08 and BGH 3. ZS 07.07.2011, III ZR 156/10.

[63] BVerfG, 1 BvR 2232/10 vom 15.9.2011, Absatz-Nr. (1 - 55), http://www.bverfg.de/entscheidungen/rk20110915_1bvr223210.html

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the definitive implementation of the new public use while receiving compensation in money for the sustained loss. The Court also found this interpretation of Section 43.3 sentence 1 of the Federal Building Code that excludes an additional compensation in money in line with Article 14.1 of the Basic Law. Regarding the question whether the transfer of title still is a proportionate compensatory measure for the removal of a private-type land use when there is no certainty whatsoever as to if and when the new building plan will ever be implemented or whether such implementation will still be by then in the public interest, the Federal Constitutional Court points out that the land owners should bring the case to the administrative courts. The Court states that it is the task of the land owners affected either to file an action to challenge the validity of the binding building plan (a by-law) whose legality can be reviewed by the Higher Administrative Court, or to file an action for mandamus to order the public authority to grant a planning permission to carry out an activity that contravenes the re-designation of the land for public use and to request, as a secondary claim, that the Administrative Court should declare unlawful and inapplicable the building plan. At any rate, the courts can neither render a disproportionate re-designation of a private-type land use proportionate nor render a building plan lawful that has become meanwhile devoid of purpose, by merely establishing ex post a duty to give compensation in money.

2.2 Examples of proportionate legislative determination of property

2.2.1 Planning and development law

The German planning law system draws a distinction between preparatory land-use plans that are prepared for a specific area of a municipality and are binding only on public authorities, and legally binding land-use plans that are developed out of preparatory plans and have the status of a municipal statute, a by-law, that constitutes a legal basis for the legitimate expectations, rights and claims of landowners.

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Limitations on land property imposed by lawful planning decisions can trigger a liability for compensation pursuant to sections 39 to 44 of the Federal Building Code. Property owners are compensated for the effects of lawful interferences with their property rights.[64] Pursuant to Section 42.1 of the Federal Building Code, where the use permitted for a plot is withdrawn or changed and this triggers a not insignificant drop in the value of the property, the owner may demand financial compensation of an appropriate amount under the conditions laid down in the paragraphs 2 to 5 of this Section. Further, when land property that was initially zoned by a binding land use plan for a profitable private use is later specified for a public land use or for a less worthy private land use, landowners are affected in their property rights. The owner is to be compensated to the extent that property loss is suffered in the cases where a legally binding land-use plan comprising one or more of the fourteen public land-use classes listed in Section 40.1 of the Federal Building Code affects an existing private-type land use of the property. No liability for compensation is triggered when the designations are in the interest of the owner or for the purpose of complying with a legal obligation resting with the owner. Where the conditions contained in Section 40 are found, pursuant to 43.3 sentence 1 of the Federal Building Code, compensation is to be paid in accordance with Section 40. This section does not only include compensation in money but also the possibility of compensation by transference of title, i.e. the right of the owner to be expropriated.

Urban redevelopment law (sections 136-164b of the Federal Building Code) has an important impact on land property. Redevelopment measures serve the public interest by formally denominating the redevelopment area and specifying the general program of renovation to buildings and neighbourhoods (section 141), and by taking implementation measures that comprise the acquisition of land, the resettlement of residents and relocation of businesses, the improvement of the outward appearance and the replacement of buildings. All these measures are subject to written approval by the municipality. Owners of proper-

[64] *Gerd Schmidt-Eichstaedt,* The law on liability for reduced property values caused by planning decisions in the Federal Republic of Germany, Washington University Global Studies Law Review, Vol. 6, 2007, 75-101.

ties in the redevelopment area have to pay a countervailing levy for any increases in land value due to the redevelopment measures. On the other hand, sections 7h, 10f and 11a of the German Income Tax Act (*Einkommensteuergesetz*, *EStG*) provide for tax breaks for owners, according to which the costs for measures to be taken can be claimed as deductible expenditure. Sections 7h and 7i are subject to regulations with regard to monuments maintenance and redevelopment costs.

An example that shows the difference between those types of interference with property that must be tolerated without mitigating measures, and types of interferences that are permissible only with the payment of compensation, is the institution of the development freeze. This instrument of planning law brings about a temporary suspension of the permitted land use. It is adopted by the municipality as a statute for a first period of validity of two years with the possibility of extension by one year and, under special circumstances and with the approval of the competent authority, by another year. As building permits cannot be refused on the basis of a new or revised land-use plan that will come into force in the future, a development freeze deals with the risk that during the plan preparation procedure works that are inconsistent with the future plan are carried out. It serves the purpose of preparing a binding land-use plan by safeguarding the planning for the area to be covered by the proposed plan. For instance, it may stipulate that development projects may not be implemented or that physical structures may not be removed, and that no major or fundamental changes of a kind which could result in an increase in value may be made to plots and physical structures in respect of which changes do not require approval, permission or notification (section 14 I Federal Building Code). The development freeze expresses the social obligation of ownership to society during the first four years of its validity. In the event that a municipality needs more time for the planning process and a development freeze remains in force for a period of more than four years beyond the date originally set for expiration, this surpasses the proportionate limit of the landowner´s obligation to society. Therefore, aggrieved landowners are to be paid financial compensation of an appropriate amount in consideration of property loss which has been incurred as a consequence of this (section 18 Federal Building Code).

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When a binding land-use places obligations in respect of planted areas and provided for the preservation of trees, shrubs, and other greenery and water bodies, or designates the planting of trees, shrubs or greenery, the owner may claim compensation as long as a significant drop in the value of the property ensues or the expenditures incurred go beyond the level required for the proper management of the property (section 41 II Federal Building Code).

Another example is the right to compensation of landowners for the downzoning of an already existing permitted private-type land use in accordance with the conditions of section 42 Federal Building Code. When an amended or new legally binding land-use plan withdraws a private land use or downgrades the permitted lucrative private type use of a land plot to a less profitable private-use category (below its existing use), the municipality amending the old or approving the new binding land-use plan is liable for compensation. However, this right to claim compensation has a time limit. Landowners have the right to develop their properties in accordance with the binding land-use plan´s designations for a seven-year period following the date when the plan came into effect, and only withdrawal or change of a permitted use within a period of seven years of its being permitted can trigger compensation. The level of compensation reflects the difference between the value of the property arising out of its permitted use and the value which emerges subsequent to the withdrawal or change of use. After the seven year period the land-use category of a plot may be changed without compensation under the conditions that there is no need of phasing-out the previous use, that the new private-use category is less lucrative than the previously permitted land-use, and that the latter is in accordance with the existing type of development. Making no use of existing development rights within seven years means taking the risk that permitted land-uses might be altered without any compensation. However, any town-planning decisions modifying or withdrawing previously permitted land uses cannot be based on the mere elapse of the seven-year period, rather, they must be justified by long-term town-planning principles and must also be free of balancing errors in order for them not to be challengeable on substantive grounds. Municipalities must compensate property owners even on expiration of the seven year-term when, as a result of the withdrawal or change of the permitted land-use, continuation of this use or any other possible commercial uses arising from the actual use are rendered impossible or are severely impaired (section 42.3 sentence 1 Federal Building Code).

2.2.2 Noise protection

Proportionality of interference can be guaranteed by the provision of different policy levels. For example, the sections 41, 42, and 43 of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz, BImSchG*)[65] deal with the acceptability of adjacent public and private property uses, and especially of traffic noise, on the part of a landowner. At a first policy level, in the case of construction or major alteration of transport infrastructures (public streets or railways) "active" noise protection is required, i.e. provision must be made that the infrastructures do not involve any harmful effects on the environment caused by traffic noise which is avoidable; traffic noise could for ex. be contained through the use of noise protection barriers. If this is not possible because of technical or economic reasons, "passive" noise protection becomes necessary at a second policy level: The property owner affected by the exceeded sound-immission limits is entitled to claim adequate financial compensation covering the actual expenditure incurred for sound-proofing measures at the affected buildings, for example for the installing of double-glazed windows. If passive means of noise abatement prove insufficient and the property is no longer suitable for any use, the owner may submit a transfer of title claim against the public authority responsible for the construction of the transport infrastructure.

[65] Excerpts available in english at http://www.iuscomp.org/gla/statutes/BImSchG.htm.

The law on the protection against aircraft noise (*Gesetz zum Schutz gegen Fluglärm*)[66] provides for the establishment of noise protection areas in the surroundings of airfields which are subdivided, according to the extent of the noise impact, into two protection zones for daytime and one protection zone for night-time. Pursuant to Article 5 of the Act for protection against aircraft noise in the noise protection area no hospitals, homes for the aged, convalescent homes and similar facilities requiring equal protection may be constructed. Exceptions are permitted (Article 5.1 sentence 3 of the Act) if this is urgently required for providing the population with public institutions or for other reasons in the public interest and only if the buildings satisfy specific noise insulation requirements. Noise insulation requirements are authorised by statutory decree and must take into account the present state of noise insulation technology in building construction. Landowners are not allowed to construct houses in the defined zones of noise impact where airplanes take off and land at airfields. As far as the building restrictions with the establishment of zones of noise impact rescind the use of the property hitherto permissible and the value of the property is thereby reduced by more than an insignificant degree, the owner may raise claims for adequate monetary compensation. The owner may additionally claim compensation as far as the building restrictions reduce the value of any expenditure in the development of the property for building purposes which has been incurred by the owner trusting in the continuity of the land use (Article 8.1 of the Act). Pursuant to Article 9.1 of the Act, reimbursement of expenses incurred for structural sound insulation is provided with regard to specified sound pressure levels and military or civilian airfields. The owner of a property located in the night-time protection zone may receive reimbursement of expenses incurred for structural sound insulation for rooms which are used by more than an insignificant degree for sleeping (Article 9.2 sentence 1 of the Act). Compensation for impairment of the outside of the outside living area is equally possible (Article 9.5 of the Act).

[66] Act for Protection against Aircraft Noise (Gesetz zum Schutz gegen Fluglärm) in the version promulgated on 31 October 2007, BGBl. I p. 2550, English translation, unofficial text, Federal Ministry for the Environment,December 2007, Nature Conservation and Nuclear Safety, IG I 7, available at http://www.bmu.de/english/protection_against_noise/general_information/doc/40636.php

2.2.3 Taxation

According to the Federal Constitutional Court the Basic Law grants protection to all taxes relating to money already earned.[67] The imposition of income tax and business tax constitutes for the Court an interference with Article 14 I 1 of the Basic Law. The German income tax act (*Einkommensteuergesetz*) and the Trade Tax Act (*Gewerbesteuergesetz*) entail provisions that define the content and limits of property rights. The property guarantee does not cover the income earning process itself, but it protects its product, i.e. the increase of assets that may be recorded in the business balance sheet and the wage claims by employees or other legally protected benefits. These rights and assets that qualify as additional acquisition of property in the course of the tax period are the starting point for determining the measure of income and business tax liability. Although the tax payer has the choice to choose, from which assets and means the tax requirement will be fulfilled, this does not mitigate the fact that the acquisition of additional property rights in the course of the tax period is a prerequisite for taxation.[68]

Even though Article 14 of the Basic Law does not protect property against taxation in general, it does protect it against excessive and confiscatory taxation. A question the Federal Constitutional Court had to answer was whether a limit to taxation can be derived from the property guarantee. It is settled case law of the Court that tax payers can only invoke their right to property to protect themselves against taxation as long as an excessive tax burden with "strangulating" effects is found to be essentially equivalent to confiscation.[69] Strangulating taxation destroys the tax source and can hardly be qualified conceptu-

[67] BVerfGE 115, 97 (112-113).

[68] BVerfGE 115, 97 (111); BVerfG, 1 BvR 1031/07 vom 25.7.2007, Absatz-Nr. (1 - 68), http://www.bverfg.de/entscheidungen/rk20070725_1bvr103107.html.

[69] BVerfGE 78, 232 (243); 95, 267 (300).

ally still as tax. Beyond this unusual and extreme case two seminal rulings deal with the question of defining a constitutional limit to taxation.[70]

The Federal Constitutional Court introduced in 1995 a fifty-percent rule that was finally abandoned in 2006 by the Court itself.[71] According to this rule which was based on Article 14.2 of the Basic Law dealing with the social obligation imposed by constitutionally protected property, the tax load on assets should be limited to 50% of the yield on those assets.[72] The rule was understood as a defence of private property and a means of warding off excessive taxation by actually defining the upper limit of taxation and, at the same token, the minimum of subsistence and material welfare of an individual person that is allowed to be kept unencumbered by taxes. However, the fifty-percent rule could not be established as a general principle of tax law, let alone of all forms of public charges. In its 2006 ruling the Federal Constitutional Court abandoned the effort to find any a priori-standard for taxes and to derive any fixed limit of taxation from article 14.2 of the Basic Law.[73] By contrast, it held that limitations on the tax legislature result from the application of the proportionality-test (reasonableness). The Court adjusted the application of the principle of proportionality to taxation. According to the principle of proportionality, any state interference with the right to property must serve a legitimate purpose, must be the least intrusive means to serve this purpose, and must have a reasonable and adequate impact on the legal position of the

[70] See for ex. the reasoning of the claimant in BVerfG, 2 BvR 1387/04 vom 24.11.2009, Absatz-Nr. (1 - 98), http://www.bverfg.de/entscheidungen/rs20091124_2bvr138704.html; and further BVerfG, 1 BvR 1924/07 vom 7.4.2008, Absatz-Nr. (1 - 37), at para 35, http://www.bverfg.de/entscheidungen/rk20080407_1bvr192407.html.

[71] BVerfG, 2 BvR 2194/99 vom 18.1.2006, Absatz-Nr. (1 - 50), http://www.bverfg.de/entscheidungen/rs20060118_2bvr219499.html.

[72] *Andreas von Arnauld/Klaus W. Zimmermann*, Regulating government (´s share): The fifty-percent rule of the Federal Constitutional Court in Germany, Working paper series, No. 100, Helmut Schmidt University Hamburg, März 2010, 1-29.

[73] BVerfGE 115, 97 (114); BVerfGE 82, 159 (190).

owner. According to the Federal Constitutional Court, applying the tripartite proportionality test to taxation means that only the third part of the test is of interest. Since taxes serve a legitimate purpose (financing of state activities), and their ability to achieve that purpose as well as their necessity are deemed to be undisputed, the only issue to be considered is a balancing of interests (proportionality in the narrow sense) aimed at determining the reasonableness and fairness of the imposed tax burden.[74] The upper limit of taxation is the result of this weighing process. According to the Court adequacy of tax burden does not only depend on the rate at which a business or person is taxed on income, but it is at least also contingent upon the relation between tax rate and basis of assessment for tax. Further, the Court emphasised that the definition of different tax rates must be governed by the principle of equality of treatment with regard to public burdens and measured against standards of fairness in taxation. Both the principle of vertical fairness in taxation and the prohibition of excessive tax burden provide the legislature with no more than guidelines for defining tax rates and upper limits or favouring progressive or linear taxation as tool to redistribute wealth. The Court did not take into account any assessment from the point of view of economic science.[75]

Therefore the Court, in its 2006 ruling, derived from article 14.1 of the Basic Law - at least in cases of taxation relating to legal positions qualifying as property in constitutional sense - a limit prohibiting an excessive overall tax burden. Even high-income earners must be able to derive a private utility of particular and high profitability to them from their remaining income after taxes.[76] The Court also combined the idea of proportionality with a comparative perspective and distributive justice. It found that in the context of equality (Article 3.1 of the Basic Law) particular justifying reasons are necessary for the legislature

[74] Taxation must reach "a constitutional ceiling of an unbearable encumbrance" BVerfG, 2 BvL 1/00 vom 12.5.2009, Absatz-Nr. (1 - 52), at para 51, http://www.bverfg.de/entscheidungen/ls20090512_2bvl000100.html.

[75] BVerfGE 115, 97 (113 et seq.).

[76] BVerfGE 115, 97 (117).

to impose a tax burden on a majority of tax payers, if this tax burden is unusually high from the point of view of an international comparison and globalised tax competition.[77]

2.2.4 Bank levy against financial systemic risk

This case law became relevant in the aftermath of the financial crisis of 2007. In an expert opinion delivered on the constitutionality of the obligation on the German banks to contribute to the costs of future bank crises a violation of article 14 of the Basic Law by the German Restructuring Act (*Restrukturierungsfondsgesetz*) was discussed. That act entered into force in December 2010 and provides for the establishment of a restructuring fund, a public body managed by the Federal Agency for Financial Market Stabilisation (*Bundesanstalt für Finanzmarktstabilisierung*). The act introduces a bank levy that is technically not a tax and must be paid by all credit institutions with a German banking licence. They will pay the levy in the form of an annual contribution to the Restructuring Fund which will be financed that way and will be used as a reserve for the purposes of financing measures in order to deal with the restructuring of systematically relevant banks facing financial stress, and in particular when the very existence of such credit institutions is at risk. Details are regulated in the Ordinance on Contributions to the Restructuring Fund for Credit Institutions passed by the German Parliament and ratified (with amendments) on 8 July 2011 by the German *Bundesrat*. The obligation on banks to pay a bank levy is an interference with the scope of protection of the property guarantee (Article 14 of the Basic Law) in as much as the level of the levy is contingent on the extent of the liabilities of the credit institution liable to the levy and on the quantity and quality of the derivative instruments used by it. According to the case law of the Federal Constitutional Court the bank levy encroaches upon rights and assets that qualify as property in the sense of Article 14 of the Basic Law.

[77] BVerfG, 2 BvR 2194/99 vom 18.1.2006, Absatz-Nr. (1 - 50), at para 46, http://www.bverfg.de/entscheidungen/rs20060118_2bvr219499.html.

Since the Federal Constitutional Court rejects any ex ante fixed limit of taxation, the bank levy must be measured against the principle of proportionality and especially the proportionality in the narrow sense which implies an overall weighing of interests.[78] The bank levy serves a legitimate purpose: it is used to finance the Restructuring Fund which is the response to the financial problem that came to be known under the name "too big to fail". If the collapse of some credit institutions of systemic importance (very large credit institutions or relatively small institutions that are nevertheless considered to be of systemic importance because of their financial obligations and connections in the financial markets) would trigger a systemic risk for the financial system, establishing a self financed bank rescue fund is a legitimate aim in the public interest. The bank levy is able to serve this legitimate purpose. The establishment of bridge banks by the Restructuring Fund which is financed by the bank levy, and the possibility for systemically relevant banks to transfer their business in whole or in part to such bridge banks, are measures able to address, counter, and minimise systemic financial risks. Moral hazard is not enhanced but rather reduced through the establishment of the Restructuring Fund. Banks can no longer speculate that they will be rescued in a case of default. Rather, although they will not be exposed to a disorderly default that would pose a systemic risk and a domino effect on the market as a result of interdependencies, they know that their stakeholders and creditors are not set to be relieved from the costs and consequences of an orderly bankruptcy. The bank levy is also necessary in the sense that there is no less intrusive means equally serving the purpose of financing the restructuring of systemically relevant credit institutions by stabilizing their systemically relevant parts and assets. A voluntary self-regulation of the banking sector (instead of the obligation to pay a bank levy) would be less intrusive but would miss the target. While private banks have an interest to protect themselves against default, they are not

[78] See the discussion in the experts opinion: *Wolfgang Schön/ Alexander Hellgardt/Christine Osterloh-Konrad*, Rechtsgutachten zur verfassungsrechtlichen Bewertung einer Bankenabgabe nach dem Regierungsentwurf eines Restrukturierungsgesetzes, Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht, Abteilung für Rechnungslegung und Steuern, München available at http://www.tax.mpg.de/files/pdf1/bankenabgabe-gutachten.pdf.

interested in paying the costs for saving the financial system as such. The banking sector would not endogenize those costs without state intervention.

3. OLD EXPROPRIATION DOCTRINES AND THE NEW NARROW EXPROPRIATION CONCEPT

3.1 The role of the German judicial system

The public-private law divide that characterises the German legal order has had an impact on the evolution of the case law and the conceptual framework in the realm of property law. The judicial review of administrative regulatory measures and actions pertaining to expropriation fall within the jurisdiction of administrative courts. In case of dispute respecting the amount of compensation for expropriation, however, recourse is had to the civil courts (Article 14.3 sentence 3 of the Basic Law). Both courts have to deal with property law and to consider when a legal violates the fundamental right to property and when compensation must be paid. Additionally, as the Federal Constitutional Court has jurisdiction on questions about whether statutes, court decisions and administrative measures are consistent and in conformity with the Basic Law, the Federal Constitutional Court has to deal in particular with the constitutional concept of property and the function of private property as an indispensable legal institution. The obligation incumbent on the Federal Constitutional Court to act as a guardian over the Basic Law exists vis-à-vis all measures of German public authority, in principle also to those which give rise to the domestic application of Community and Union law[79] transpose[80] or perform Community and Union law. Therefore, all three jurisdictions have had to develop their own interpretation of the consti-

[79] See BVerfGE 89, 155 <171>; 123, 267 <329>),

[80] See BVerfGE 113, 273 <292>; 118, 79 <94>; BVerfG, judgment of the First Senate of 2 March 2010 - 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 -, NJW 2010, p. 833 <835>.

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tutional property guarantee and to present their own definition of expropriation. The Federal Constitutional Court defines expropriation in a formal way: An expropriation may not take place accidentally, unintentionally, but rather, the state act must be especially intended to remove a property right from its owner. A partial or total removal of property from the hands of the owner, a transfer of property, must take place.

3.2 Old expropriation doctrines and their present day relevance

Apart from the private use doctrine (private use test) outlined above, the doctrine of individual sacrifice, the doctrine of a situation-specific approach to property limitation, and the doctrine of the intensity of the interference with property have been used by the Courts in order to draw the line between expropriation and non-compensable general limits on property.

The doctrine of individual sacrifice is based on the idea of the sacrifice of the individual for the public good. It qualifies expropriation as a breach of the principle of equality of all in relation to the discharge of public burdens, since it compels the individual property owner to make a special sacrifice by inflicting a special burden (*Sonderopfer*) on him/her. A measure going beyond general limits imposes such a special burden on the person concerned and constitutes, according to the Federal Supreme Court (*BGH*) the gist of expropriation.

The doctrine of a situation-specific approach to real estate ownership rested upon the limitations on the property resulting from the location and social context of the property object (*Situationsgebundenheit*). Some land plots or buildings were considered to be by nature burdened with a particular social obligation. Every land plot was considered to be characterised by its location, composition as well as inclusion in the landscape and the environment. This expressed the general limits imposed on ownership within the social context and an immanent limitation of the rights of the owner linked with the "situation" of the object of property. Nowadays, however, "*Situationsgebundenheit*" is considered as a circular concept "*Zirkelbegriff*".[81] "`*Situation´ ist Beurteilungsgegenstand nicht Beurteilungskriterium"*. "Situation" is the subject, not the criterion of the assessment. The norms are not inherent in the situation. In order to find out where the limits on the power of using and disposing of the property asset are to be set, an assessment of the conflict between the affected public interests and the relevant private property interests of the owner is necessary.[82]

The doctrine of the intensity of the encroachment or the severity of the burden imposed upon property (*Schweretheorie*) has been developed by the Federal Administrative Court: When the burden placed upon the property is so onerous that it goes beyond the border of the general reasonable limits on property, it is no longer bearable and should be considered as a material expropriation, and this without regard to the number of the affected owners and without the need of any comparison with other owners.[83]

In the wake of the abandonment of a wide ranging concept of expropriation by the Federal Constitutional Court these theories of distinction between expropriation and legislative determination of property have become irrelevant for defining expropriation. Nevertheless, they have not become obsolete, but they have found a new area of application in so far as they provide guidance in evaluating the permissibility and constitutionality of the legislative determination of property under Article 14.1 sentence 2 of the Basic Law. Although it is true that according to the case law of the Federal Constitutional Court a content determination of property rights can never turn into expropriation, such content determinations are

[81] *Walter Leisner*, Eigentum, in: Isensee/Kirchhof (eds), Handbuch des Staatsrechts, 3. Auflage, Band VIII, C.F. Müller, Heidelberg 2010, p. 370, para 176, 178.

[82] Walter Leisner, Situationsgebundenheit Des Eigentums: Eine Uberholte Rechtssituation, de Gruyter, Berlin, 1990.

[83] See for instance BVerwGE 32, 173 (179).

subject to limitation. The old expropriation doctrines are used to help distinguishing the cases in which a content determination of property rights expresses a non-compensable social obligation on property, from those cases in which a content determination is only proportional if equalisation payments or other non-pecuniary mitigating transitional arrangements are provided for. The range and degree of state intervention is an indispensable criterion in order to single out the cases in which a content determination of property rights is an expression of a social obligation on property and does not require any compensatory measures.

4. EXPROPRIATION

4.1 Requirements of Article 14.3 of the Basic Law

Article 14.3 requires that expropriation must be authorised by a valid law that makes provision for and determines the nature and extent of the compensation; additionally, the expropriation must take place in the common weal for a public purpose which is explicitly stated in the authorising law.[84]

The corresponding compensation must be provided for in the same statute authorising the expropriation. If these requirements are not met, then the legislative regulation does not amount to expropriation. If the law does not conform to Article 14.3 it will have to be declared unconstitutional. If a regulation imposes upon the owner a substantial cost or burden with little or no offsetting benefit, in other words, if the regulation has an expropriatory effect, because the owner cannot benefit from any of the advantages of a private use of her property, it is the validity of the legal rule as a whole, not just the lack and want of a compensation provision, that must be attacked. There is no room for courts to remedy the failure of the legislature to provide for compensation, the expropriation measure must be

[84] BVerfG, 1 BvR 2187/07 vom 8.7.2009, Absatz-Nr. (1 - 30), para 8-10 http://www.bverfg.de/entscheidungen/rk20090708_1bvr218707.html with further references to the case law on the standard of judicial scrutiny of expropriatory legal measures.

annulled. The question is whether the intention of the rule was to remove an asset from the owner or not. Expropriation must from the outset aim at and finally result in the total or partial deprivation of concrete property rights.

4.2 Compensation for expropriation and the linking clause

A statute of expropriatory nature that does not comprise an explicit compensation provision is unconstitutional. The courts may not complement the missing compensation provision. Rather, they have to refer the case to the Federal Constitutional Court pursuant to Article 100 of the Basic Law. In this way, both the Constitutional Court´s exclusive power to dismiss an unconstitutional statute and parliament´s budget autonomy are respected. The budget is not burdened with the costs of unforeseen compensation payments that are associated with the implementation of a prima facie constitutional statute, and the Federal Constitutional Court´s exclusive competence of rejection is not undermined by a judicial amendment of laws. As soon as the expropriatory measure becomes final and is no longer subject to appeal any compensation claim on the part of the affected owner will be dismissed. If the affected owner makes no use of her/his right to ensure a return to constitutional rule, she/he is not entitled to demand monetary compensation for a loss she/he could have averted by simply challenging the act of interference upon her/his right to property. As much as the violation of the linking clause, the breach of the constitutional commitment to serve the public interest makes the expropriation unconstitutional. That means that the aggrieved party is not entitled to compensation. Rather, the only possibility for her/him is to challenge the constitutionality of expropriation. The same is true when the principle of balancing the public and private interests involved is violated by the legal enactment determining the amount of fair compensation to be paid, no matter if that enactment performs the expropriation itself or empowers the executive to perform it.[85] The requirement that expropriatory laws must be linked to complementary compensatory measures, i.e. that expropria-

[85] See for a summary Pieroth/Schlink, Staatsrechte II, 2010, para 1023.

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tion may only occur if compensation is provided for, does not apply to pre-constitutional laws.

The linking clause (*Junktimklausel*) requires that expropriation must be authorised by a law providing for compensation ex ante. This reverses the ordinary course of things usually valid in dealing with compensation in the context of a decision on a damages claim: In the field of liability proceedings the indicated course is to determine the amount of damages once the origin and quantum of damage have been assessed or, at least, the actual existence of damage has been proven. In expropriation matters the linking clause guarantees that expropriation will only take place once the nature and extent of the compensation has been determined in the authorising law. This has the function of protecting the expropriatee and promoting budget discipline by obliging the legislature to stipulate the compensation amount or the way of ascertaining, quantifying and liquidating that amount. This also has the meaning that expropriation cannot be an unintended result of state activity. Not only must the interference with the property right have been foreseen by the statute, the statute must in addition anticipate the qualification of the interference as expropriation and link it to an amount or a specific method for the calculation of compensation. The Federal Building Code, for example, sets out the legal requirements for expropriation, i.e. the purpose and subject of expropriation, the requirements for the admissibility of expropriation, the prerequisites for expropriation on urgent urban development grounds as well as the scope, limits and extent of expropriation (sections 85-92). The principles governing compensation are also specified; compensation can be determined on the date on which the expropriation authority applies for the expropriation or on the date on which possession of the asset is taken (sections 93-103). Recourse is had to market value.

4.3 Necessity of expropriation

The reason for expropriation must be legislatively determined through laws on federal or state level and not created by the executive.[86] For example, the Federal Building Code regulates expropriations for the purpose of urban development. Expropriation presupposes that an individual is deprived of her/his specific legal positions. The expropriation must be necessary for the attainment of an exactly defined public purpose. If the purpose of the expropriation is not fulfilled the expropriatee has a claim for restitution of the asset.[87] The requirements for the admissibility of expropriation are briefly and succinctly expressed in Section 87.1 of the Federal Building Code: "Expropriation is only admissible in individual cases where this is required for the general good and the purpose to be served by expropriation cannot reasonably be achieved by any other means."[88]

No expropriation is necessary if a purchase in the open market can reasonably be required, when the public project can be carried out equally well on public land, or when partial instead of total deprivation of property, for instance by creating a right *in rem* on real property, would be sufficient for the attainment of the public purpose. When the expropriation is performed on the basis of an executive act (*Administrativenteignung*)[89] there are more legal remedies available to the aggrieved party against the legal measure than in the cases when expropriation is performed on the basis of a legislative act which is only challengeable by making use of the extraordinary remedy of the constitutional complaint before the Federal Constitutional Court. That means that expropriation on the basis of a legislative

[86] BVerfG, 1 BvR 2187/07 vom 8.7.2009, Absatz-Nr. (1 - 30), para 9 http://www.bverfg.de/entscheidungen/rk20090708_1bvr218707.html

[87] BVerfGE 38, 175 (179).

[88] See BVerfG, 1 BvR 2187/07 vom 8.7.2009, Absatz-Nr. (1 - 30), para 12 et sequ. http://www.bverfg.de/entscheidungen/rk20090708_1bvr218707.html for a constitutional review of the application of this section.

[89] BVerfGE 100, 226 (239); 102, 1 (15) settled case law. BVerfG, 1 BvR 242/91 vom 16.2.2000, Absatz-Nr. (1 - 69), paras 41-43, http://www.bverfg.de/entscheidungen/rs20000216_1bvr024291.html.

act is not necessary if an "administrative expropriation" is feasible, unless the latter would be connected with extensive and significant disadvantages for the common good which could only be countered and resolved by a legislative enactment.[90]

Expropriation is held as a measure of last resort that may not occur if the state can go for other less extreme measures that are still available to serve the public purpose. Although no expropriation can take place exclusively for the benefit of a third party, it can advantage private persons while serving the public weal. If a property asset was expropriated for a public purpose but it comes out later that the expropriated asset has not actually been used for the purpose stated in the authorising law, it must be returned to the expropriatee even if compensation was paid. The expropriatee has to pay compensation to the state that may not exceed the market value at the time of the initial expropriation.

4.4 Expropriation for the public good

The purpose of expropriation is to fulfil certain public tasks. However, not every deprivation is expropriation within the meaning of the Article 14.3 of the Basic Law. "If by depriving an individual of her/his legal position the legislature intends to settle private interests, then its legislative enactment will be a determination of the content and limits of property".[91] Expropriation is not deemed promoting private interests if public authorities are availing themselves of private law tools to fulfil their public duties, or when a private person is making use of private forms of organisation to fulfil a public task.[92] The deprivation of property assets is not deemed to serve to promote private interests alone, when it of-

[90] BVerfGE 95, 1 (22).

[91] see BVerfGE 101, 239 (259); 104, 1 (10). BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 – 77, 53), http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

[92] BVerfGE 66, 248 (257).

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fers new potential for profit-making and innovation in order to ensure the improvement of economic structures and employment situation within the country. The Federal Constitutional Court requires that these aspects of public welfare be explicitly differentiated and mentioned as part and parcel of such structural policies as well as objectives of the relevant legislative expropriatory enactment.[93]

4.5 Amount of the compensation

The amount of the compensation for expropriation must be determined by establishing an equitable balance between the public interest and the interests of those affected and involved. The legislature will have to set limits on the amount of compensation payable to the aggrieved person in accordance with the request of balancing the public and private interests involved, whereas the executive will have to implement and fulfil the legal framework by specifying the compensation amount within the limits laid down by the legislature. In case of dispute regarding the amount of compensation recourse may be had, pursuant to Article 14.3 sentence 4 of the Basic Law, to the ordinary courts which will also have to observe the requirement of a fair balancing between the public and private interests involved. Under the weighing of interests principle no payment of a token compensation would be allowed, and no full compensation at a fair market value would be necessary.[94] Between these two extremes, the courts, in determining the amount of compensation, will have to take into account to what extent the expropriated property has been achieved or acquired through the owner´s own work or, rather, it was due to a series of lucky coincidences and governmental arrangements and measures. The significance of an owner´s own investment of work or money in a property use is illustrated by § 154 I Federal Building Code. If benefits accrue to the owner of a property situated within a formally designated redevelopment area, without any exertion on her/his side, merely from the enactment of a zoning regula-

[93] BVerfGE 74, 267 (287 et sequ.).

[94] BGHZ 67, 190(192).

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tion that substantially raises the market value of her/his property from one day to another by improving the infrastructure of the redevelopment district in the public interest, then an elimination of this windfall, of the planning profit, is held legitimate.[95]

Pursuant to Article 14.3 sentence 2 of the Basic Law the compensation for expropriation must be determined by a statute establishing an equitable balance between the public interest and the interests of those affected, i.e. the owners. The Federal Constitutional Court does not adopt an exclusively market value oriented approach in the calculation of compensation. The owner must not receive an amount of compensation commensurate with the full market value of the asset which is expropriated. Section 194 of the Federal Building Code provides that market value is the price that would be paid in a usual transaction at the time when the assessment is made, taking into account the existing legal circumstances, and the condition and location of the property, without having regard to any extraordinary or personal circumstances. Characteristics pertaining to the person of the owner are only exceptionally taken into account, as compensation concentrates on the removed property asset and not on personal factors.

Expropriation remains a measure of last resort: For example, in areas designated by municipalities as protected social environments, the demolition of a building is allowed if its preservation would impose costs that cannot be covered from the current income. If the municipality excludes demolition of the building, then owner expropriation is possible under section 85.1 sentence 6 of the Federal Building Code. In cases when a municipality claims land for public purposes it will take the property from the owner by purchase, after negotiations, or, if there is dissension, by expropriation.

5. CASE LAW ON THE DISTINCTION BETWEEN CONTENT DETERMINATION AND EXPROPRIATION

[95] See for ex. section 154.1 BauGB.

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The distinction between **partial expropriation** and extensive limitation of use through legislative determination of the content and limits of property is not always easy. A legal position can be an object of expropriation if it is susceptible of legal independence and severance. If an asset is legally not susceptible of severance and independence, a necessary prerequisite for the performance of a sovereign purchase of goods, and hence for expropriation within the meaning of Article 14.3 of the Basic Law, is missing. The encumbering of land property with a right *in rem* constitutes a partial deprivation of property rights. The mandatory legal measure fulfils here the function of a private agreement creating the rights in rem. A partial expropriation can only withdraw those rights *in rem* that could also be object of a private agreement.[96] In the same way, the deprivation of granted hunting rights through reduction of a hunting district by reason of highway construction is deemed to be an expropriation.[97]

Reparcelling and land consolidation constitutes an expropriation as long as this process deprives people from their land in order to improve and reshape agricultural structures in the public interest in procedures under the **Law on land consolidation** (*Flurbereinigungsgesetz*). If the reshaping of large agricultural areas is viewed to serve the private interest of farmers, it is to be considered as a content determination of property. The Federal Constitutional Court left this question open in a first decision. In a further decision it noted that the qualification or reparcelling as expropriation or content determination play no role in determining the nature and extent of compensation (*in natura*) which must be paid in this case anyway. The plots and parcels that are given to the owner must be of the same agricultural utilisation value (and not of the same market value) as those taken.[98]

[96] BVerfGE 45, 297 (339).

[97] BGH, NJW 2000, 3638 et seq.

[98] BVerfGE 74, 264 (279); BVerfG, 1 BvR 851/87 vom 8.7.1998, Absatz-Nr. (1 - 13), http://www.bverfg.de/entscheidungen/rk19980708_1bvr085187.html

The **Federal Water Resources Act** (*Wasserhaushaltsgesetz, WHG*) did not expropriate land owners when it introduced the obligation to obtain a permit for the use of ground water.[99] The legal measure did not take concrete and individualised aim at removing the right to use ground water from the sphere of influence of a specific land owner. Rather, the Federal Constitutional Court understood the measure as a general and abstract determination of the content and limits of land ownership so as to exclude in general ground water. The constitutional guarantee of the legal institution of property is not encroached upon, when the use of resources that are essential to the common weal, like water, is regulated and placed under the authority of the public legal order, rather, than left completely to the market forces to allocate. For that reason, a legislative act does not take from landowners any right that includes ownership of water below the ground surface and that they ever had under the Article 14, in subjecting to a permit system the individual landowner´s ability to exploit groundwater. As the individual use of groundwater affects the whole community, subjecting the landowner´s right to use groundwater to regulatory censure or approval is compatible with the guarantee of the legal institution of property. Pursuant to § 905 BGB, the right of the owner of a parcel of land extends to the space above the surface and to the resources below the surface. While the Federal Constitutional Court does not question that this is true for private law purposes, it takes another view from the perspective of public and constitutional law, by focussing on the constitutionally safeguarded core field of property and by putting the relation of individual freedom to common weal in the limelight.

The Federal Administrative Court took the same stance on the removal of the right to extract specific mineral resources from the bundle of rights concerning surface land ownership pursuant to the **Federal Mining Act** (*Bundesberggesetz*).[100] Similarly, the virtual impossibility for **small garden plot owners** to cancel the lease agreements under which the plots were held by residents of urban communities for recreational reasons is not

[99] BVerfGE 58, 300 (332 et seq.)

[100] BVerwGE 94, 23 (27).

an expropriation of the garden plot owners but a re-adjustment of the determination of the content and limits of their property.[101]

Equally, a law prohibiting the **raising of rents** more than 30% in order to protect lessees of residential property in view of the shortage of living space does not constitute a partial deprivation but a legislative determination of the content and limits of property.[102]

The **reallocation procedure of property rights** which is codified in Part Four of the Federal Building Code and aims at creating plots suitable in terms of location, shape and size for built development or for other uses, is not considered a "taking", but rather a legislative definition of property rights - despite the fact that this zoning instrument is also explicitly (section 61 of the Federal Building Code) associated with the withdrawing of real property rights – on account of a lack of public interest: the reallocation serves the interest of the land owners.[103]

The **slaughtering** of a herd of infected (or suspected of being infected) animals, for example pigs found infected with swine fever, might be held to correspond to an expropriation at first sight as the owner suffers a total deprivation of a specific ownership position. Yet, notwithstanding the total withdrawal of property rights, the duty on the part of the owner to slaughter a whole herd of infected bovine animals is an expression of the social obligation of property owners to avert hazardous situations stemming from their property holdings. The establishment of this duty did nothing more than to put the owner in her/his place within the legal restrictions associated with police responsibility. This is also true for

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[101] BVerfGE 52, 1 (26 et seq.); 87, 114 et sequ. *Jarass*, Inhalts- und Schrankenbestimmung oder Enteignung? - Grundfragen der Struktur der Eigentumsgarantie, Neue Juristische Wochenschrift (NJW) 2000, 2841, 2845.

[102] BVerfGE 71, 230 (247).

[103] BVerfGE 104, 1 (9 et seq.); *Evelyn Haas*, Die Baulandumlegung - Inhalts- und Schrankenbestimmung des Eigentums, NVwZ 2002, 272; BVerfG, 1 BvR 1512/97 vom 22.5.2001, Absatz-Nr. (1 - 39), at para 31, http://www.bverfg.de/entscheidungen/rs20010522_1bvr151297.html; see also BVerwGE 3, 246 (249).

the slaughtering of animals simply suspected of being infected, in that police responsibility of owners is directly linked with a danger or risk, not with its materialisation.[104] Under section 66 of the **German Contagious Animal Diseases Act** (*Tierseuchengesetz*) compensation is paid to owners for their losses due to the slaughter or culling of animals.

Similarly, the following interferences with the right to property have been considered by the Federal Constitutional Court as determinations of the content and limits of the affected property rights, and not as expropriation: Steps that are taken to minimise the **impact of noise emissions** on affected neighbouring properties[105], measures taken to modernise, renew, regenerate and revitalise urban real estate[106], property use restrictions or prohibitions based on legal requirements on environmental protection[107], the establishment or expansion of protected nature conservation areas[108], and the pooling of forestry plots to create a hunting area unit[109]. The level of noise and exhaust fumes emitted by the traffic that a land owner must tolerate[110] is also a question of property use limitation.

When a person is responsible for an dangerous object in her/his ownership the police are entitled pursuant to the German police laws to take measures against the legal owner or the person exercising physical control over the dangerous object. The land use re-

[104] BVerfG NJW 1999, 2877; BVerwGE 94, 1 (4).

[105] BVerfGE 72, 66 (76).

[106] BVerwG NJW 1996, 2807.

[107] BVerwG NJW 1996, 409.

[108] BVerwG DVBl. 2001, 931.

[109] BVerfG, 1 BvR 2084/05 vom 13.12.2006, Absatz-Nr. (1 - 43), http://www.bverfg.de/entscheidungen/rk20061213_1bvr208405.html

[110] BVerfGE 79, 174 (191).

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strictions under the **Federal Legislation on Soil Conservation** (*Bundes-Bodenschutzgestz, BBodSchG*) regarding the police responsibility of land owners, tenants, lessees or usufructuaries do not amount to expropriation. Rather, they establish the duty on the land owner to safeguard public security by preventing or averting a danger emanating from her/his land ownership.[111] The seizure of goods belonging to a sentenced person cannot be an expropriation since the legal measure is not aimed at the procurement of goods but at the prevention and avoidance of indictable offences.

When a public law regulation provides for the exclusion of civil law rebuttal claims against restrictions on the right to property the exclusion of those rights is deemed to be a content determination of the right to property. For example, under the **German Air Traffic Act** (*Luftverkehrsgesetz, LuftVG*), section 11 in conjunction with the **Federal Immission Control Act** (*Bundesimmissionsschutzgesetz, BImSchG*), section 14, local residents do not have the right to request cessation of operation at any installation on grounds of civil-law claims to protection against the detrimental impacts emanating from a piece of land on neighbouring premises. Civil-law claims are not excluded if they are based on specific titles and the licence for the plant or installation has become final. Otherwise, it is only admissible to insist on precautionary measures to prevent the detrimental impacts. If such measures are not technically feasible according to the best available techniques or not economically viable, only compensation may be claimed. Local residents tried to stop the extension of an airport runway by questioning the compatibility of this public law rule with Article 14 of the Basic Law. The Federal Constitutional Court held that this rule was a content determination of the right to property, and that it was in line with Article 14.1 sentence 2 of the Basic Law.[112]

[111] BVerfG, 1 BvR 242/91 vom 16.2.2000, Absatz-Nr. (1 - 69), http://www.bverfg.de/entscheidungen/rs20000216_1bvr024291.html case annotation *Sachs*, Juristische Schulung (JuS) 2000, 1219.

[112] BVerfG, 1 BvR 218/99 vom 11.11.2002, Absatz-Nr. (1 - 23), http://www.bverfg.de/entscheidungen/rk20021111_1bvr021899.html; see case annotation by *Oberrath*, in Juristi-

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Under the **Federal Telecommunications Act** (*Telekommunikationsgesetz*, TKG), section 76, the owner of property which is not a traffic way within the meaning of the act cannot prohibit the setting-up, operation and renewal of telecommunications lines on his property insofar as a line or installation on the property which is secured by a right is also used for the setting-up, operation and renewal of a telecommunications line and the usability of the property is not thereby additionally restricted on a lasting basis, or the property is not or is only insignificantly affected by such use. This provision is also regarded as a determination of the content of the right to property in line with Article 14.1 sentence 2 of the Basic Law.[113] This is so especially as subsection 2 of the same section guarantees the proportionality of the impingement on property by providing for appropriate pecuniary compensation from the operator of the telecommunications line if the use of the property or the income therefrom is affected to an extent more than can be reasonably expected by the setting-up or renewal or by maintenance or repair work of the telecommunications line. In addition, with regard to extended use for telecommunications purposes, non-recurrent pecuniary compensation may be claimed, provided that there were hitherto no lines that could be used for telecommunications purposes. In the event of damage to the property and its accessories caused by exercise of the operator´s rights, the latter shall remedy the damage at his expense.

As far as **intellectual property** is concerned, the legislature, in the framework of the regulation requirement under 14(1) sentence 2 GG, "has the obligation to define appropriate standards which ensure that its use and appropriate exploitation correspond to the na-

sche Arbeitsblätter 2003, 373; see also BVerfG, 1 BvR 1502/08 vom 4.5.2011, Absatz-Nr. (1 - 61), http://www.bverfg.de/entscheidungen/rk20110504_1bvr150208.html.

[113] BVerfG, 1 BvR 142/02 vom 26.8.2002, Absatz-Nr. (1 - 36), http://www.bverfg.de/entscheidungen/rk20020826_1bvr014202.html; for a case annotation see *Sellmann*, Die eigentumsrechtliche Inhalts- und Schrankenbestimmung - Entwicklungstendenzen, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2003, 1417, 1422; *Kischel*, Wann ist die Inhaltsbestimmung ausgleichspflichtig?, Juristenzeitung (JZ) 2003, 604 – 613.

ture and the social significance of this right”. The Federal Constitutional Court considers that this also applies “accordingly to the patent right”.[114] The interpretation and application of copyright law must, in particular in view of the large number of technological innovations in this area, guarantee the property rights of authors under Article 14.1 of the Basic Law.[115] It is the duty of the legislature, in establishing the extent of copyright under Article 14.1 sentence 2 of the Basic Law, to lay down appropriate standards which ensure use and exploitation of the right in conformity with its general nature and social significance.[116] In this regard, the legislature is afforded a relatively wide margin of discretion,[117] while interferences with the author's right of exploitation may be justified only by significant public interest.[118]

In the proceedings for constitutional review of the **Act on the Regulation of Genetic Engineering** (*Gesetz zur Regelung der Gentechnik* - Genetik Engineering Act - GenTG) amended by Article 12 of the **Act on the Reform of the Law of the Protection of Nature and Landscape Conservation** (*Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege*) of 29 July 2009, BGBl I p.2542) the Federal Constitutional Court found that section 36a GenTG is compatible with Article 14 of the Basic Law. Apart from the aim to prevent risks to environment and health, the German Genetic Engineering Act also pursues the aim to ensure the co-existence of the cultivation of genetically

[114] BVerfG, 1 BvR 1864/95 of 05/10/2000, paragraphs No. (1 - 38), para 13 http://www.bverfg.de/entscheidungen/rk20000510_1bvr186495en.html with reference to BVerfGE 36, 281 <290-291> concerning the inventor's technical intellectual property right which has not yet gained patent right status.

[115] BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1 - 69), para 64 http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html

[116] See BVerfGE 31, 229 (240-241); 79, 1 (25)

[117] See BVerfGE 21, 73 (83); 79, 29 (40)

[118] See BVerfGE 31, 229 (243); 49, 382 (400); 79, 29 (41)

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modified and non-genetically modified crops side by side. § 36a GenTG ensures that a defensive claim and claim for compensation under the law relating to neighbours exists in the cases in which introductions of genetically modified organisms (GMOs), in particular in the form of unintended cross-pollination, materially interfere with the use of another person's land (§ 36a.1 to 36a.3 GenTG). The Court noted that section 36a GenTG governs the legal relations between neighbours with neighbouring plots in conjunction with section 906 and section 1004 of the Civil Code (BGB). Section 906 BGB deals with the introduction of imponderable substances and 1004 provides for a claim of the owner to require the disturber to remove the interference with the ownership and a claim to seek a prohibitory injunction. Sections 906, 1004 BGB are considered as part of the provisions on the content and limits of property under Article 14.1 sentence 2 of the Basic Law.[119] Like sections 906, 1004 BGB, section 36a GenTG lays down rights and duties of the landowners in general abstract terms and is thus a provision determining the content and limits of ownership under Article 14.1 sentence 2 GG.

The Court held that the provision complies with the constitutional requirements to which any provision determining content and limits of property is subject. The provision was found to be sufficiently specific, and the legislature made all the material decisions itself. The Court also found "unobjectionable" the legislative reference to provisions on the labelling of products which are promulgated by the European legislature and may be amended by it. There were no objections to section 36a GenTG as a content and limits determination of property, with regard to the constitutional requirement of certainty despite the fact that the “groups of cases of material interference have not been exhaustively laid down”, as this takes account “of the large number of conceivable sets of circumstance”, and it would be impossible "at present" to foresee and conceive of the "complete range" of these groups of cases.

[119] See BVerfGE 72, 66 (75-76).

6. IS EXPROPRIATION AN OBSTACLE TO REFORM?

6.1 Stability and dynamism through legislative content determination

The legislature embarks on the task of determining the content and limits of property rights in a dynamic manner, i.e. in adapting the scope of protection of the property guarantee to the evolution of the social and economic context while taking into consideration the relevant constitutional values. Therefore, legislatively defined property rights can be re-determined under new circumstances. Every time an area of law is to be regulated anew, the legislature is not limited to the alternative of either preserving old property interests or taking them away in exchange for compensation. The constitutional guarantee of property does not imply that a property interest, once recognised, would have to be preserved in perpetuity or that it could be taken away only by way of expropriation with compensation. Thus, a limitation of property rights that has historically been considered as justified by the social obligation and common good in Article 14.2 of the Basic Law can appear as no longer justifiable as a reasonable social obligation against the backdrop of new economic, social or demographic circumstances. The burden on the private owners and lessors of small garden plots can become disproportionate, if the social conditions that made necessary the severe limitation of their right to terminate the garden lease change and the garden plots lose their original social purpose, as they are no longer used for economic, but only for recreational reasons.

The Federal Constitutional Court examines whether an intended encroachment upon property rights constitutes a legislative determination of the content and limits of the right to property or an expropriation, on the basis of the subject matter, the purpose, scope and object to which the legislative enactment refers.

When the rights and obligations of property owners are affected abstractly and at a general level, not in a concrete and specific manner, by a measure serving the public interest without thereby depriving the owners of their affected property rights, the Federal Constitutional Court qualifies this as a limitation on property, not as an expropriation because the latter necessitates a formal property transfer and a removal of the asset from the sphere of influence of the owner. The fact, for example, that the nuclear energy providers are hit very hard by the impingement on their property rights still does nothing to alter the legal qualification of the infringement.

Some scholars have expressed the concern that under the guise of a general reform the legislature would actually pursue another specific policy goal, a hidden agenda as it were, aimed not at re-determining an already existing property system as a whole, but, rather, at removing concrete property rights from the sphere of influence of specific energy companies.[120] The legislature could simulate an overall regulation or arrangement of the property order, in order to deprive specific companies and their shareholders of their assets.

It is further possible to maintain that in the case of a reform project the legislature should not confine itself to restating the content and limits of property, but it should additionally flank this re-determination of an already settled property order with a formal expropriation: this should be particularly the case, the argument goes, in order to avert the bypassing of the constitutional guarantee for property, when the reform impinges on "old" vested property rights which are not simply restated, but removed altogether.[121] Some of the elements of a reform, if regarded in isolation, i.e. taken separately from the whole body of the reform, might be regarded as expropriation of pre-existing property rights.

The case-law of the Federal Constitutional Court does not support this view, however. A determination of the content and limits of property does not turn into expropriation, not even if the effects of the interference with the property rights equate to a dispossession of the owners. A legislative determination of the content and limits of property must avoid imposing a burden to the owner contrary to the principles of proportionality and equality, and must take into account the legitimate expectations of the owner. A determination of the content and limits of property rights will not alter its legal nature if it induces effects

[120] *Udo Di Fabio*, Der Ausstieg aus der wirtschaftlichen Nutzung der Kernenergie, 1999, 136.

[121] *Fritz Ossenbühl,* Verfassungsrechtliche Fragen eines Ausstiegs aus der friedlichen Nutzung der Kernenergie, in: Archiv für Öffentliches Recht (AöR) 1999, 1, 27.

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equivalent to or even more serious than formal expropriation. While it is true that expropriation does require the removal of a legal position protected by article 14.1 sentence 1 of the Basic Law, the reverse is not the case: not every removal of property rights constitutes an expropriation in the sense of the Federal Constitutional Court´s case-law.[122] Additionally, the Court pointed out that the deprivation of old property rights is in line with the constitution when taking place in the course of a reform and redetermination of the existing property order. The Court also confirms the right of the legislature to withdraw legal protection from a subject matter that used to be legally protected as part and parcel of a hitherto valid system of property ownership which can be reshaped and delimited anew as a result of a reform. This does not make the deprivation of old property rights much easier for the legislature: It should take place within the framework of a redetermination of the content and limits of an existing system of property ownership and be compatible with the principle of proportionality and equality.

6.2 Reliability and protection of previous vested rights

The right to property includes the protection of reliance upon vested rights. The question for the Federal Constitutional Court is whether the property owner could legitimately place reliance upon the continuation and maintenance of a legal situation or legislation. The property owner is only protected, if she/he has contributed labour or capital to set legally permitted and intended use in motion: a legally authorised possibility of property use must have undergone consolidation by already being carried into effect. The special reasons of public interest that argue in favour of the impingement upon vested property rights must be so significant that they claim clear priority before the reliance of the owner on the continuing application of her/his existing property rights. The permissibility of the

[122] BVerfGE 102, 1 (15); 104, 1 (9); *Papier*, Maunz/Dürig, Grundgesetz, Art. 14, para 361.

state intervention depends on the significance of the legitimate public interest and objective.[123]

The Federal Constitutional Court stated in 1991 that expropriation does not come into play when previous vested property rights are abolished through a new law as part of a general reform of an entire legal field even though the abolished rights have no corresponding legal positions in the new system. „*Art. 14 Abs. 3 GG ist jedoch dann nicht unmittelbar anwendbar, wenn der Gesetzgeber im Zuge der generellen Neugestaltung eines Rechtsgebiets bestehende Rechte abschafft, für die es im neuen Recht keine Entsprechung gibt.*“[124] Yet the Court nonetheless also admits that in such particular cases the general sense of the Article 14.3 of the Basic Law must be taken into consideration by the legislature. The high constitutional significance of the right to property that is reflected in Article 14.3 of the Basic Law must, according to the Court, be taken into account in the balancing process between public and private interests. This is even truer if the legislative determination of the content and limits of the property rights is tantamount, with regard to its effects, to a partial or total disappropriation.[125]

6.3 A debate on ownership unbundling

Against this backdrop it did not come as a surprise that the German discussion on ownership unbundling in energy sector was focused on property rights.[126] Ownership unbundling was thought to be by the European Commission in its 2006 legislative proposals set-up the most efficient way to achieve an open and equal access to networks and an effec-

[123] BVerfGE 83, 201 para 49.

[124] BVerfGE 83, 201, BVerfG vom 09.01.1991 - 1 BvR 929/89, para 45.

[125] BVerfGE 83, 201 para 50.

[126] See on regulation and grids from a German, European and comparative point of view *Michael Fehling/Matthias Ruffert* (eds), Regulierungsrecht, Mohr Siebeck 2010.

tive competition in the European energy markets. It was thought to be the optimal resolution of the conflict between commercial incentives of vertically integrated energy companies and the emergence of a level playing field that has not been yet established in Europe. However, the German view considered property guarantee under article 14 of the Basic Law as a major legal obstacle to imposing ownership unbundling in Germany. It was not seen as the appropriate means to achieve competitive energy markets. Similarly, the compulsory sale of shares or company capital was thought to affect share ownership to such an extent that the right to property is emptied of any private utility for the owner. In such cases, according to German understanding not just a regulatory measure with an expropriatory side-effect, but a direct formal expropriation would be necessary and should be provided for in a legal rule satisfying the requirements mentioned in article 14.3 of the Basic Law.[127]

The expropriation thesis was deemed to be also supported by the ECJ case law, which considers the substance of the right to property as protected if compensation is provided for as long as the value of the investments made are taken into consideration. The inviolable substance of the right to property seems to be encroached upon, if there is no economic utility, no appreciable economic value of the asset left behind after the encroachment. Further it was argued that strict ownership unbundling would have been a deprivation of property in the sense of article 1 of the First Protocol of the European Convention of Human Rights. In the event that the formal ownership position of a network owner would be left untouched, but the owner would lose every chance of disposing of the network and of deciding about investing in it, this would amount to a de facto expropriation.[128] Besides, according to this reasoning, energy network operators are entitled to a larger protection under German law. German constitutional law protects apart from the right to property of the

[127] *Johann-Christian Pielow/Eckart Ehlers*, Ownership unbundling and constitutional conflict: a typical German debate?, European Review of Energy Markets- volume 2, issue 3, May 2008, 1-34, 22-6, 24.

[128] *Pielow/Ehlers*, 21-22, 26.

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vertically integrated energy supply company also the right to property of private shareholders of such companies. By contrast, the Strasbourg Court has only exceptionally recognised the right to property of shareholders by "piercing the corporate veil".[129]

As a reply to this reasoning it was pointed out that the ECHR does not provide for the protection of the freedom to pursue an economic activity.[130] With regard to the right to pursue trade or professional activities, as long as the right bearer can continue to pursue her/his previous economic activity despite the regulation of that activity, the substance of that right is deemed to be protected.[131] Applying this to the situation of ownership unbundling would mean that the unbundling would simply affect the possibility of the energy producers pursuing network activities. Hence, the argument goes, companies, which are active in both production and transmission, would not be forced to give up all of their previous economic activities.

It must be noted that two more aspects, complementary to the expressed opinions, should be addressed: The first is that the Federal Constitutional Court can use Article 14.1 sentence 2 of the Basic Law to review property regulations inducing reforms (see below 6.4.3). The second is that the intensity and degree of interference and the value of what is left unregulated are related to a problem labelled "conceptual severance" in U.S. takings law (see below 7.3.4).

6.4 Is the German nuclear phase-out decision an expropriation? Some remarks

[129] *Pielow/Ehlers*, 20.

[130] *Kim Talus/Angus Johnston*, Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling', Journal of World Energy Law & Business, 2009, Vol. 2, No. 2, 149-154, 153.

[131] Joined Cases C-184 and 223/02, Kingdom of Spain and Republic of Finland v European Parliament and Council of the EuropeanUnion.

The Federal Constitutional Court´s narrow view of expropriation is focussed on the deprivation of the property rights of a single person for the common weal. The act must have an individual and concrete effect. Whether the withdrawal of unlimited legally binding operating licences for nuclear power plants amounts to an expropriation has been a highly controversial and debatable question.[132] At present, the nuclear phase out decision revives the old discussion and opens up a debate revolving around the question whether the legislative enactment must be measured according to the standards set for expropriation in Article 14.3 of the Basic Law. Expropriation presupposes that an individual is deprived of his or her specific legal positions; however not every deprivation is expropriation within the meaning of the Article.[133]

[132] The discussion was based on legal experts opinions: *Stefan Soost,* Salz statt Atommüll. Von der Instrumentalisierung des Bergrechts im Fall Gorleben, in: Forum Recht (FoR) 1997, 94; *Udo Di Fabio*, Der Ausstieg aus der wirtschaftlichen Nutzung der Kernenergie, 1999 (Legal expertise on behalf of the Bayernwerke); *Gerhard Roller*, Die Vereinbarkeit der nachträglichen Befristung atomrechtlicher Genehmigung mit Art. 14 GG, in: Zeitschrift für Umweltrecht (ZUR) 1999, 244; *Fritz Ossenbühl,* Verfassungsrechtliche Fragen eines Ausstiegs aus der friedlichen Nutzung der Kernenergie, in: Archiv für Öffentliches Recht (AöR) 1999, 1 (Legal expertise on behalf of the German federal government of the time); *Alexander Roßnagel*, Zur verfassungsrechtlichen Zulässigkeit eines Gesetzes zur Beendigung der Kernenergienutzung, in: Roßnagel, Alexander / Roller, Gerhard, Die Beendigung der Kernenergienutzung durch Gesetz, 1998 (Legal expertise on behalf of the Hessian state government of the time); *Bernhard Stüer / Sandra Loges,* Ausstieg aus der Atomenergie zum Nulltarif?, in: Neue Zeitung für Verwaltungsrecht (NVwZ) 2000, 9; *Erhard Denninger*, Befristung von Genehmigungen und das Grundrecht auf Eigentum, in: Hans-Joachim Koch / Alexander Roßnagel, (eds.), 10. Deutsches Atomrechtssymposium, 2000, 167; *Hans-Joachim Koch*, / *Alexander Roßnagel*, Neue Energiepolitik und Ausstieg aus der Kernenergie, in: Neue Zeitung für Verwaltungsrecht (NVwZ) 2000, 1; *Matthias Schmidt-Preuß*, Die Befristung von atomrechtlichen Genehmigungen und das Grundrecht auf Eigentum, in: Hans-Joachim Koch, / Alexander Roßnagel, (eds.): 10. Deutsches Atomrechtssymposium, 2000,153; *Frank Schorkopf*, Die „vereinbarte" Novellierung des Atomgesetzes, in: Neue Zeitung für Verwaltungsrecht (NVwZ) 2000, 1111; *H. Wagner*, Atomkompromiss und Ausstiegsgesetz, in: NVwZ 2001, 1089; *Matthias Ruffert*, Entformalisierung und Entparlamentalisierung politischer Entscheidungen, in: Deutsches Verwaltungsblatt (DVBl.) 2002, 1145.

[133] BVerfG, 1 BvR 1804/03 of 12/07/2004, paragraphs No. (1 - 77), para 53 http://www.bverfg.de/entscheidungen/rs20041207_1bvr180403en.html

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6.4.1 The amendment of the Atomic Energy Act

Pursuant to section 1 of the Act on the peaceful utilisation of nuclear energy and the protection against its hazards (Atomic Energy Act), last amendment of 8 November 2011[134], the purpose of the Act is "to phase out the use of nuclear energy for the commercial generation of electricity in controlled manner, and to ensure orderly operation up until the date of termination." Pursuant to section 7.1b, the electricity volumes "may be wholly or partially transferred to another installation"; they can be transferred from the nuclear power plants "also after their authorisation for power operation has expired".

However, before the last amendment of 8 November 2011, in December 2010 the amount of electricity allowed for production was extended by amendment of the Atomic Energy Act: Further electricity production rights equalling additional 12 years on average were granted. As a result, the Atomic Energy Act in its currently valid version has the following impact on nuclear industry: The additional electricity production rights granted in December 2010 are withdrawn: The electricity volumes are cut to the size of those granted in the Atomic Energy Act in 2002.[135] The seven oldest reactors and the nuclear power plant *Krümmel* are immediately shut down permanently. The three most recent nuclear power plants will be shut down by the end of 2022, and all other nuclear power plants will be shut down until the end of 2021 in a stepwise programme.[136] The Act finally reintroduced the

[134] English translations available of the Atomic Energy Act and Ordinances as well as of other safety codes and guides are documented for download at: http://www.bfs.de/en/bfs/recht/rsh/englisch.html; see further OECD, Nuclear Legislation in OECD Countries, Regulatory and Institutional Framework for Nuclear Activities, Germany, 2011, 4-31.

[135] *Axel Vorwerk*, The 2002 Amendment to the German Atomic Energy Act Concerning the Phase-out of Nuclear Power, Nuclear Law Bulletin No. 69, available at http://www.oecd-nea.org/cgi-bin/nlbsearch.cgi?wf=3251&q=Vorwerk&submit=Search&m=phrase

[136] On the several changes that took place in the policy of using nuclear energy in Germany during the last couple of years see BMU, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety/BfS, Federal

expropriation provisions which were deleted without replacement in 2002. These provisions allow the expropriation for public purposes of "erection and operation of installations for the disposal of radioactive waste as well for purposes of carrying out essential modifications of such installations or their operation" (section 9d of the Atomic Energy Act). The Federal Office for Radiation Protection is enabled to initiate an expropriation procedure for these purposes insofar as the expropriation is necessary.

6.4.2 Electricity production rights as property

Energy companies want reportedly to have the Atomic Energy Act declared unconstitutional or to sue with the International Center for Settlement of Investment Disputes (ICSID) in Washington D.C.[137] From the point of view of the constitutional property guarantee, the first question would be whether the amount of electricity from nuclear power which nuclear power plants are allowed to generate before they are permanently shut down, constitutes a property right in the sense of Article 14.1 of the Basic Law. The second question would be whether the additional electricity production rights granted in December 2010 and withdrawn in 2011 are an expropriation within the meaning of Article 14.3 of the Basic Law or a determination of the content and limits of the right to property of the power plants affected pursuant to Article 14.1 of the Basic Law. A dispossession law should, anyway, contain provisions for compensating those affected by the withdrawal of property rights. And, at any rate, the distinction between expropriation and content determination of property could not be based solely on the number of the property owners aggrieved. The Atomic Energy Act could not be deemed expropriatory simply because the nuclear energy industry in Germany consists of a relatively small number of power plants.

Office for Radiation Protection, Nuclear Regulatory Issues and Main Developments in Germany, 30 September 2011, pp. 1-11, available at http://www.bfs.de/en/kerntechnik/papiere/Germany_Nuclear_Reg_Issues_0911.pdf.

[137] Energiekonzerne ziehen vor Gericht, Frankfurter Allgemeine Zeitung, 02.11.2011, Wirtschaft.

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Is the German phase out of nuclear energy and the limiting of the period of use of the (remaining) nuclear power stations a disproportionate impingement on the property rights of energy companies and their shareholders? On the one hand the legislature is required to define the content and limits of property rights in accordance with the proportionality test that is to be applied to all state interference; on the other hand it must be careful not to disproportionately disregard or leave out of consideration the social obligation-dimension of ownership. The impingement by the state upon the property of the power plants is proportionate if the legislature provides for an implementation of the exit strategy that contains transitional arrangements, hardship clauses, and a provision for variances or for exemptions making an appropriately differentiated application of the statute in certain circumstances due to specific pre-existing facts possible. Equalisation payments might also be necessary. However, the latter would not be a compensation for expropriation calculated according to the economic value of the property use or asset. Rather, it would be determined by a balancing test that weighs private investment and property use against the new perception of the general good.

6.4.3 Reform through proportionate regulation

The electricity production rights are not withdrawn in order to be used for implementing a specific project in the public interest. On the contrary, they are protected up until termination. After termination, they will not be needed to fulfil any public task, and will not be used for implementing any specific project in the public interest which is the distinctive feature of the Federal Constitutional Court´s formal expropriation concept. That means that the legal protection of the affected owners will have to revolve around the question of whether the revised Atomic Energy Act is a legitimate determination of the content and limits of property. They could first express doubts about the justification for treating similar nuclear power plants differently or about the safety-related relevance of the distinction between old and new nuclear power plants. Then, they could contend that the Act has only a veneer of proportionality as it destroys the economic value of their property: they could argue that the Act does away irreversibly with the rights necessary for the enjoyment of their property and deprives them of the benefits they could have expected from their investment without providing for any sufficiently long phasing-out period and mitigating measures ca-

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pable of absorbing and compensating for the annihilating impact of the Act on the business operations associated with their power plants. They could further affirm that by their shutdown on the designated date the power plants will not have produced their allotted residual electricity quantity.

6.4.4 Protection of vested rights, investment risk, and mitigating measures

The compelling reasons for limiting the life spans of nuclear power plants or shutting them down would be evaluated in the light of the legislature´s assessment prerogative. In the light of the nuclear accident at the power plant Fukushima-Daichii, the German government decided to re-evaluate the risk of the use of nuclear power. Beforehand, the Reactor Safety Commission, an advisory body to the Federal Ministry for the Environment, had reviewed the safety of all German reactors. The review “indicated weaknesses for some plants regarding protection against some identified natural hazards as well as against airplane crashes”. Further, a specific commission on "reliable energy supply" gave advice to the Government on ecological, economic and societal questions of a phase out of nuclear power in Germany.[138] Against this backdrop a challenge of the Atomic Energy Act would have the task to prove these commissions wrong, to show that the safety standards in German nuclear power plants are high and that no compelling reasons for abridging the life-spans of German nuclear power plants are discernible.

The nuclear power plants could claim protection for their vested rights. In particular they could claim protection of their legitimate expectations based on the amount of electricity allowed for production before their abridgment by the last version of the Atomic Energy Act. They could avail themselves of the Article 14.1 of the Basic Law to claim protection for reasonable reliance on the legal situation created by the German government´s pre-

[138] BMU, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety/BfS, Federal Office for Radiation Protection, Nuclear Regulatory Issues and Main Developments in Germany, 30 September 2011, p. 3.

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vious extension of nuclear power production rights. They could claim protection of their legitimate expectations and safety of their investment against a “capricious” regulatory power including U turns: agreement signed in 2001, the coalition government´s commitment in 2009 to rescinding the country´s nuclear phase-out, and the recent agreement reached in September 2010 to give eight-year licence extensions for power plants built before 1980 and fourteen-year extensions for newer ones which was combined with the introduction of a nuclear fuel tax. The nuclear plant owners could claim compensatory measures for both cancelled upgrades and decommissioning costs following the subsequent contradictory policy changes in September 2010 and in March-May 2011. On the other hand, the government could argue that although such a quick change in the energy policy of the Federal Republic of Germany might have not been foreseeable, changes in this field had already become likely through political, social and cultural discourse in the country. Under these circumstances it could be deemed predictable that the occurrence of a nuclear accident would trigger at least a revision of safety standards and a state of regulatory flux and uncertainty. The question whether this should have necessarily culminated to the declaration of a three-month moratorium on nuclear power and the decision to close all reactors by 2022 is a matter of assessment within the context of a proportionality test.

The Atomic Energy Act provides that residual electricity production rights may be transferred - partially or in total - from one nuclear power plant to another, normally from an older and smaller plant to a more recent one. The utilities affected might argue that the Atomic Energy Act is designed to cause them to sell the electricity production rights at a distress price. The question for the Federal Constitutional Court would then be whether this mitigating measure, combined with a transition period, can suffice to render the impact on property proportionate or whether additional, more flexible, measures or even “equalising” compensatory payments are necessary to balance out the industry´s losses.

7. COMPARATIVE ASPECTS

7.1 Comparison with some aspects of European law

7.1.1Court of Justice of the European Union

In the case law of the ECJ, the justification of an interference with the right to property rests upon a balancing test which is very much alike that used by the German Federal Constitutional Court. ECJ has repeatedly noted that the right of property does not constitute an absolute prerogative. It may, on the contrary, in view of its social function, be subject to "appreciable restrictions". The similarity with the social obligation dimension in Article 14 of the Basic Law is evident. The ECJ applies a means-end proportionality test: the restriction on property cannot, with respect to the aim pursued by the authority applying them, constitute "a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right of property".[139]

Both the ECJ and the German Federal Constitutional Court acknowledge that not any restriction on the right to property must necessarily be accompanied by compensation. One reason for not paying compensation is, for instance, that the measures adopted do not deprive the owners of their property. In *Booker*[140], for ex. there was no expropriation of the fish tanks but an obligation to destroy the fish already infected or highly likely to be infected by the disease. The immediate destruction and slaughter of all the fish enabled the farm owners to continue to carry on their activities and to restock the affected farms as soon as possible.

Another reason for not paying compensation is when the property good has no market value. This is the case when, even in the absence of any intervention by public authorities, the owners would, in any case, have suffered a loss, given the loss of a large part or of all of the property asset´s commercial value for reasons that lie beyond the responsibility of the public authorities that adopted the property affecting measures. For example, the loss of value is triggered by the outbreak of a disease on the owner´s farm. When a

[139] ECJ, Nold v. Commission, Case 4/73 [1974] ECR 491; Case 44/79 Hauer [1979] ECR 3727; Joined Cases 41/79, 121/79 and 796/79 Testa [1980] ECR 1979; Case 265/87 Schräder [1989] ECR 2237; and Case C-84/95 Bosphorus [1996] ECR I-3953.

[140] ECJ, C-20/00 and C-64/00, 10 July 2003, para 85.

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property asset becomes a danger, even if it may possibly still hold some market value, it is one of the tasks of public authorities to take measures against it or to eliminate it. In such cases there is no transfer of ownership in property of definite economic value to satisfy a need in the general interest.[141]

The first main difference between the ECJ and the German Federal Constitutional Court in matters of property protection is that the ECJ uses a rather reduced proportionality concept. The other one is that compensation, under German law, is not only paid in connection with expropriation but also as part of compensatory pecuniary and non-pecuniary measures that are taken in order to render proportionate an otherwise disproportionate regulation of property.[142]

7.1.2 European Court of Human Rights

The distinction between reparation due for an illegal act and compensation for lawful expropriation is of major importance for both the German Federal Constitutional Court and the ECtHR. The latter requires, in accordance with general international law that reparation must, as far as possible, eliminate all the consequences of the (impugned) illegal act (principle of *restitutio in integrum*). Against this backdrop the Court notes that it is impossible to equate lawful expropriation and the so called "constructive expropriation" (*occupazione acquisitiva* or *accessione invertita*)[143] because the latter seeks to confirm a fac-

[141] ECJ, *Booker*, C-20/00 and C-64/00, 10 July 2003, para 84. See an analysis of the relevant case-law of the ECJ on the right of property in the opinion of AG Mischo, delivered on 20 September 2001 on the abovementioned Booker case, paras 60 et sequ.

[142] See on this point *Inigo del Guayo, Gunther Kühne, and Martha Roggenkamp*, Ownership unbundling and propert rights in the EU Energy sector, in: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds),Property and the law in energy and natural resources, Oxford University Press, 2010, 326, 347.

[143] See for ex. case of *Belvedere Albeghiera S.r.l. v. ITALY* (Application no. 31524/96) Judgment,30 May 2000, at para 21.

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tual situation arising from unlawful acts committed by the authorities and thus permits (the authorities) to profit from their illegal conduct.

The difference between formal expropriation under German law and the case law of the European Court of Human Rights is that the linking clause in Article 14.3 of the Basic Law requires compensation in all cases of expropriation. By contrast, the Strasbourg Court applies here a proportionality test: On the one hand, it has already said that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference. On the other hand, a total lack of compensation can well be deemed justifiable under Article 1, but "only in exceptional circumstances".[144]

The cases when the ECtHR looks "behind the appearances" and investigates "the realities of the situation" complained of, with the intention to ascertain whether the situation amounted to a "de facto expropriation",[145] correspond to the cases when under German law the affected owner is granted a "right to expropriation" (*Übernahmeanspruch*).

In the case of measures controlling the use of goods (Article 1 of Protocol No.1 ECHR) compensation is only one element amongst all those taken into consideration in determining whether the extent of the restriction imposed upon the use of the property can be considered justified in the light of the public interest. Therefore, absence of compensation will not automatically tilt the balance towards the conclusion that the measure controlling the use of the property good is not permissible. It is settled case law that an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The German equivalent for this rule is Article 14.1 sentence 2 of the Basic Law, i.e. the legislative

[144] *Holy Monasteries v Greece*, 1994, Series A, No 301-A, p. 35, para 71; *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, § 54.

[145] See for ex. *Brumărescu v. Romania* [GC], no. 28342/95, § 76, ECHR 1999-VII, and *Sporrong and Lönnroth v. Sweden,* 23 September 1982, §§ 63 and 69-74, Series A no. 52.

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determination of the content and limits of property which similarly requires a balancing of interests.

Both the German Federal Constitutional Court and the ECtHR take into account the particular status of reform: As regards the amount of compensation the ECtHR ruled that in the event of "economic reform or measures designed to achieve greater social justice", a compensation that is "less than reimbursement of the full market value" is enough.[146]

7.2 Indirect expropriation in international investment law

Foreign investors have the option to introduce proceedings against Germany in an international tribunal. It has been said that it was not by chance that the Swedish energy utility *Vattenfall* brought in 2009 the German government to international arbitration rather than to German courts.[147] Does the protection provided in investment treaties give international investors guarantees not available to domestic investors? This question makes the interrelation between national expropriation law and international investment law obvious. In what follows, the focus is on some salient differences.

While the German Federal Constitutional Court uses a narrow formal concept of expropriation that covers intentional dispossessions for the fulfilment of a specific public task, international law recognises next to "direct" expropriation also a broad concept of "indirect expropriation". The criteria used by tribunals to determine when a legal measure amounts to indirect expropriation in international investment treaty law focus, traditionally, on the adverse effects of governmental action on the use and enjoyment of the foreign investment. In applying the judicially well established "sole effects standard" tribunals first

[146] James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, at para 54.

[147] *Nathalie Bernasconi*, Background paper on Vattenfall v. Germany arbitration, International Institute for Sustainable Development, Foreign Investment for Sustainable Development Program, July 2009, p.4.

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determine the relevant investment which in some cases might be only a part of a whole bunch of investments, and then go on to look at the degree to which a significant part of the investment has been affected and reduced in its value as well as the degree to which the investors have been deprived of their right to use and enjoy their investment, for example of the control or of the reasonably to be expected benefit of the investment. „Creeping“ expropriation is a special form of indirect expropriation with a temporal quality.

By contrast, the German Federal Constitutional Court uses a mixed standard in determining when governmental action constitutes an expropriation. Under German law, both expropriation and content determination by or pursuant to law are for a public police power purpose. The question is whether the authorising statute is aimed at a transfer of ownership or benefit to another person (mostly a public authority) for the public good, or whether the statute is of a general character and scope. On the one hand the Court looks at the effects of the legal measure: a dispossession must take place. On the other hand the court considers the purpose of the measure and looks at an overt intention to use the property for the fulfilment of a specific public task. In international investment law, in determining whether a state measure is tantamount to expropriation, some tribunals have relativated the sole effect doctrine by looking "at the real interests involved and the purpose and effect of the government measure", [148] or by examining the purpose behind the measure and applying a proportionality test in accordance with the ECtHR.[149] The main difference with German constitutional law is, however, that the Federal Constitutional Court can use a narrow, formal expropriation concept, because Article 14.1 sentence 2 of the Basic Law provides for complementary protection: Between valid non compensable regulations on the one hand and compensable expropriations on the other, *tertium datur.* This third option is regulations that are made

[148] S.D. Myers, Inc. v. Canada First Partial Award UNCITRAL, Partial Award on the Merits, Nov. 13, 2000 , at para 285. 40 I.L.M. 1408 (2001) (NAFTA Ch. 11 Arb. Trib. 2000), http://www.naftaclaims.com/disputes_canada_sdmyers.htm

[149] Técnicas Medioambientaleas Tecmed S.A. v. United Mexican States ICSID Case No. ARB(AF)/00/2, Award May 29, 2003, paras 122, 129.

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proportionate through mitigating non-pecuniary and pecuniary measures. Hence, factors such as the degree and duration of the interference, the purpose of the governmental measure, or the investor´s legitimate expectations are balancing factors in determining the proportionality of the determination of property by or pursuant to a law.

In addition, under the linking clause of Article 14.3 of the Basic Law, compensation is due for lawful expropriation. Unlawful expropriations cannot be made judicially lawful. In international investment law, the distinction between lawful and unlawful expropriation[150] associates the first with the payment of compensation for expropriation and the latter with the award of damages for unlawful conduct. From this point of view, the lawful/unlawful division makes no difference if both lawful and unlawful expropriations trigger the same legal effects, e.g. the payment of the market value of the investment prior to the taking. The distinction would only make a difference, if the standard of compensation would be different: if the standard of compensation for lawful expropriation is determined in the relevant BIT, whereas the standard for unlawful expropriation is identical with the general international law standard as expressed in the Factory at Chorzow judgment of the Permanent Court of International Justice (*13 September 1928, Germany v. Poland*) which requires full reparation, and in particular, the elimination of all the consequences of illegal acts. By contrary, under German law, the unlawful conduct of public authorities must be invalidated, and if the negative effects cannot be wiped out, damages (not compensation) must be paid.

7.3 Comparison with some aspects of US regulatory takings law

Under US constitutional law, a government measure may effect a "taking" not only by physically appropriating the property. Government is equally held to be "taking" property by regulating or limiting the use thereof under the government´s police power authority in such a way as to do away with one or more of the essential components inherent

[150] ADC Affiliate et al. v. The Republic of Hungary, ICSID Case No. ARB/03/16, at para 481.

in ownership, i.e. the right to possess excluding others and the right to dispose of property. Such "regulatory takings" are government regulations that are deemed to go too far so as to produce the same effect as if the government had actually physically taken away the property. The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking (*Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922))*. In US takings law there are three inquiries for ascertaining when and which regulatory actions are functionally equivalent to a direct appropriation of or ouster from private property: the *Loretto* permanent physical invasion test, the *Lucas* deprivation of all economically beneficial use test and the *Penn Central* balancing test.

7.3.1 Social obligation and police power

The lawful exercise of the state´s so called "police power" that serves the general public good in the United States could be considered to a certain extent as an equivalent of the German theory of social obligation of property.[151] In the US an economic or physical loss of property is not a compensable taking if the interference is an action of the police power. In Germany, the social obligation of property is not natural law or norm emanating from "society". Rather, it is the legislature that has the power to set the limits on private property by taking into account the public good. However, this legislative balancing act places limitations on the definition of property (Article 14.2 Basic Law), not on the definition of a taking (Article 14.3 Basic Law).

7.3.2 Inverse condemnation

The Fifth Amendment to the U.S. Constitution requires the government to provide just compensation to the owner of the private property to be taken. Government has the power of eminent domain or condemnation, i.e. the authority to conduct a compulsory sale

[151] See the debate on the social-obligation norm in American property law in: Cornell Law Review, Volume 94, Number 4, May 2009, special issue, Property and Obligation.

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of private property for the common welfare. The choice of remedy against unlawful expropriation depends on the reason for the unlawfulness of the expropriation. Inverse condemnation actions are to a certain extent comparable to the right to be expropriated or the claim for transference of property by means of expropriation in German planning law, because, here too, there is an inversion of the typical expropriation situation. The difference is that, under German law, the right to be expropriated must be based on a statute. Additionally, under German law, there is a primacy of the so called primary legal protection, i.e. of claims for invalidation over claims for compensation or damages. That means that an unconstitutional regulation of property cannot become a lawful expropriation by means of the payment of compensation ex post, it must be invalidated. Although a clear distinction of different remedies is crucial in both legal orders, the interrelation between them is different due to different institutional contexts.

The distinction between a claim for compensation and a means-end test which is very important for German law, has been emphasized, for instance, in *Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)* where the US Supreme Court repudiated the test outlined in *Agins v. City of Tiburon, 447 U.S. 255, 260* . Applying the *Agins´* formula means that government regulation of private property effects a taking if it does not "substantially advance legitimate state interests". This test, the US Supreme Court said, is actually an inquiry in the nature of a due process test, i.e. a means-ends test, asking, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. However, the US Supreme Court adds that a heightened means-ends review of government regulations of private property by the courts is a task for which the courts are not well suited.

Similarly, the difference between just compensation and damages is equally important in both jurisdictions. In *City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999)*, for instance, a permit application by a property owner to develop a parcel of land was denied because of environmental impacts. The US Supreme Court stressed the fundamental differences between a section 1983 tort action to redress an uncompensated taking (which is about liability), and a condemnation proceeding (which deals with conceding the owner´s right to receive just compensation and seeks determination of the amount of compensation due) where liability simply is not an issue. The Court specified that since the owner was denied not just his property but also just compensation or even an adequate forum for seeking it, the cause of action sounds in tort and is analogous to common law actions that seek damages for interference with property interests. When the government repudiates its duty to provide just compensation, it violates the Constitution, and its conduct is unlawful and tortious.

Another similarity is the use of a balancing test. The difference is that it is used to define proportionate restrictions on property in Germany, while it is applied in determining the occurrence of a taking in the American context. The reasoning in *Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)* is similar to the German doctrine of the intensity of interference and the private use test, with the difference that, in the German context, these tests serve to assess the proportionality of a legislative determination of property. Under the three-factor balancing test in Penn Central the owner still keeps some property use after regulation. In *Penn Central* the U.S. Supreme Court held that, to determine whether a regulatory taking has occurred, one has to look at the character of the regulation, the economic impact on the property owner, and the extent of interference with investment-backed expectations, rather than to focus upon distinct segments of the affected property.

Another example is *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning, 535 U.S. 302 (2002)*. The US Supreme Court held here that two moratoria (totaling 32 months) imposed by a regional planning agency on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area do not constitute a per se taking in the sense of the *Lucas* categorical rule. The *Lucas* test, being a categorical rule, does not answer the question whether a regulation prohibiting any economic use of land for 32 months must be compensated. Resisting the application of a categorical rule, and adopting a reasonableness test, the US Supreme Court makes an assessment which is also inherent in the German institute of development freeze outlined above. The difference is that under German law the imposition of a development freeze on property is considered as a determination of the content and limits of property pursuant to law. If the development freeze is not proportionate, it will be subject to judicial review and invalidated.

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Finally, in cases where conditions are imposed to development permits, a balancing test is applied that is quite similar to the German proportionality test. In *Nollan v. California Coastal Commission, 483 U.S. 825 (1987)* the Court held that governmental power to forbid particular land uses (e.g., the granting of a permit to replace a small bungalow on the beachfront with a larger beachfront house) in order to advance some legitimate police power purpose includes the power to condition such use upon a concession of property rights (e.g., physical invasion of private property through dedication of easement), so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. In *Dolan v. City of Tigard, 512 U.S. 374 (1994)* the U.S. Supreme Court held that, if the approval of a development permit to expand the property owner´s store is made conditional on the owner dedicating part of the land for storm drainage and for a pedestrian and bicycle pathway to relieve traffic congestion, such dedication of property must be roughly proportional to the impact of a proposed development. There must be an essential nexus between the legitimate public interest (congestion reduction, diminution of overflow from the pavement) and the development permit requirements. Under German law both cases would be viewed as problems of content determination (Article 14.1 sentence 2 of the Basic Law) and a proportionality test would be applied.

7.3.3 Categorical takings and institutional guarantee

Under US takings law there are forms of government action that are qualified as "categorical" or "per se" takings. In *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)* the Court ruled a state law unconstitutional, finding that, when the character of the governmental action is a permanent physical occupation of real property (installation of cable television on rental buildings without the owner´s permission), there is a taking to the extent that the occupation effectively destroys the owner´s rights to possess, use, and dispose of the property. Regard was not had to whether the action achieved an important public benefit or whether it had only minimal economic impact on the owner, since it was considered that constitutional protection cannot be made to depend on the size of the area permanently occupied. Rather, the focus was on the right to exclude others as essential component of property irrespectively of the public purpose that the regulation might serve. This focus precludes any balancing between the infringement upon the property and the public purpose that it serves. It is a strict test applying when the government physically occupies the property. The elimination of the owner´s right to exclude others is presumptively classified as a violation of the core of property, i.e. as so substantial that it always constitutes a taking. Under German law an interference with property would amount to a destruction of the core of property only if it would constitute a violation of the "institutional guarantee" of property which includes the private use test as well as the requirement for the legislature to assign the property right to a right holder who also stands to enjoy and effectively dispose of that right. A restriction of the right to exclude as in Loretto could be viewed as a partial expropriation (in case of removal of an independent right *in rem*), or a legislative content determination requiring a balancing of interests and mitigating, compensatory measures. As already outlined above, section 76 of the German Federal Telecommunications Act opted for the solution of a proportionate content determination.

The second form of categorical taking is the "Lucas taking". In *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)* the US Supreme Court held that it is not consistent with the historical compact embodied in the Takings Clause if a regulation has the effect of eliminating all economically beneficial use pressing private property into some form of public service. In such cases the owner has suffered a per se taking. In the event of a Lucas taking the property owner is entitled to the undiminished value the property had before all the use was taken away. It is permitted to regulate all economic value only if the regulation prohibits uses that would not be permitted under background principles of nuisance and property law. Under German law the legal act reducing property to an empty shell without providing for mitigating measures equivalent to a compensation for expropriation (by analogy to Article 14.3 Basic Law) or without granting the right to get expropriated, should be invalidated and could not be transformed to a lawful expropriation ex post.

7.3.4 Partial expropriation and totality rule

Under US takings law the so called totality rule was set in *Penn Central*. According to this rule an owner´s property may not first be divided into discrete segments, and especially, into the particular segment that was taken and what was left after the taking for the purpose of demonstrating the withdrawal of a distinct segment to be complete and hence compensable. One may not divide the whole property into segments and then treat what was taken as the entire property. Under German law, this problem of "conceptual severance" or "denominator problem" presents itself in three ways: Firstly, partial expropriation is deemed possible, when what is taken (the regulated piece of property) could also be the object of a private agreement (see above section 5). Secondly, in development law, as outlined above, if the unregulated piece of property becomes useless due to the regulation, the owner can avail himself of a right to be expropriated that is granted to him by the regulation (see above section 2.1.5.5). Thirdly, a parallelism of the "denominator problem" can also be found in the context of the application of the German private use test (see above section 2.1.5.3).

8. WEB SITES

www.bundesverfassungsgericht.net – Federal Constitutional Court (BVerfG)
www.bverwg.de – Federal Administrative Court (BVerwG)
www.bundesgerichtshof.de – Federal Court of Justice (BGH)
http://www.bundestag.de – Deutscher Bundestag
www.bmu.de – Federal Ministry for the Environment
www.iuscomp.org – German Statutes in English

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PUBLIC PROCUREMENT LAW

IN THE FEDERAL REPUBLIC OF GERMANY

ANNUAL REPORT - 2012 - Germany

(February 2012)

Prof. Dr. Martin BURGI*

INDEX

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1. INTRODUCTION

Public procurement describes the sector in which government agencies act as contracting entities for either works, goods or other services. With a part of 17 % of the German gross domestic product, the public procurement sector has a high economic relevance. Given this information, it is up to the State to ensure that tender procedures follow the principles of transparency, competition and equal treatment.

In regard to the federal structure of Germany, there are contracting authorities on the level of the Bund and the Länder. Furthermore, the districts, communes or other self-governing bodies are important purchasers as well.

The main goal of German public procurement law is to secure the interests of the enterprises and bidders and to make sure that the three principles of public contracting, transparency, competition and equal treatment, are inherent in every tender procedure.

2. LEGAL BASES

German public procurement law has its roots in both national and European law. During the last years, the law of the European Union became more and more important. First and foremost the Procurement Directives had a remarkable impact on the public procurement sector in Germany.

2.1 European law

In fact, the influence of European law to the German system of public procurement law keeps on growing. National public procurement law transposes the EU Procurement Directives 2004/17 and 2004/18 (EU Procurement Directives) into German law and integrates these directives into the existing legal structure of national procurement law. The judicial review system is highly influenced by the EU Remedies Directive 2007/66.

The Directives 2004/17 and 2004/18 succeed the former generation of Procurement Directives (Directives 93/36, 93/37 and 93/38). Most importantly, these directives set the so-called threshold values for public procurement which directly decide about the law applicable for the award of public contracts. If the value of a public contract equals or exceeds these values, then the contract needs to be advertised Europe-wide and in line with the law of the Directives.

The Public Sector Directive 2004/18 and the Public Utilities Directive 2004/17 also set the basic principles to be followed when awarding a contract. It is Art. 2 of Directive 2004/18 enshrining the principles of equal treatment and transparency while the principle of competition underlies the different procurement provisions of the Directive. German contracting authorities need to act in line with these principles.

For the first time the EU Procurement Directives 2004/17 and 2004/18 also stipulate that environmental aspects and as well as issues of sustainability have to be considered by public contracting entities when purchasing goods, services or works.

2.2 National law

German public procurement law consists of a multi-layered structure of legal rules. The rules of public procurement divide into three different levels of regulation:

On the first level there are the rules of budgetary law (BHO and LHO – Federal and State Budgetary Regulations) and competition law (GWB – German Act Against Restraints on Competition). On the second stage there is the Procurement Ordinance (Vergabeverordnung – VgV) and (as a special rule concerning utilities) the Utilities Regulation (Sektorenverordnung – SektVO). The latter are both acts of delegated legislation. The third level consists of the so-called procurement regulations which basically contain the most important procedural provisions regarding the award of public works and service contracts (Vergabe- und Vertragsordnung für Bauleistungen – VOB/A, Vergabe- und Vertragsordnung für Leistungen – VOL/A) and regarding contracts having

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professional services as their object (Vergabeordnung für freiberufliche Leistungen – VOF).

Having a closer look on the system, the GWB with its 4th part is the flagship in German procurement law. The §§ 97 - 129 GWB contain the most important rules of public procurement. The fundamental procurement principles are enshrined in § 97 I, II GWB, subjective rights are conferred pursuant to § 97 VII GWB whereas the details of judicial review are laid down in §§ 102 - 124 GWB. It is of utmost importance that the GWB is only applicable if the threshold values are reached.

Setting the threshold values, the VgV complements the rules of the GWB. But its most important task is to ensure that the procurement regulations are applicable. In fact, it is only because of the VgV that the rules of the procurement regulations enjoy the status of norms producing external effects and providing subjective and enforceable rights besides the rules of the GWB. The neuralgic point of the German procurement system, however, is that the reference by virtue of the VgV is not comprehensive. Only the provisions laid down in sections 2 of the regulations of VOL/A and VOB/A are applicable for contracts exceeding the thresholds as only these norms transpose the provisions of the European Procurement Directives. Plus, the VOF is in itself only applicable above the thresholds.

The procurement regulations (VOB/A, VOL/A, VOF) contain additional rules for the tendering procedure. More concrete, they include the actual procedural rules whereas the GWB follows a more or less principle-based approach. These regulations, each covering a different type of contract, are not issued by the legislative authorities themselves which is why they are not considered "law" under the German law regime. In fact, these regulations were created by so called procurement committees. Once again, only the second parts of the VOB/A and the VOL/A as well as all provisions of the VOF produce external effect for above the thresholds contracts exclusively due to §§ 4 - 7 VgV. Below the thresholds, the situation is markedly different. There, the so-called budgetary solution is dominant. This means that neither the GWB nor the VgV is applicable. Plus, only the first part of the procurement regulations are employable – meaning that subjective and enforceable rights are not granted.

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A specific characteristic of German public procurement law is that the award is recognized as the acceptance of an offer. In fact, the award switches the law regime from public procurement law to 'ordinary' civil law.

3. APPLICATION OF PUBLIC PROCUREMENT LAW

3.1 Important terms

For an overview of German public procurement law it is essential to know some of the important terms regarding the tendering procedure.

Probably the most important terms are the terms "selection and award criteria". Contracts are awarded to operators that are suitable with regard to the subject of the contract (see § 97 para. 4 GWB). A bidder is considered suitable if he possesses reliability, technical knowledge and efficiency. Award procedures are won by the most economically advantageous tender (see § 97 para. 5 GWB). Therefore the price is not the only decisive criterion. But without doubt, the price is still the most crucial factor when deciding about the most economically advantageous tender.

In fact, other criteria are now admissible due to the substantial public procurement law reform in 2009. These so-called "secondary criteria" are only permitted if federal or state law provides for them. § 97 para. 4 GWB now explicitly provides for the permission to consider social, environmental and innovative aspects if they are related to the subject-matter or the performance of the contract and either indicated in the contract notice or in the specifications.

§ 97 para. 3 GWB declares an obligation to take small and medium-sized enterprises into serious consideration as another specific characteristic of German public procurement law.

3.2 The tendering procedure

Basically there are four different ways in German public procurement law to award a public contract:

- Open procedure: In this procedure all interested contractors may participate and submit a bid;

- Restricted procedure: This is a 2-step-procedure. As a first step the contract authority publishes an invitation to participate. Then a limited number of the interested economic operators are selected by the contract authority to submit a tender;

- Negotiated procedure: In this procedure the contracting authority consults the economic operators of its choice either with or without a contract notice. The contracting authority negotiates the terms of the contract with one or more of the chosen operators (in fact, this procedure is chosen in Germany quite often);

- Competitive dialogue: This procedure starts with the contracting authority issuing a contract notice and a descriptive document setting out the authority`s needs and requirements. Then the contracting authority conducts a dialogue with the chosen economic operators the aim of which is to identify and define the means and solutions best suited to meet the requirements and satisfy its needs. The competitive dialogue is normally used in case of particularly complex contracts (e. g. Public Private Partnerships).

In general, the open procedure enjoys priority over the other procedures. Restricted procedure, negotiated procedure and the competitive dialogue are exceptional procedures and only permissible if an explicit exception allows their use.

A ‘usual’ tendering procedure starts with the contract notice in which the contract authority declares its interest to award a contract. The contract notice needs to give every interested party sufficient information about the subject-matter of the contract so that the potential bidders can make their decision whether to participate in the procedure or not. In order to ensure that every candidate interested in the award procedure is able to participate, the contract notice has to be published in daily newspapers, on websites or other official publications. The tendering procedure ends with the award (Zuschlag) which is won by the most economically advantageous bidder.

4. LEGAL PROTECTION

The German remedy mechanisms available in procurement law are integrated in a two-stage system relating to the fact that German procurement law differentiates between contracts above and below the thresholds.

4.1 Above the thresholds

Full legal protection is only granted for public contracts above the thresholds. More concrete, judicial review for contracts above the thresholds bases on a two-level system. The first instance of judicial review is granted by the so-called Judicial Review Chambers (Vergabekammer). They exist on the State and on the federal level. Judicial Review Chambers are not part of the jurisdiction in the strict sense though. Decisions made by the Judicial Review Chambers therefore do not appear as judgments but rather as administrative acts (Verwaltungsakt), see § 114 para. 1 GWB.

On the second instance, decisions made by the Judicial Review Chambers can be challenged in front of specialized and experienced Review Senates (Vergabesenate) situated at the Higher Regional Courts (Oberlandesgerichte). The Judicial Review Chambers' decisions need to be challenged with an immediate appeal (sofortige Beschwerde) within two weeks.

Legal protection in German public procurement law is only granted with the following conditions to be fulfilled:

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- an interest in the award by the bidder (generally proven by the submission of an offer)

- a violation of individual rights provided for by the public procurement law (§ 107 para. 2 GWB)

- a harm as a consequence of the violation of public procurement provisions

- a prompt complain to the contracting authority with regard to the asserted violation (§ 107 para. 3 GWB)

An application for review has a suspensive effect. That means that with an ongoing review by the procurement review chamber the contract authority is not permitted to award a contract to any bidder. Contracts awarded during a review procedure are void.

4.2 Below the thresholds

In tendering procedures below the EU thresholds, the GWB is not applicable. Such tendering procedures are only guided by budgetary law and the first part of the procurement regulations. Due to these circumstances the Judicial Review Chambers are not competent for legal protection and the fully equipped review system by the GWB is not available either.

Until lately it was even uncertain which Courts were held competent for review below the thresholds. In the meantime, it became the prevailing opinion that the civil courts have jurisdiction.

The Federal Ministry of Economics started a public consultation in summer 2010 in order to improve the review situation below the thresholds. This will certainly shape the future of legal protection for bidders applying for contracts with a minor value and it will certainly give better attention to the pecularities of public procurement law below the value thresholds. Nonetheless, legal protection below the EU thresholds will remain a hot topic.

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PUBLIC UTILITIES

ANNUAL REPORT 2011 – Germany

(Juni 2011)

Prof. Dr. Hinnerk WISSMANN

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1. INTRODUCTION

1.1 Public utilities in Germany

In Germany the appliance of infrastructure and universal services has traditionally been a public duty in modern state. However there is no constitutional range of public utilities as a general rule but normally a setting of organization and volume by the legislative authorities. [1]

Since the 1990ies many former publicly owned enterprises (like the „Deutsche Bundespost") have been privatised. Henceforward we have two different kinds of public utilities: On the one hand there is a (private) „regulated industry", which fullfills services in the areas of provision of energy (generation and transportation), telecommunication and railways. In many cases the main enterprises are legal successor of formely public enterprises such as "Telekom", "Postbank" or "Deutsche Bahn". The government has retained only small shareholdings in these enterprises. Instead, a special form of regulation has been established: Regulated industries are committed to share their network with competitors („Zugangsregulierung" – regulation of access); also the proposal of services is under governmental control with regard to availability („Universaldienstleistungen" – universal services) and adequate prices ("Entgeltregulierung" – regulation of fees).

On the other hand, services in the areas of water supply, local provision of energy, local public transport, waste management and medicial institutions are often offered by local public enterprises. Most of these duties are delegated by legislative acts. Those enterprises can be organized under public or civil law („Formenwahlfreiheit").In many cases we see a public-private-partnership („gemischtwirtschaftliche Unternehmen").

In 2010/2011 some memorable changes took place in questions concerning public utilites. First of all the Bundesverfassungsgericht has given its judgement about the binding by fundamental rights in cases of public-private enterprises („Fraport").[2] Then there is the end of nuclear power plants by law in July 2011 (after the Fukushima disaster), which will

1 Wißmann, in: Hoffmann-Riem/Schmidt-Aßmann (Hrsg.), Grundlagen des Verwaltungsrechts, Band I, 2. Aufl. (i.E.), 2012, § 15 Rn. 10 ff., 57.

2 See below 1. c).

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lend to far-reaching changes in the cases of energy production and transportation.[3] In some sectors we see a „Re-Municipalization“ after a long time of privatization.

1.2 Guidelines by European Law

For both parts of public utilities there is important guidance by the Law of the European Union: Regulated industries are mainly formed by European directives. The normal organization of public administration in Germany is modificated: The “Bundesnetzagentur” has been found as a separate higher federal authority for regulating the sectors Electricity, Gas, Telecommunications, Post and Railway. Its task is to provide for the further development of these markets. For the purpose of implementing the aims of regulation, the Agency has special rights of information and investigation as well as the right to impose graded sanctions. Those decisions are made by independent ruling chambers, which have a specific kind of discretion („Regulierungsermessen“).

The local public enterprises have to follow the EU laws on state aid and competition rules. In principle economic activities are not forbidden as long as they are out of privilege. The municipal ordinances decreed often give noticeably stricter guidelines: public enterprises must be justified by a public purpose and private undertakings must not be in an equally good position to provide the services.[4]

1.3 Especially: Judgement „Fraport“ by the Bundesverfassungs-gericht

For a long time there were question marks wether enterprises owned by both private owners and the state (gemischtwirtschaftliche Unternehmen) are directly bound by the fundamental rights. In 2011 the Bundesverfassungsgericht set a clear concept: “The use of private-law forms of organisation does not exempt state authority from its being bound by the fundamental rights pursuant to Article 1.3 GG. Like public enterprises that are in the sole ownership of the state and are organised in the forms of private law, enterprises owned both by private owners and the state (..) on which the public authority has a controlling

[3] See below 2.1.

[4] Ziekow, Öffentliches Wirtschaftsrecht, 2. Aufl. 2010, § 7 Rn. 39 ff.; Vollmöller, in: Schmidt/Vollmöller (Hrsg.), Kompendium Öffentliches Wirtschaftsrecht, 3. Aufl. 2007, § 5 Rn. 33 ff.

influence, are directly bound by the fundamental rights. Pursuant to Article 1.3 GG, the fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law. They do not only apply to certain areas, functions or forms of action of the state's assumption of its responsibilities but comprehensively bind state authority in its entirety." [5]

In this case an action against Fraport AG was unsuccessful in all instances, concerning the ban on demonstrating and on expressing one's opinion imposed with regard to the premises of Frankfurt Airport. Fraport Aktiengesellschaft is a stock corporation. The majority was shared in public ownership, (now) divided between the *Land* (state of) Hesse and the City of Frankfurt am Main.

The Bundesverfassungsgericht established that the "controlling influence" is the case if more than half of the shares are publicly owned. "The assumption that not only the shareholders but also the respective enterprise itself are directly bound by the fundamental rights corresponds to the enterprise's nature as a single operating entity; this assumption ensures an effective binding force of the fundamental rights irrespective of whether, to what extent and in what form the owner or owners can exert an influence under company law on the management of business and of how, in the case of enterprises with different public shareholders, a coordination of the influence rights of several public owners can be guaranteed."[6] This guideline is formulated as a "general rule", it will work for all sectors of public utilities.

2. INDIVIDUAL SECTORS

2.1 Energy

The German energy sector turns out to be very inconsistent. Though private companies entered the market early compared to other sectors of general public services,

[5] BVerfG, Urt. v. 22.2.2011 – 1 BvR 699/06 -, http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222_1bvr069906.html (Download vom 1.12.2011). (Press release no. 18/2011 of 22 February 2011).

[6] BVerfG, Urt. v. 22.2.2011 – 1 BvR 699/06 -, http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222_1bvr069906.html (Download vom 1.12.2011). (Press release no. 18/2011 of 22 February 2011).

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there were many local monopolies due to concession and demarcation contracts. On the level of power generation there are municipal enterprises operating, whose market share sums up to 54.2 % concerning electricity, 58.2 % concerning thermal energy and 67.7 % concerning the gas sector.[7] Since the corresponding legislation (EnWG)[8] came into effect in 2005 the energy sector has been facing regulation according the operation of electricity networks.[9] In the field of transmission system operators four private enterprises dominate the German market: Tennet TSO GmbH (= formerly E.ON), 50hz Transmission GmBH (= formerly Vattenfall), Amprion (= formerly RWE Transportnetz Strom GmbH; RWE still holds about 25 % of the shares)[10] and EnBW Transportnetze AG (a full subsidiary of EnBW which again is partly owned by the federal state Baden-Württemberg).

The most substantial change in the energy sector in 2010 and 2011 has been the (renewed) statutory nuclear phase-out in answer to the reactor catastrophe in Fukushima.[11] Seven older vessels have been removed from the network and decommissioned for good. The 13th amendment to the Atomic Energy Act (AtomG) dated from July 31st, 2011[12] takes back the lifetime extension (granted only three months earlier) and additionally sets a fix date (December 31st, 2022) for the final shutdown of all German nuclear power plants.[13] Therefore the decision to extend respectively to even expand nuclear power made in late 2010 is outdated; the German energy policy now focuses on a massive support of renewable energy ("Energiewende" – Energy Turnaround).[14]

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7 Statistics given by VKU ("Verband kommunaler Unternehmen e.V." – Association of municipally determined infrastructure, cf. www.vku.de.) dated from August 26th, 2011; see http://www.vku.de/grafiken-statistiken/statistik.html (latest download on December 7th, 2011).

8 Second Amendment to the Revision of Energy management legislation, July 7th, 2005 (Federal Law Gazette I, p. 1970).

9 Britz, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 9 Recital 1.

10 Cf. the corresponding press release dated September 6th, 2011; see http://www.rwe.com/web/cms/de/37110/rwe/presse-news/pressemitteilung/?pmid=4006769 (latest download on December 7th, 2011).

11 For further information about „Energiewende", see http://www.bmu.de/energiewende/downloads/doc/47467.php (latest download on December 8th, 2011) and http://bmwi.de/BMWi/Navigation/energie,did=405004.html (latest download on December 8th, 2011).

12 Federal Law Gazette I 2011, p. 1704.

13 Sellner/Fellenberg, NVwZ 2011, p. 1025 (1026).

14 Besides the Amendment to the Atomic Energy Act the "Energiewendepaket" contains „Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien" (Revision of legal framework concerning the promotion of power generation out of renewable energies), July 28th, 2011 (Federal Law Gazette I, p. 1634), „Gesetz über Maßnahmen zur Beschleunigung des Netzausbaus Elektrizitätsnetze" (Electricity Network Expansion Acceleration Act), July 28th, 2011 (Federal Law Gazette I,

2.2 Water

The water supply in Germany is to a large extent still carried out by public authorities.[15] According to § 50 I, II WHG (Law on water resources) the public water supply shall as a duty of general interest be primarily covered by making use of local water occurrences.[16] Generally there are local monopolies that are protected by concession and demarcation contracts and strengthened by statutory obligation of connection and usage.[17] According to VKU statistics the market share of municipal enterprises adds up to 76.3 %, statistics of BDEW[18] actually see the market share of water distribution companies owned by public authorities at about 96 %.[19]

Attempts to privatise the public water supply have not been successful so far.[20] The feeding-in of water provided by other distribution companies into the existent network is seen critically, as an intermixing technically comes along with an "extensive loss of quality".[21] Furthermore there is no adequate interconnected network system.[22] Due to the

p. 1690), „Gesetz zur Neuregelung energiewirtschaftlicher Vorschriften“ (Revision of prescriptions concerning energy industry regulation), July 26th (Federal Law Gazette I, p. 1554), „Erstes Gesetz zur Änderung schifffahrtsrechtlicher Vorschriften“ (First Law amending waterway legislation), July 22nd, 2011 (Federal Law Gazette I, p. 1512), „Gesetz zur Förderung des Klimaschutzes bei der Entwicklung in den Städten und Gemeinden“ (Act on the promotion of climate protection in municipal development), July 22nd, 2011 (Federal Law Gazette I, p. 1509), „Gesetz zur Errichtung eines Sondervermögens ‚Energie- und Klimafonds'“ (Law on the establishment of a fund „Energy and Climate Fund“), July 29th, 2011 (Federal Law Gazette I, p. 1702).

15 Laskowski, KritJustiz 2011, p. 185 (185). Whereas there is a special model in Berlin: The „Berliner Wasserbetriebe“ (Berlin Water Works) are run as a public-law institution, the City of Berlin however only owns 50.1 %, while 49.9 % of the shares are hold by the private enterprises RWE and Veolia, cf. the figures on the website http://www.bwb.de/content/language1/html/881.php (Latest download on December 8th, 2011).

16 So Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 1 f.

17 Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 7 m.w.N. Also see the field exemption in § 131 VI GWB.

18 Bundesverband der Energie- und Wasserwirtschaft (German Association of Energy and Water Industries), cf. www.bdew.de.

19 According to the statistics in „Branchenbild der deutschen Wasserwirtschaft 2011“, see http://www.bdew.de/internet.nsf/id/40873B16E2024175C125785A00350058/$file/110321_Branchenbild_dt_WaWi_2011_Langfassung_Internetdatei.pdf (latest download on December 7th, 2011). Similar figures (only 4 % of water supply in private hands) stated by the „18. Hauptgutachten der Monopolkommission“, Bundestag printed papers 17/2600, p. 49.

20 Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 4 with further evidence. Critical Laskowski, KritJustiz 2011, p. 185 ff. The latest attempt by the „Monopolkommission“ (18. Hauptgutachten der Monopolkommission 2008/2009, Bundestag printed papers 17/2600, p. 49 ff.) has been rejected by the government (Statement dated December 17th, 2010, Bundestag printed papers 17/4305, p. 4 (Recital 12, 13)), cf. Laskowski, KritJustiz 2011, p. 185 (185).

21 Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 6 with further evidence.

still existing market foreclosure and for the lack of sector specific legislation the area of water supply regulation in this respect takes an "exceptional position".[23]

2.3 Rail

During a long period rail traffic in Germany was exercised as a public responsibility by the Federation ("Bundesbahn"). That is why today the fundamental rules are still lying in the German Constitution (Art. 87e GG); furthermore the "Allgemeines Eisenbahngesetz" (AEG - General railway act) is to apply. The "Deutsche Bundesbahn" (German Federal Railway) was formally privatised in 1994 by the incorporation of the "Deutsche Bahn AG" (DB AG - German Railway Inc.). As part of the unbundling the infrastructure companies were spun off, when in 1999 "Deutsche Bahn Holding" was incorporated (now "DB Netz AG" – German Railway Network Inc.), holding 100 % of the shares of each "Deutsche Bahn AG" and "DB Netz AG". The holding itself is fully owned by the German Federation. A scheduled partial privatization was cancelled in 2008. Beside the "Deutsche Bahn AG" there are 398 other railroad traffic companies, partly operated by municipal enterprises[24], as well as 359[25] railroad infrastructure companies (that are to some extent identical with the traffic companies).[26]

The integration between the sub-companies of "Deutsche Bahn" is a typical problem of competition and regulation law. Concerning the unbundling of "Deutsche Bahn" the Bundesverwaltungsgericht (BVerwG - Federal Administrative Court) decided in 2010, that the infrastructure company "DB Netz AG" is not allowed to consult the legal department of "Deutsche Bahn Holding" which is at the same time owner of the traffic company "Deutsche Bahn AG".[27]

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22 Schalast, N&R 2005, p. 110 (111 f.).

23 Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 21.

24 Figures to download on http://www.eba.bund.de/cln_033/nn_202596/DE/Infothek/Eisenbahn-unternehmen/EVU/evu__node.html?__nnn=true (latest download on December 8th, 2011).

25 In comparison: „DB Netz AG" runs 5982, „DB Regionetz AG" another 275 stations. Figures to download on http://www.eba.bund.de/cln_033/nn_204050/DE/Infothek/Eisenbahnunternehmen/EVU/evu__node.html?__nnn=true (latest download on December 13th, 2011).

26 Figures to download on http://www.eba.bund.de/cln_033/nn_204046/DE/Infothek/ Eisenbahnunternehmen /EIU/eiu__node.html?__nnn=true (latest download on December 13th, 2011).

27 BVerwG, May 18th, 2010 – 3 C 21.09 -, = BVerwGE 137, 58-74.

2.4 Telecommunication

In Germany the telecommunication market has been passed into private hands in a particular resolute way (Art. 87f GG[28]). Today, the "Deutsche Telekom AG" (German Telekom Inc.) is a largely privatized enterprise. However, the German Federation still holds 14.95 % of the shares, the state-run "Kreditanstalt für Wiederaufbau" (Reconstruction Loan Corporation) [29] holds another 17.02 %.[30]

By Art. 87f Par. 2 Sect. 1 GG the German Federation is obligated to guarantee a basic service.[31] Due to the advances in technology this is more about partaking in this progress (e.g. faster internet), less about losing previous standards (which is still imaginable in the area of wired technologies though).

Actual regulation applies on companies with "significant market power"[32] that are obligated to provide universal services where necessary. The regulation carried out by the BNetzA relates to network access (obligation on companies with significant market power, §§ 19-25 TKG) and remuneration control (§§ 30-39 TKG) based on a previous market definition (§ 10 TKG) and market analysis (§ 11 TKG).

2.5 Post

Similar to the area of telecommunication, the German legislator was bound to effect privatization by Art. 87f GG. The "Deutscher Bundespostdienst" (German Federal Postal Service) was converted into "Deutsche Post AG" (German Mail Inc.) in 1995

[28] In Germany the directives of the first generation (Directive on implementation of open network provision 90/387/EG, Directive on general authorization and individual licenses 97/13/EG, Directive on interconnection 97/33/EG, Directive on personal data and protection of privacy 97/66/EG; Regulation on unbundled access Nr. 2887/2000) caused a substantial change an administrative law. Again the same applies for the Reform in 2002 (Framework Directive 2002/21/EG, Authorization Directive 2002/20/EG, Access Directive 2002/19/EG, Universal Service Directive 2002/22/EG, Directive on privacy and electronic communivations 2002/58/EG).

[29] Public-law institution, to 80 % owned by the Federation, to 20 % by the States („Länder").

[30] Statistics dated September 2011, see http://www.telekom.com/dtag/cms/content/dt/de/8822 (latest download on December 6th, 2011).

[31] „Universaldienst" (Universal service), cf. §§ 78 ff.TKG.

[32] Ruthig, in ders./Storr, Öffentliches Wirtschaftsrecht, 3rd edition, § 6 Recital 592.

(known as "Postreform II"), too. In 2000, the company went public, in 2010 30.5 % of the shares were still held by KfW-Banking Group.[33]

The German Federation bears responsibility for providing universal services (Art. 87f GG), but can put companies with significant market power in charge, §§ 11 ff. PostG (Postal Act) via the Bundesnetzagentur. The regulation in the area of postal services focuses less on network access (see § 29 PostG though) but on remuneration control, §§ 19 ff. PostG.

In 2011 the German legislator has enacted a revision of PTSG[34] concerning both the postal and the telecommunication area, which enables him to put the large service provider in charge of maintaining the corresponding infrastructure at times of crisis. Some real innovation has been brought by the legislation on de-mail-services[35] which is the bases for the launch of "E-Postbrief" (a secured electronic document dispatch) by "Deutsche Post AG".[36]

3. Conclusion

Public utilities play a decisive role in the German economy. They operate especially there, where a free market is not able to effect the required performance because of high or extremely differing costs at multiple sites or because of existing natural monopolies. Concerning the role of the state several possibilities arise: As a renderer of service, as one party in public-private-partnerships or as a regulating authority. In the future these differing models will still be seen side by side in the miscellaneous sectors in Germany.

33 Annual report 2010, see http://www.dp-dhl.com/content/dam/Investoren/Publikationen/DPDHL_Geschaeftsbericht_2010.pdf (latest download on December 6th, 2011).

34 Law to ensure postal and telecommunication services under special circumstances, March 24th, 2011 (Federal Law Gazette I, p. 506 and 941).

35 De-mail-Act, April 28th, 2011 (Federal Law Gazette I, p. 666).

36 For further information see Gramlich, Das Postrecht in den Jahren 2010/2011, N&R 2011, p. 253 (258 f.).

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