

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by France****4 June 2019**

This document reproduces a written contribution from France submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

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<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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**JT03448043**

## France

1. The analysis of the judicial oversight of the *Autorité de la concurrence* requires attention to several points: the determination of the judge of competition regulation (1), review on the merits of the decisions of the *Autorité de la concurrence* (2), oversight of its investigative measures (3), oversight of the institutional design of the *Autorité* (4), as well as the temporal and material scope of judicial oversight (5). In the context of judicial oversight of the *Autorité de la concurrence*, the issue of judges' access to expertise can also be raised (6).

### 1. Judge of competition regulation

2. Litigation concerning the decisions of the *Autorité de la concurrence* is divided between the administrative and judicial authorities and, within the latter, between the civil and criminal courts. The review of conduct thus falls within the jurisdiction of the judicial judge (1.1), while the administrative law judge has a reserving jurisdiction for the review of market structure (1.2).

#### 1.1. Review of conduct: transfer of jurisdiction to the judicial judge

3. The review of conduct falls within the jurisdiction of the judicial judge. The civil law judge is competent for decisions on anticompetitive practices (1.1.1), while the review of the means of investigation is the responsibility of the criminal law judge (1.1.2).

##### 1.1.1. Jurisdiction of the civil law judge

4. In 1986, the legislator wanted the decisions of the *Conseil de la concurrence* on anticompetitive practices to be submitted to the civil law judge rather than to the administrative law judge, who is nevertheless a common law judge of the administration. This derogation from the traditional rules of jurisdiction was justified by the desire to create a “block of jurisdiction” with other litigation, such as commercial or compensation claim litigation, under the jurisdiction of the judicial judge. However, this attribution of jurisdiction was not affected by the ordinance of 1 December 1986 but was the subject of a separate parliamentary bill, passed on 20 December 1986.

5. The French Constitutional Council (*Conseil constitutionnel*) has accepted that the legislator, in the interest of the proper administration of justice, may attribute this litigation to the judicial system principally concerned “when the application of specific legislation or regulations could give rise to various contentious litigation which would be divided, according to the usual rules of jurisdiction, between the administrative court and the judicial court”<sup>1</sup>.

6. The Paris Court of Appeal has jurisdiction in matters relating to the litigation of anticompetitive practices. This jurisdiction derogates from the traditional rules on the assignment of jurisdiction.

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<sup>1</sup> CC, 23 January 1987, 86-224 DC, Law transferring the litigation of decisions of the *Conseil de la concurrence* to judicial jurisdiction.

7. It should be noted that some non-regulatory decisions of other economic regulatory authorities (such as the *Autorité des marchés financiers*, French Telecommunications Regulator (Arcep), French Energy Regulatory Commission (CRE), Rail and road regulatory body (Arafer) and the High Authority for the Dissemination of Works and the Protection of Rights on the Internet (Hadopi)) also fall under the jurisdiction of the judicial judge.

### *1.1.2. Jurisdiction of the criminal law judge*

8. Litigation concerning the means of investigation comes under the oversight of the criminal law judge. The authorisation and review of the conduct of dawn raids are the jurisdiction of the criminal law judge, i.e. the liberty and custody judge and in the event of an appeal, the first president of the appeal court of the liberty and custody judge (at first instance) and then the criminal division of the French Supreme Court (Cour de cassation) in the event of an appeal. This is true of the jurisdiction conferred by the Constitution on the judicial judge to safeguard individual freedoms. Thus, in a 1983 decision<sup>2</sup>, the Conseil constitutionnel, in the case of inspections concerning tax matters, sanctioned certain provisions of the 1984 Finance Law, the first text legalising the administration's power for surprise inspections, ruling that the intervention of the judicial judge was not sufficiently precise, since "such investigations can be conducted only in accordance with Article 66 of the Constitution, which entrusts the judicial authority with the protection of individual freedom in all its aspects."

## **1.2. Review of market structure: full jurisdiction of the administrative law judge**

9. On the other hand, judicial oversight of merger decisions, which carries out *ex ante* review of market structure and not, as in the case of anticompetitive practices, *ex post* review of conduct, remains the jurisdiction of the administrative law court, more precisely the French Administrative Supreme Court (*Conseil d'État*) ruling in first and last instance. The principle of assigning litigation concerning decisions of public bodies taken in the exercise of their prerogatives as public authorities was thus preserved - it being recalled that, until 2009, the Minister of the Economy was responsible for the review of mergers.

10. This litigation does not fall within the scope of the assumptions of derogation from the principle which guarantees the administrative court a monopoly on the annulment and reform of laws of public authority: "*By virtue of a fundamental principle recognised by the laws of France, with the exception of matters reserved by nature to the judicial authority, the ultimate jurisdiction of the administrative court lies with the annulment or reform of decisions taken by the authorities exercising executive power in the exercise of the prerogatives of public authority.*"<sup>3</sup>

11. In addition, it is necessary to focus on the review on the merits of the decisions of the *Autorité de la concurrence*, which varies according to whether the case is before a judicial or administrative law judge.

<sup>2</sup> CC, 29 Dec. 1983, 83-164 DC.

<sup>3</sup> Conseil d'État, 7 November 2005, *Cie générale des eaux*, in a case concerning the respective powers of the Minister and the *Conseil de la concurrence*.

## 2. Review on the merits of the decisions of the *Autorité de la concurrence*: full jurisdiction and review of legality

12. The judicial judge exercises full jurisdiction of an administrative nature (2.1). The administrative law judge exercises full review over the legality of the *Autorité de la concurrence*'s decisions clearing mergers in the context of an action for abuse of power, as well as full jurisdiction of decisions rendered on the basis of IV of Article L. 430-8 of the French Code of Commercial Law (*Code de commerce*) (2.2).

### 2.1. Review by the judicial judge

13. The appeal to the Paris Court of Appeal is by nature hybrid (2.1.1). This review of full jurisdiction is expressed in particular by a power to review fines and injunctions (2.1.2).

#### 2.1.1. *The hybrid nature of proceedings before the Paris Court of Appeal*

14. The proceedings before the Paris Court of Appeal are hybrid in nature. This is an action for full jurisdiction brought before a civil law judge, whose office is however very similar to that of the administrative law judge. The appeal is brought before an appeal court of the judiciary and the rules of the trial are the special rules of the *Code de commerce* and, failing that, those of the French Code of Civil Procedure (*Code de procédure civile*). In material terms, this judicial review is not an appeal but a first instance review intended to “annul or reform” unilateral administrative acts.

15. However, the appeal court may have to refer the case back to the *Autorité de la concurrence* for a decision to be annulled before notification of the objections. For example, in a case in the cinematographic advertising sector where the *Conseil de la concurrence*, on 29 January 2002, had rejected the referral for insufficient probative value of the evidence on file, the appeal court chose to refer the case back for further investigation<sup>4</sup>. The appeal court may also decide to refer the case back to the *Autorité* when further investigation is required, even after the objections have been sent<sup>5</sup>. The court confirmed its solution in the *Vendée Vedettes case*<sup>6</sup>.

16. It should be noted that in practice, it is a specialised chamber of the Paris Court of Appeal that is responsible for dealing with the *Autorité*'s decisions imposing fines, which ensures that judges are fully aware of this complex litigation.

#### 2.1.2. *The power to review fines and injunctions*

17. This review of full jurisdiction proceedings is expressed by a power to review fines and injunctions. The appeal court may reduce the fine but may also increase it, on

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<sup>4</sup> CA Paris, 24 September 2002, 2002-04232, Mediavision and Jean Mineur.

<sup>5</sup> Cass. com. 26 February 2008, Brenntag, confirming the appellate decision in a case where the court reversed, due to insufficient investigation, a decision stating that the alleged practices were not established.

<sup>6</sup> CA Paris, 20 December 2012, 2011/05667, Vedettes Inter-îles Vendéennes v. Régie départementale des passages d'eau de la Vendée.

application by the Minister or a party<sup>7</sup>. The appeal court also exercises its power of reform with respect to injunctions, which it may amend<sup>8</sup>.

18. With regard to the review of the method of calculating the penalty, it should be noted that the judicial judge considers that the notice on fines published by the *Autorité de la concurrence* in May 2011 “constitutes a directive in the administrative sense of the term, which is enforceable against it [i. e. to the *Autorité*], unless it explains, in the reasons for its decision, the particular circumstances or reasons in the public interest leading it to depart from it in a given case,” so that the appeal court must ensure, when requested, that the *Autorité* has complied with its notice on fines<sup>9</sup>.

## 2.2. Oversight by the administrative law judge

19. The administrative law judge exercises full oversight over the legality of the decisions by the *Autorité de la concurrence* to clear mergers in the context of an action for abuse of power (2.2.1), as well as an oversight of full jurisdiction of the *Autorité*'s decisions qualified as merger fines (2.2.2).

### 2.2.1. Review of legality

20. The French Administrative Supreme Court (*Conseil d'État*), as an administrative law court, exercises full oversight over the legality of the *Autorité*'s decisions to clear mergers, in the context of an action for abuse of power<sup>10</sup>. The same applies to all appeals against individual decisions by economic regulators concerning applications for approval or clearance (CSA, Arcep, etc.). The review by the *Conseil d'État* is governed by the structure for litigation concerning abuse of power which distinguishes between the external legality of the contested law (jurisdiction of the author of the law, procedure, form) and its internal legality (errors of law, assessment and misuse of power). In particular, it may review the competitive analysis retained by the *Autorité* or the corrective measures to address any identified competition concerns. On the latter point, its review is specially thorough, since it is similar to a control of proportionality specific to administrative police decisions<sup>11</sup>. In this respect, the *Conseil d'État* verifies that the corrective measures adopted (commitments, injunctions or prescriptions) make it possible to remedy the harmful effects

<sup>7</sup> CA Paris, 11 January 2005, Sté France Télécom: judgement by which the Paris Court of Appeal, on France Télécom's appeal, and the cross-appeal by the Minister of Economy, against the decision of the *Conseil de la concurrence* sanctioning it for non-compliance with an injunction on the high-speed Internet access market, reviewed the decision by doubling the initial fine; confirmation by the *Cour de cassation* (Cass. com., 14 March 2006, Sté 9 Télécom réseau), which states that the court thus used its “power to assess the proportionality of the fine”.

<sup>8</sup> CA Paris, 29 April 2003, France Telecom/Cegetel, which restricts the scope of the protective measures imposed by the *Autorité*, in a “concern for the proportionality of the measure in relation to the interests in question”; CA Paris, 17 September 1992, GIE Géosavoie, the appeal court has, on its own initiative, amended the injunction issued by the *Conseil* by completing it.

<sup>9</sup> Cass. com. 18 October 2016, Sanofi et al.

<sup>10</sup> See *Conseil d'État*, 9 April 1999, The Coca-Cola Company, 201853, in *recueil*; *Conseil d'État*, 21 December 2012, Canal Plus Group and others, 362347, in *recueil*; *Conseil d'État*, hearing an appeal against a decision clearing a merger, rules as a court judging abuses of power.

<sup>11</sup> *Conseil d'État*, 19 May 1933, Benjamin, in *recueil*.

of the merger without unduly restricting the freedom of enterprise of the parties to the merger. It shall ensure that these measures are appropriate, necessary and proportionate.

21. The office of the merger judge is limited. As Vincent Daumas indicates in his submissions on the case of Groupe Canal Plus: “The merger control judge seems to us to have to assess the legality of the administrative decision challenged on the date of the latter. He should limit his own decision to an annulment, which will most often be total but which may, in certain cases, be only partial, it is the responsibility of the administration, if necessary, to take up the case and rule again, to the extent of the annulment pronounced.”

22. Consequently, in the event of an appeal against a decision clearing a merger subject to the fulfilment of commitments entered into by the parties, the *Conseil d'État* may not, in the event of an error affecting the competitive analysis or corrective measures, reform the contested decision and carry out a new competitive analysis or decide to replace the remedies considered unlawful with other remedies. Thus, in this case, it has only the power to revoke the contested merger clearance<sup>12</sup>.

### 2.2.2. Review of full jurisdiction

23. The limited powers of the court judging abuses of power responsible for the litigation of merger decisions are in contrast with those of the court of full jurisdiction for reviewing fines imposed by the *Autorité de la concurrence* on the basis of IV of Article L. 430-8 of the *Code de commerce*. An emblematic case concerns the clearance for Vivendi Universal and Canal Plus Group to acquire Canalsat and TPS. Since an appeal was lodged against the decision of 20 September 2011 by which the *Autorité* withdrew the clearance for this merger issued by the Minister and ordered them to pay a fine for failure to comply with the commitments entered into, the *Conseil d'État* confirmed the validity of the withdrawal of the clearance and reduced the amount of the fine. On the same day, the *Conseil d'État* ruled on the appeal against the *Autorité's* decision of 23 July 2012, having subsequently cleared, after re-notification, the same merger and issued a series of injunctions, and confirmed both the new clearance in the absence of an error of assessment by the *Autorité*, and the proportional nature of the injunctions attached to it<sup>13</sup>.

24. After analysing the review on the merits of the decisions of the *Autorité de la concurrence*, it is now time to focus on the review of investigative measures.

## 3. Review of investigative measures: appeal on the merits and self-standing appeal

25. The jurisdiction of the investigation of cases is, in principle, attached to the appeal on the merits against the final decision (3.1). However, there are self-standing appeals (3.2).

<sup>12</sup> See e.g. *Conseil d'État*, 6 July 2016, Compagnie des gaz de pétrole Primagaz, 390457.

<sup>13</sup> *Conseil d'État*, 21 December 2012 [353856](#) and [362347, 363542, 363703](#): These are two decisions by which the *Conseil d'État* had to hear both the decision on fines and the new clearance decision.

### 3.1. A litigation in principle attached to an appeal on the merits against the final decision

26. It is worth recalling that the *Conseil constitutionnel*, in exercising its review over the right to an effective judicial review, makes a distinction based on the nature of the contested measure. Thus, when the measure is not coercive, the absence of a form of proper appeal is not sanctioned<sup>14</sup>. On the other hand, legislative provisions that do not provide for an appeal against coercive measures are censured as contrary to the right to an effective judicial review<sup>15</sup>.

27. The *Conseil constitutionnel* thus confirmed that, given their nature, the simple investigative measures implemented by the *Autorité de la concurrence* do not require the opening of an immediate and autonomous appeal, since judicial oversight with the final decision and/or in the context of compensation proceedings is sufficient<sup>16</sup>.

### 3.2. Self-standing appeals

28. Dawn raids (3.2.1), as well as decisions relating to the protection of business secrecy (3.2.2), may be the subject of self-standing appeals.

#### 3.2.1. Appeal against dawn raids

29. Because of their nature, dawn raids are carried out with the prior authorisation of the liberty and custody judge, who assesses the value of the evidence in the file to establish the existence of presumptions of anticompetitive practices. Its order may be appealed without suspensive effect to the first president of the appeal court<sup>17</sup>, whose order in turn is subject to appeal before the supreme court. Similarly, the conduct of the dawn raids may be the subject of a self-standing appeal brought before the same judges.

30. All these proceedings are expressly governed by the French Code of Criminal Procedure (*Code de procédure pénale*).

31. It should be recalled that the introduction of this self-standing appeal involving a court challenge at the appeal level is the result of the ordinance of 13 November 2008 modernising the regulation of competition, made as a result of the 2008 *Ravon* judgement<sup>18</sup> in which the European Court of Human Rights (ECHR) held that in matters relating only to inspections carried out on homes, the persons concerned must be able to obtain effective judicial oversight, in fact and in law, of the regularity of the decision ordering the inspection and the measures taken on its basis, and that the appeal must make it possible, in the event

<sup>14</sup> Decision 2011-214 priority ruling on constitutionality of 27 January 2012, COVED, regarding the Customs Administration's right of communication.

<sup>15</sup> Decision 2014-387 priority ruling on constitutionality of 4 April 2014, Mr. Jacques J., on the decision of the president of the general court of first instance authorising surprise inspections in order to combat undeclared labour.

<sup>16</sup> Priority ruling on constitutionality, 8 July 2016, Brenntag.

<sup>17</sup> Art. L 450-4 Section 6 of the French Code of Commercial Law (*Code de commerce*).

<sup>18</sup> ECHR, 21 May 2008, *Ravon et al v. France*.

of an irregularity, to prevent the inspection from taking place or, if it has already taken place, to provide the person concerned with appropriate redress.

32. The system of this appeal further highlights the hybrid nature of litigation before the *Autorité de la concurrence*, which involves elements of criminal procedure but is essentially governed by the rules of civil procedure<sup>19</sup>. The consequences of this double standard are reflected in particular in the application of the case law principle of fair evidence, based on Article 9 of the *Code de procédure civile*, to which the plenary assembly of the *Cour de cassation* has ruled that in matters of anticompetitive practices litigation, the recording of telephone conversations without the knowledge of the persons concerned constituted an unfair procedure rendering the evidence obtained inadmissible in court<sup>20</sup> - whereas the situation is different in criminal proceedings where, on the basis of Article 427 of the *Code de procédure pénale*, the criminal court consistently holds that the criminal law judge must admit the same elements, whose probative value is for him only to assess<sup>21</sup>.

### 3.2.2. *Protection of business confidentiality*

33. The litigation of business secrecy protection has provided a recent example of both the evolution of the distribution of litigation between orders of jurisdiction and the establishment of a self-standing appeal.

34. The *Conseil d'État*, before which an appeal was brought against the provisions of the *Code de commerce* providing that decisions by which the General Rapporteur of the *Autorité de la concurrence* refuses to protect business secrecy or grants its lifting could only be challenged in connection with the appeal against the decision on the merits, held that those provisions infringed on the right to an effective judicial review on the ground that such decisions were “likely to adversely affect, by themselves, the parties from whom the documents or elements in question originate”<sup>22</sup>. It further held that the appeal that could be lodged against these decisions fell within the jurisdiction of the *Conseil d'État*, whereas the decisions of the General Rapporteur granting protection of business secrecy or refusing to lift it would continue to be challenged before the Paris Court of Appeal, with an appeal on the merits.

35. The law of 18 November 2016 on the modernisation of justice in the 21st century was passed to unify litigation before the Paris Court of Appeal by providing that these decisions may be appealed for reformation or annulment before the first president of the Paris Court of Appeal, ruling in chambers.

36. The idea, for the legislator, is to entrust the litigation of these decisions to the judge who hears cases concerning anticompetitive practices, insofar as they are taken during their investigation. The law also provides for the suspension of the ten-year limitation period during the exercise of this appeal, in order to avoid any delaying tactics.

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<sup>19</sup> Cass. Com. 3 March 2009: “The provisions of the *Code de procédure civile* yield only to provisions expressly contrary of the *Code de commerce* or amending the procedures for appeals against decisions of the *Conseil de la concurrence*.”

<sup>20</sup> Cass., Plenary Assembly, 7 January 2011.

<sup>21</sup> Crim. Cass., 7 March 2012.

<sup>22</sup> Conseil d'État, 10 October 2014, *Syndicat national des fabricants d'isolants en laines minérales manufacturées*.

37. After examining the review of investigative measures, it is now important to focus on the judicial oversight of the institutional design of the *Autorité de la concurrence* at the level of the French supreme courts, European court and constitutional court.

#### 4. Judicial oversight of the institutional design of the *Autorité de la concurrence*

38. An administrative authority must comply with certain requirements. This review will be considered at the level of the French supreme courts (4.1), the European court (4.2) and the constitutional court (4.3).

##### 4.1. French supreme courts

39. The *Cour de cassation*, then the *Conseil d'État*, meeting in their most authoritative assemblies, ruled that an administrative authority, although not a court, must comply with the requirements laid down in Article 6 Section 1 of the European Convention on Human Rights concerning the right to a fair trial, including from the perspective of impartiality<sup>23</sup>.

40. The *Cour de cassation* also considered that impartiality required that the case officer (*rapporteur*) of the Investigation Services of the *Conseil de la concurrence* should not participate in the deliberations<sup>24</sup>, which constitutes a stricter requirement than that set out by the European court.

##### 4.2. European judge

41. The ECHR, for its part, holds in the *Menarini* judgement<sup>25</sup> that a full jurisdiction appeal against a decision of an administrative authority, which does not itself strictly meet the conditions of impartiality, is sufficient to satisfy the requirements of the Convention. This position was reiterated in a more recent decision, *Grande Stevens* of 4 March 2014, according to which, “Compliance with Article 6 of the Convention does not therefore exclude that in an administrative procedure, a “penalty” is first imposed by an administrative authority. However, it presupposes that the decision of an administrative authority which does not itself fulfil the conditions of Article 6 is subject to subsequent review by a judicial body of full jurisdiction.”

##### 4.3. Constitutional judge

42. The entry into force of the Organic Law of 10 December 2009 initiating the priority ruling on constitutionality broadened the range of resources that parties may develop before

<sup>23</sup> Cass., Plenary Assembly, 5 February 1999, COB v. Oury, 97-16.440; *Conseil d'État, Assemblée*, 3 December 1999, Didier, in *recueil*.

<sup>24</sup> Cass. com., 5 October 1999, *SNC Campenon Bernard et al v. Minister of the Economy*: “The participation of the case officer in the deliberation, even without voting rights, as soon as he has carried out the necessary investigations to examine the facts before the Council, is contrary to the principle [of equality of arms] referred to.”

<sup>25</sup> ECHR, *Menarini*, 27 September 2011.

the appeal judge, by opening the way for a constitutionality review on the legislative regime governing the action of the *Autorité de la concurrence*.

43. With regard to respect for the principle of impartiality, the *Conseil constitutionnel* considered that the *Autorité*'s exercise of the power to fine, following the model of functional separation which guarantees the independence of the investigation services from the Board, was in accordance with Article 16 of the Declaration of 1789<sup>26</sup>. In another decision of 14 October 2015<sup>27</sup>, it declared the functional separation model in accordance with the Constitution, as regards the mechanism for automatic referral of anticompetitive practices, provided for by the Law on New Economic Regulations, known as the "NRE Law", of 15 May 2001. The *Conseil constitutionnel* noted that starting proceedings *ex officio* is not an act of prosecution and is not intended to impute practices to a company, and that compliance with the requirement of impartiality is assessed in the light of all the guarantees provided by the legislator, from the beginning of the investigations to the deliberations of the Board.

44. Thus, although not considered a jurisdiction, the *Autorité de la concurrence* must comply with a number of requirements. It is now necessary to focus on the scope of judicial oversight of its decisions.

## 5. The temporal and material scope of judicial oversight

45. Considering the scope of judicial oversight of decisions by the *Autorité de la concurrence* involves analysing its temporal scope (5.1) as well as its material scope (5.2).

### 5.1. Length of time for judicial oversight of decisions by the *Autorité de la concurrence*

46. Appeals against decisions of the *Autorité de la concurrence* are non-suspensive and its decisions may be the subject of requests for suspension (5.1.1). The administrative law court may also decide to limit the effects of the decision of the appeal court (5.1.2).

#### 5.1.1. Suspension of execution and request for interim relief to suspend a decision

47. The privilege of the prerequisite specific to administrative decisions implies that the decisions of the *Autorité* are enforceable. An application for a stay of execution may, however, be made to the first president of the appeal court (Article L. 464-8, Section 2) if the execution is "likely to lead to manifestly excessive consequences or if new facts of exceptional gravity have arisen since [the decision]." This mechanism thus goes against the general law of civil procedure, which prohibits the judge from ordering an interim execution of legal origin – he can only suspend an interim execution which would result from the express decision of the judge of first instance, as the *Cour de cassation* frequently

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<sup>26</sup> CC 2012-180 of 12 October 2012, in the context of a priority ruling on constitutionality requested by Canal Plus following the appeal against the withdrawal of the TPS/Canalsat merger clearance.

<sup>27</sup> "Société Grands Moulins de Strasbourg S.A. et al", decision 2015-489 QPC.

recalls the prohibition on the judge to order an interim execution which is automatically attached to a decision<sup>28</sup>.

48. It will be recalled that the parliamentary bill, adopted on 20 December 1986, which provided for the allocation of the *Conseil de la concurrence's* litigation to the judiciary, was censured by the *Conseil constitutionnel* on 23 January 1987, on the grounds that the law did not sufficiently guarantee the rights of the defence, in the absence of a mechanism to suspend the execution of decisions subject to appeal before the appeal court.

49. Economic operators affected by decisions of regulatory authorities also often use the interim measures available before the administrative law judge, such as a request for interim relief to suspend a decision, to safeguard a fundamental right or to ask for a necessary measure before a decision is taken; the freedom of trade and industry and the freedom of enterprise have in fact been recognised as constituting fundamental freedoms within the meaning of Article L. 521-2 of the French Administrative Justice Code (*Code de la justice administrative*), and can therefore be invoked in the context of this procedure<sup>29</sup>.

50. There are thus several cases of requests for interim relief to suspend the *Autorité's* merger decisions. However, since the *Conseil d'État* considers that a request for interim relief to suspend a decision loses its purpose if it is directed against an executed administrative decision, it has on several occasions ruled that there is no need to rule on applications for interim injunctions seeking the suspension of a merger clearance as the parties provide proof that the merger has been carried out. For example, in the appeals against the *Bouyer-Leroux/Imerys* case of 27 November 2013 and the *UGI/Totalgaz* case of 9 July 2015, the judge responsible for dealing with urgent matters, having noted that the transactions concerned had actually been carried out, considered that he could not rule on requests for suspension of clearances and limited the subject of the interim measure to the suspension of the execution of commitments.

### 5.1.2. Limiting the effects of the decision of the appeal court

51. The margin of manoeuvre of the court judging abuses of power is binary since it can annul or reject the appeal lodged. Nevertheless, its powers allow, in certain cases, to neutralise the unlawful grounds of a law and the annulment of the contested decision. In addition, when it happens that in the event of annulment of the *Autorité's* decision, the *Conseil d'État* decides to limit its effects. This limitation can take several forms. From a material point of view, the administrative law judge may decide to annul the law in part if he considers that the law is divisible and that legality is only partially affected. It can also modulate the effects of the annulment and postpone its effects.

52. Thus, on this last point, the administrative law judge may decide, in the event of the annulment of a decision, to postpone the effects of such annulment. For example, the *Conseil d'État*, having annulled the decision of 23 July 2012 on the acquisition of sole control of Direct 8 and other companies by Vivendi Universal and Canal Plus, by which the *Autorité de la concurrence* had cleared the merger subject to the effective implementation of the commitments entered into by the parties, noted that the immediate annulment of the clearance would remove any binding value from the commitments entered

<sup>28</sup> Cass, 2ème Civ., 5 May 1993; Soc., 28 June 2001.

<sup>29</sup> *Conseil d'État*, judge responsible for dealing with urgent matters, 12 November 2001, *Commune de Montreuil-Bellay*, 239840, in *recueil*.

into by the parties, whereas the merger had taken place. To avoid such a legal vacuum, it decided that the annulment would take effect only from 1 July 2014 and would only apply for the future<sup>30</sup>.

## 5.2. Material extension of the scope of review: the emergence of an action against soft law

53. By two decisions of 21 March 2016<sup>31</sup>, the Litigation Assembly (*Assemblée du contentieux*) of the *Conseil d'État* allowed the admissibility of actions for abuse of power intended to annul law without decisive impact, known as "soft law" - such as opinions, recommendations, warnings or positions - adopted by regulatory authorities in the performance of their duties, when they are likely to produce significant effects, in particular of an economic nature, or are intended to significantly influence the conduct of the persons to whom they are addressed.

54. The *Conseil d'État* thus found admissible the actions seeking the annulment, on the one hand, of a press release published by the *Autorité des marchés financiers* on its website warning investors against the conditions under which certain investment products were marketed<sup>32</sup> and, on the other hand, of a position paper by the *Autorité de la concurrence* recognising that, for the implementation of a merger decision, a company may acquire exclusive distribution rights for television channels on another company's broadcasting platform<sup>33</sup>. Subsequently, this case law was extended to recommendations issued by the *Autorité* on prudential regulation and resolution on agreements concluded between insurance companies and insurance intermediaries concerning the distribution of life insurance contracts, the purpose of which is to encourage their signatories to significantly change their relationship<sup>34</sup>.

55. Another illustration of an appeal considered admissible results from the decision<sup>35</sup> of 10 November 2016 concerning a deliberation and two CSA press releases indicating to television channel managers that the broadcasting of the disputed message relating to an awareness of Down's syndrome as part of advertising was inappropriate.

56. Finally, more recently, the application of case law on soft law has led the *Conseil d'État* to recognise the admissibility of an action for abuse of power directly against the guidelines of a sector-specific regulator, Arcep<sup>36</sup>.

57. It is worth recalling that, in addition to the *Conseil d'État*, the Paris Court of Appeal has also been called upon to rule, on an exceptional basis on this occasion and not by way of action, on the lawfulness of soft law. Such questions may be referred to this court during implementation of these rulings by the *Autorité* and are then the subject of an appeal. The

<sup>30</sup> *Conseil d'État, Assemblée*, 23 December 2013, *M6 and TFI*.

<sup>31</sup> *Conseil d'État, Assemblée*, 21 March 2016, *Fairvesta International*; *Conseil d'État, Assemblée*, 21 March 2016, *Numericable*.

<sup>32</sup> *Conseil d'État, Assemblée*, 21 March 2016, *Fairvesta International*.

<sup>33</sup> *Conseil d'État, Assemblée*, 21 March 2016, *Numéricable*.

<sup>34</sup> *Conseil d'État*, 20 June 2016, *Fédération française des sociétés d'assurances*.

<sup>35</sup> *Conseil d'État*, 10 November 2016, *Mme Z. et al.*

<sup>36</sup> *Conseil d'État*, 13 December 2017, Bouygues Télécom, 401799, in *recueil*.

court was thus able to rule on the validity and conditions of application of the notice on fines of 16 May 2011, in a *Nestlé Purina* judgement of 10 October 2013. On the one hand, the court confirmed the possibility for the *Autorité* to adopt soft law and, on the other hand, validated the content of the said notice which is in line with the existing legal framework.

## 6. Judges' access to expertise

58. Depending on the nature of the review exercised, it is necessary to distinguish between expertise before the judicial judge, on the one hand (6.1), and before the administrative law judge on the other hand (6.2).

### 6.1. Access to expertise by the judicial judge

#### 6.1.1. A judge in charge of economic regulation

59. The Paris Court of Appeal is organised into eight divisions. Division five deals with economic matters. The tasks within this division are divided among sixteen chambers. Two of them deal with competition issues: Chamber 5-7 "Economic Regulation and Public Finance", hears appeals against decisions of the *Autorité de la concurrence* and Chamber 5-4, "Commercial Contracts", hears other competition issues, in particular actions for damages and restrictive competitive practices. However, the jurisdiction of both chambers goes beyond competition and covers a wide range of economic law issues. Chamber 5-7 is competent for appeals against decisions of independent administrative regulatory authorities (*Autorité de la concurrence*, AMF, CRE, Arcep, Arafer, etc.).

60. Chamber 5-7 signed a contract of objectives and resources with the Ministry of Justice in 2015 giving it more human resources in return for a reduction in the time required to process cases. There are four judges in Chamber 5-7 and they are assisted by a team of specialised assistants (including economists), judicial assistants, assistant clerks and interns. The public prosecutor's office has also been expanded with a specialised assistant, an assistant clerk to the judge and an intern.

#### 6.1.2. Possible recourse to experts

61. Pursuant to the rules of the *Code de procédure civile* (Article 27) and the rules of the *Code de commerce* (Article R.464-10), the Paris Court of Appeal has investigative powers. It shall have the right to hear any person likely to enlighten it and may admit, as such, the oral observations of a person at the hearing.

62. The Paris Court of Appeal, while able to use experts, makes moderate use of them in practice in litigation contesting the *Autorité's* decisions to issue fines. However, it more frequently seeks experts (particularly in economics and finance) for litigation relating to compensation for damages to assist it in assessing its amount.

### 6.2. Access to expertise by the administrative law judge

#### 6.2.1. Special means of investigation

63. The administrative law judge has several possibilities of investigation listed in Articles R. 621-1 et seq. of the French Code of Administrative Justice (*Code de justice administrative*). These are mainly expertise, site inspections, investigations, transmission

of documents or the opinion of a third party whose skills or knowledge would be of such a nature as to enlighten the formation of judgement.

64. In practice, these means of investigation have been used relatively rarely by the *Conseil d'État* in merger litigation. For example, the latter has never appointed an expert in such litigation. This could be explained by the fact that it considers itself sufficiently informed by the decisions of the *Autorité de la concurrence* and any expert opinions produced by the parties to the proceedings.

### *6.2.2. Implemented on a case-by-case basis*

65. Although the *Conseil d'État* makes relatively little use of its additional means of investigation, the action for abuse of power brought against Decision 15-DCC-53<sup>37</sup> shows that it can nevertheless do so. In this case, the *Conseil d'État* carried out two specific investigative measures. On the one hand, it required an investigation before the members of the third litigation chamber of the court judging the appeal. This investigation was intended to shed light on various factual data relating to the contested decision (competitors' storage capacities, condition for implementing the commitments, etc.). On the other hand, the *Conseil d'État*, in an interlocutory judgement<sup>38</sup>, requested the *Autorité de la concurrence* to contribute to the *inter partes* debate the content of two subsidiary commitments entered into by UGI and concealed in the contested decision.

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<sup>37</sup> *Autorité de la concurrence*, Decision 15-DCC-53 of 15 May 2015 on the acquisition of sole control of Totalgaz SAS by UGI Bordeaux Holding SAS.

<sup>38</sup> Conseil d'État, 15 April 2016, *Compagnie des gaz de pétrole Primagaz*, 390457, in *recueil*.