

## I Introduction<sup>1</sup>

The present article seeks to assess the degree of judicial scrutiny performed by French courts when reviewing decisions of National Competition Authorities ('NCAs') and National Regulatory Authorities ('NRAs') in the aftermath of the seminal ruling handed down by the European Court of Justice (the 'ECJ') in *Commission v. Tetra Laval*.<sup>2</sup>

In this judgment, the ECJ considered that the European Community ('EC') courts should refrain from engaging in a *de novo* assessment of the decisions adopted by the European Commission (the 'Commission'), when enforcing EC competition rules and, arguably, in other fields such as sector-specific regulation.<sup>3</sup> Yet, the Commission's complex economic assessments should not be left unchecked. The EC Courts must verify whether the Commission's analysis is convincing, accurate, reliable, consistent and exhaustive.

In light of the general duty of Member States to fully ensure the *effet utile* of EC legislation, the question arises whether the *Tetra Laval* standard of judicial review promoted by the ECJ has been endorsed by national courts when reviewing decisions of NCAs and NRAs.<sup>4</sup> With this, one must keep in mind that the equally ranking principle of *procedural autonomy* implies that national legal orders should remain free to decide the degree of judicial scrutiny applicable to decisions from national regulators.<sup>5</sup>

The present contribution examines whether the French courts have drawn inspiration from the ECJ's moderate standard of judicial review in *Commission v. Tetra Laval*, or if, on the contrary, a stricter standard prevails under French law. To that end, it is divided into four paragraphs, which follow a chronological approach. The first paragraph provides an overview of the characteristics of the French judicial review system in the pre-*Tetra Laval* world. As in the French judicial system many courts have jurisdiction over regulators' decisions, it seeks to clarify who judges the regulators, the judicial remedies available to regulated entities and the degree of judicial scrutiny traditionally exercised over regulators' decisions in the pre-*Tetra Laval* period. The second paragraph offers a brief analysis of *Commission v. Tetra Laval* where the Court introduced a new standard of judicial review different from that found in previous case law. It argues that the ECJ's judgment marks a striking piece of judicial deference towards regulators' decisions. The third paragraph determines whether the *Tetra Laval* judgment has impacted on the degree of judicial scrutiny applied in practice by

<sup>1</sup> The authors thank Alexis Brunelle, Elise Provost and Anne-Lise Sibony for their helpful comments.

<sup>2</sup> See Case C-12/03 P *Commission v. Tetra Laval BV* [2005] ECR I-987.

<sup>3</sup> The concept of sector-specific regulation should be understood in this article as the various pieces of secondary legislation adopted by EC institutions to promote the opening up to competition of former monopolistic network industries such as telecommunication, energy etc.

<sup>4</sup> See Article 10 of the EC Treaty.

<sup>5</sup> See notably Case 33-76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

French courts when reviewing regulators' decisions in the areas of competition law (including merger control and antitrust) and sector-specific regulation. We find that French courts have not followed the *Tetra Laval* ruling in the area of competition law, and, to the contrary, that they scrutinize intensively both the procedural aspects and the merits of the NCAs' decisions. By contrast, French courts display a much higher degree of deference with respect to NRAs' decisions in the field of sector-specific regulation. The fourth paragraph offers a brief conclusion.

## 2 An overview of the French judicial system in the pre-*Tetra Laval* world

### 2.1 The French courts' system: NCAs and NRAs under the scrutiny of two judges

The French legal order is organised around two separate bodies of law, namely 'civil' (private) law and 'administrative' (public) law, each of which is subject to the jurisdiction of a specific type of court. The civil courts, at the head of which sits the 'Supreme Court of Appeals' (*Cour de cassation*), are responsible for deciding on issues of private law. On the other hand, the administrative courts, at the head of which sits the 'Council of State' (*Conseil d'Etat*), have jurisdiction over issues falling within the scope of public law.

As a matter of principle, decisions of the French administrative authorities fall within the exclusive jurisdiction of the administrative courts.<sup>6</sup> Deeply rooted in the political history of France, the rationale for sheltering the French administrative authorities from the scrutiny of the civil courts deserves a short explanation.<sup>7</sup> In the years following the 1789 French revolution, civil courts – which also enjoyed legislative powers at the time – became widely distrusted in political circles. Shortly thereafter, revolutionary leaders, and later on Napoleon, came to the view that an absolute separation of powers between civil courts and the administration was necessary. Civil courts were accordingly barred from adopting legislative or regulatory acts and from scrutinizing decisions

<sup>6</sup> The civil courts remain nevertheless competent to decide on a certain number of disputes involving administrative decisions, notably those in the area of legal/marital status and those involving fundamental rights such as the right to private property.

<sup>7</sup> During the '*Ancien Régime*' (the political system in vigour before the French Revolution in 1789), the local Parliaments (which at the time acted both as superior courts and as legislative bodies) were suspected by the French revolutionaries of having abused their authority to counter administrative and economic reforms in order to protect the interest of their class. For this reason, French revolutionaries were wary that these courts would systematically oppose the important revolutionary reforms needed to build a new political and economic system. This 'revolutionary' distrust led to the creation of two separate orders in order to ensure that civil judges would be precluded from having any undue influence over the French administration. See Chapus (1997) at paras. 950 and following.

of legislative and administrative bodies.<sup>8</sup> A new administrative courts system was instituted, composed of magistrates recruited amongst experienced civil servants, and entrusted with jurisdiction over appeals against decisions issued by administrative authorities.<sup>9</sup>

Whilst, approximately two centuries later, decisions of NCAs and NRAs should logically have been subject to the scrutiny of administrative courts,<sup>10</sup> a convoluted judicial architecture was instead established in the field of competition law and economic regulation. Endorsing the view that those disciplines belonged at least as much to administrative law from an institutional standpoint than to private law from a conceptual standpoint, the French legislator gradually and significantly entrusted the civil courts through specific derogatory legislative provisions with jurisdiction over NCAs and NRAs decisions. For instance, when establishing the Competition Council in 1987, the French legislator deemed it apt that, in the interest of a 'good administration of justice', disputes arising from the Competition Council's decisions be brought within the exclusive jurisdiction of the civil courts system<sup>11</sup> and, in particular, within the sole jurisdiction of the Paris Court of Appeals.<sup>12</sup> A key explanatory factor for the French legislator's decision was the view that competition law would be better

<sup>8</sup> See Bonnard (1934) at para. 79.

<sup>9</sup> As a result of this absolute separation, the French administration was left solely accountable before its own judge, coming from its own ranks, and who acted as a 'judge-administrator'. At the time it was felt that this judge-administrator would be best placed to understand the problems, the needs and the realities underlying the actions of the administration. See Chapus (1997) at para. 982. This reasoning is well encapsulated in the saying that 'To judge the administration is still administering' (*Juger l'administration, c'est encore administrer*). See Sandevor (1964).

<sup>10</sup> See Article R311-1 of the French Code of Administrative Justice. NCAs and NRAs fall within the broader category of independent Administrative Authorities ('IAAs'). IAAs are administrative bodies with both impartiality and technical expertise that are responsible for the regulation of various sectors such as competition law, telecommunications, audiovisual services, energy, privacy issues, etc.

<sup>11</sup> It was felt that, in the case of the Competition Council, a strict application of the principle of separation between civil courts and administrative courts would lead to risks of divergence or even contradictory interpretations of competition law. Indeed, the French dualistic judicial system has already led a number of times to contradictory case law. See Chapus (1997) at para. 979.

<sup>12</sup> The Paris Court of Appeals is an ordinary appellate court that belongs to the civil courts system (there are 35 Courts of Appeals in France). Like any other appellate court, it is in principle only competent to hear disputes which fall within its territorial jurisdiction. Since the Paris Court of Appeals had the reputation of having the greatest number of specialized judges in the area of competition law and economic regulation, it has usually been chosen by the French legislator as the competent judge with regard to administrative decisions falling within these areas of law. With regard to competition law, the Paris Court of Appeal has no longer exclusive jurisdiction over antitrust matters at first instance. Since 2006 a limited number of courts of first instance are competent to hear disputes concerning Article L.420-1 to L.420-5 of the French commercial code and Articles 81 EC and 82 EC (see new Article L.420-7 of the French commercial code). The Paris Court of Appeal has been given exclusive jurisdiction to hear appeals against decisions rendered by the Competition Council and by these courts of first instance in

applied by the already experienced civil courts. Indeed, civil courts routinely heard disputes in the area of commercial, civil and criminal law which often involved issues of competition law by virtue of the direct effect of Article 81 and 82 EC.

A similar, albeit less radical, derogation was later introduced in the telecommunications and energy sectors, where *certain decisions* of the French Telecommunications and Post Regulator ('ARCEP') and the Commission for Energy Regulation ('CRE') were made subject to the jurisdiction of the civil courts. Under the impetus of EC secondary legislation, the French legislator endowed NRAs with dispute settlement duties, for example with respect to issues arising in the context of interconnection pricing negotiations, *etc.* Whilst, formally, a NRA's settlement decision is an administrative act which should fall within the jurisdiction of the administrative courts, it is in substance comparable to a judgment rendered by a civil court in the context of a typical commercial law, and, more specifically, competition law dispute.<sup>13</sup> Hence, the legislator entrusted the civil courts, and in particular the Paris Court of Appeal, with the power to review NRAs' dispute settlements decisions. The Council of State remains competent to review the legality of all the other decisions taken by NRAs.

In sum, under French law, two types of courts are competent to review decisions of the NCA and NRAs, namely the administrative courts and the civil courts. The administrative court is in theory the natural venue for actions against their decisions. For instance, NRAs' decisions declaring that a market player enjoys 'significant market power' ('SMP') or ordering remedies, are normally challengeable before the Council of State. Yet, as explained previously, the administrative courts' legal monopoly has been significantly curtailed over the years and, in practice, the Paris Court of Appeal is now the primary venue for challenging decisions of the Competition Council,<sup>14</sup> as well as dispute settlement decisions of NRAs.

In spite of a certain degree of complexity, this dual judicial system does not, as such, generate significant problems in respect of the effectiveness and the

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antitrust matters. A specific chamber of the Court (1st Chamber Section H) is entrusted with the review of all competition and regulation cases.

<sup>13</sup> See Bonnard (1934) at para. 79.

<sup>14</sup> Whilst until recently decisions over merger transactions were taken by the French Minister of Economy and were therefore challengeable before the Council of State, in August 2008, a new legislation has transferred these decisions to the Competition Council as a result of which the Paris Court of Appeal has now jurisdiction over its decisions in the field of merger control. This law (The Law on the Modernisation of the Economy) substantially amends the procedural rules in French merger control. The Minister of Economy ceases to have jurisdiction over merger control and its powers are transferred to a new authority (the 'Competition Authority') which (subject to a number of limited exceptions) becomes the sole authority competent to take decisions in the area of merger control. The new Competition Authority also replaces the Competition Council and centralizes the power of investigation and the power to impose sanctions and fines which were previously exercised by the General Directorate for Competition Policy, Consumer Affairs and Fraud Control and the Competition Council respectively.

quality of judicial review.<sup>15</sup> Both the civil and the administrative courts appear equally qualified to review decisions adopted in the field of competition law and economic regulation. The Paris Court of Appeal, on the one hand, boasts professional judges with significant expertise in technical commercial disputes between private parties. The Council of State, on the other hand, is composed of high-profile civil servants (a good part of them was trained in the prestigious *École Nationale d'Administration*), who are accustomed to deal with sensitive public policy issues, such as those encountered by NRAs in their daily market regulation activities.

Furthermore, the duality of judicial fora in the field of competition law and economic regulation offers additional well-known advantages such as, for instance, cross-fertilisation dynamics, experimentation and benchmarking.

## 2.2 General principles governing the intensity of judicial review pre-*Tetra Laval* – in-depth assessment vs. ‘sliding-scale’ approach

The purpose of the present section is to describe the principles that have traditionally governed the intensity of judicial review of the decisions of NCAs and NRAs in the pre-*Tetra Laval* world. In that respect, a salient feature of the French dualist courts system consists of the asymmetrical principles applicable to the intensity of judicial review in the field of competition law and economic regulation. Whilst it has been generally undisputed that the Paris Court of Appeal *had* to scrutinize ‘in depth’ all aspects of NCAs and NRAs decisions (1), the ability of the Council of State to perform similar assessments has been less obvious, and was instead subject to a ‘sliding-scale’ approach (2).

### 2.2.1 The duty of the Paris Court of Appeal to scrutinise thoroughly decisions submitted to its review

In the context of its judicial review activities, the Court of Appeal of Paris has been traditionally placed under the duty to painstakingly scrutinize the Competition Council’s decisions. This, in turn, is primarily explained by the so-called *effet dévolutif* ascribed to the constitutionally-protected right of appeal. The *effet dévolutif* means that the Court of Appeal has both (i) the obligation to examine fully the grounds of the Competition Council’s decision in fact and in law; and, if it subsequently declares the appealed decision void, (ii) the duty to replace (or *reform*) it with its own decision in order to terminate the dispute.<sup>16</sup>

<sup>15</sup> We refer to the effectiveness of judicial review from an applicant’s standpoint.

<sup>16</sup> Article 561 of the new French Code of Civil Procedure. See also, Supreme Court of Appeal, Commercial Chamber 31 January 2006, *Colas Midi Méditerranée/Bonna sabla and others* where the Supreme Court of Appeals confirmed that, in antitrust matters, although there are specific procedural rules applicable to

The relatively uncontroversial nature of the Court of Appeals' extensive judicial prerogatives has often been attributed to the French Constitution itself, which explicitly entrusts civil law courts with the duty to protect fundamental freedoms (and, in particular, the right to be heard by an independent judge). In addition, the rulings of the Court of Appeal may be subject to a further appeal (*pourvoi en cassation*)<sup>17</sup> on points of law to the Supreme Court of Appeals, which obviates concerns of arbitrary judgments and inconsistent interpretation and application of the law.<sup>18</sup>

#### 2.2.2 The Council of State's fluctuating standard of judicial review

By contrast, the Council of State has not been entirely free to apply a similarly high standard of judicial review when scrutinizing administrative decisions. Rather, the Council of State's standard of judicial review varied according to the circumstances of each case, pursuant to a well-established 'sliding scale' which is intrinsically linked to the degree of discretion statutorily enjoyed by the administrative authority under review.<sup>19</sup>

The first and most limited standard of review, the so-called 'marginal review' (*contrôle restreint*) has traditionally been applied where – by virtue of statutory provisions – the administrative authority enjoys discretionary power (*pouvoir discrétionnaire*), i.e. when it is free to choose between different measures to regulate a certain factual situation.<sup>20</sup> In this case, the Council of State simply assesses whether the decision is vitiated by a 'manifest error of appraisal', defined as 'a blatant error, which a reasonable man would not have made'.<sup>21</sup> For instance, when a civil servant acts unlawfully, the administration may either initiate a disciplinary procedure or consider that such action is not necessary, for example, because the civil servant has an outstanding record. In this case,

annulment proceedings or reversal proceedings brought against decisions of the Competition Council, the principle of the *effet dévolutif* of the appeal remained fully applicable.

<sup>17</sup> This appeal is not suspensive. Provisional measures may, however, be requested and obtained.

<sup>18</sup> The Supreme Court will nevertheless review whether the law has been correctly applied to the facts of the case, and, thus, what kind of facts must necessarily be mentioned in the judgment under appeal to do so. Thus, in case the Supreme Courts concludes that the judgment has not mentioned certain facts or that the facts are inadequate or inaccurate, the Court will annul the ruling as these defects have hindered its review of the law. See the 'mobile telephony' case, where the Supreme Court of Appeal criticized the Paris Court of Appeal for failing to review all the criteria constitutive of an anti-competitive information exchange (see Supreme Court of Appeal, Commercial Chamber, 29 June 2007, *Mobile Telephony*).

<sup>19</sup> See Chapus (1997) at para. 1253.

<sup>20</sup> See Rivero (2006) at p.559.

<sup>21</sup> See conclusions of the *Commissaire du gouvernement* G. Braibant in case Council of State, 15 February 1961, *Lagrange*: 'une erreur évidente, invoquée par les parties et reconnue par le juge, et qui ne fait aucun doute pour un esprit éclairé'.

the Council of State's review must not go beyond a mere marginal review of the decision. To take an example in the field of competition law, this standard should logically be applied in the area of merger control in cases where, for example, the Minister of Economy would examine<sup>22</sup> a merger leading to a tight oligopoly and where it could choose between (i) prohibiting the transaction; (ii) clearing the transaction unconditionally; or (iii) clearing it subject to conditions.<sup>23</sup>

The second standard of review, the so-called 'standard review' (*contrôle normal*) has been applied where the administrative authority has a 'duty to act in a certain way' (*compétence liée*), i.e. where the administrative authority must, by virtue of the law, take a specific decision with regard to a given factual setting. In this case, the Council of State has normally applied a thorough standard of judicial review. Administrative courts have to apply a *contrôle normal*, for instance in retirement cases where the administration has a duty to ensure that the civil servant has the right to retire, thereby giving him a right to pension. In the field of economic regulation, the same standard of review has been applied by administrative courts where they examined whether, for instance, the regulatory authority has complied with the fundamental principle of the right to be heard, including the right to have access to the key documents on which the administration has based its decision<sup>24</sup> or the right to submit observations.<sup>25</sup>

Both standards of review share common features and, when applying these standards, the Council of State has been under an obligation to review whether the NCA/NRA has:

- i) Made an error of law – the legal basis for the decision, or the criteria applied, are erroneous. For example, in the field of economic regulation, this could happen where a NCA has found a non-dominant firm guilty of an infringement of Article 82 EC, or its national equivalent;
- ii) Made an error on the facts – the factual basis for the decision is non-existent, or erroneous. For example, in the field of economic regulation, this would be the case where a NCA has found a low pricing strategy abusive on the basis of an alleged increase in the market share of the dominant firm, whilst in fact, its market share has decreased;
- iii) Misused its powers – the underlying purpose of the decision is alien to the protection/promotion of competition. For example, in the field of economic regulation, this could happen where a NCA sanctions an efficient foreign firm in the sole purpose of protecting domestic companies from increased rivalry;
- iv) Incorrectly characterised the facts in law – a NCA or NRA characterizes facts in law when it translates the factual setting which is subject to its review (for instance, a price cutting commercial practice) in a legal concept (to take the

<sup>22</sup> See footnote 13.

<sup>23</sup> See ex-Article L. 430-5 *Code de Commerce*.

<sup>24</sup> See for instance Council of State, 22 May 1985, *Société Cabot Corporation* or Council of State, 31 May 2000, *Société Wienergerger Baustoffindustrie AG*.

<sup>25</sup> Council of State, 9 April 1999, *Société Interbrew*.

same example, an *abusive* predatory strategy). The facts are incorrectly characterized in law when the factual setting at the origin of the decision does not fulfil the conditions for being translated into a legal concept. For example, in the field of economic regulation, this would be the case where a NCA finds that a tight oligopolistic market is akin to a collective dominant position, whilst the market does not exhibit sufficient price transparency to give rise to joint dominance.

Under well-established case law, it is only in respect of the fourth parameter namely the 'legal characterization of the facts', which is by far the most subjective<sup>26</sup>, that the standard of judicial review of the Council of State can fluctuate, depending on whether the administration has the 'duty to act in a certain way' or, on the contrary, if it has a 'discretionary power'. If, on the one hand, the administrative authority has the duty to act in a certain way, the Council of State exercises a 'standard' review and examines the decision thoroughly. It tracks down any error in the application of the law to the facts and may even, pursuant to a 'third' degree of control, namely the 'proportionality assessment', examine (i) whether the measure is suitable to achieve its intended purpose and (ii) whether its expected benefits do not exceed its costs. If, on the other hand, the administrative authority enjoys a discretionary power, the Council of State – considering that the administration should nonetheless be subject to a certain, albeit limited, degree of judicial accountability – exercises a marginal review.

In this context, it becomes critical to determine the degree of discretionary power that competition authorities and sector-specific regulators enjoy at the time of the adoption of the decision. This issue becomes particularly intricate when the judge must review complex economic assessments performed by regulators. To take just one example, given previously, of a merger leading to a tight oligopoly, we saw that the Minister of Economy could choose between (i) a prohibition decision; (ii) an unconditional clearance decision; or (iii) a clearance decision subject to conditions. This naturally led to the conclusion that the Minister enjoyed a 'discretionary power' in merger control. However, on closer examination, the Minister was clearly bound by various well-defined case law criteria for the purposes of deciding whether the merger gave rise to a joint dominant position. Since the fulfilment of these conditions was a necessary requirement for a finding of joint dominance, the Minister could also be deemed, in reality, to be under a 'duty to act in a certain way'.

This latter view of duality generally prevailed in the case law of the Council of State in the pre-*Tetra Laval* era. The Council of State usually considered that most complex economic assessments in the field of competition law constituted factual, objective, issues, over which – disputably – the deciding authority enjoyed in fact little discretionary power.<sup>27</sup> Accordingly, NCAs decisions were

<sup>26</sup> See Rivero (2006) at p.557, para. 641.

<sup>27</sup> See Legal (2005) p.107.



subject to a *contrôle normal* in those fields. This applied, for instance, with regard to the delineation of the relevant product and geographic market.<sup>28</sup>

### 2.3 Consequences and outcome of the French courts' judicial review

In the field of competition law and economic regulation, the Court of Appeal of Paris and the Council of State's task is not to review – and resolve – disputes between parties. Rather, they scrutinize the legality of an administrative decision taken by a public authority. In this respect, actions against regulators' decisions bear close resemblance to annulment actions brought before the Community courts on the basis of Article 230 EC.<sup>29</sup> If, whilst reviewing a NCA/NRA decision, the courts find a ground for annulment, they should normally quash the decision.<sup>30</sup> As explained previously, to ensure expediency in judicial matters, the Court of Appeal of Paris additionally has the power to reform the decision, in part or in full. Much like a second-level regulator, it can issue a new decision (formally, a judgment) exempt from any illegality. For instance, if in a cartel case the Court has found exculpatory evidence sufficient to reduce the amount of the fines imposed on one of the cartel members, it can issue a judgment providing for a different, lower fine.<sup>31</sup>

The ability to reform decisions has been extended to the Council of State, but only in the exceptional circumstance where the regulators impose sanctions on operators.<sup>32</sup> For instance, where an operator with Significant Market Power has not complied with the remedies ordered by the regulator and, as a result, has been sanctioned, for example, by means of suspension of his authorisation to provide services for a period of X months,<sup>33</sup> it can challenge that decision before the Council of State, which may decide to reduce or increase the sanction.

<sup>28</sup> See Council of State, *Analyse de la jurisprudence, 1991-1999, Droit économique 1999*, available at [http://www.conseil-etat.fr/ce/jurispa/index\\_ju\\_aj9910.shtml](http://www.conseil-etat.fr/ce/jurispa/index_ju_aj9910.shtml).

<sup>29</sup> See Geradin (2005) p. 393, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=877967](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877967). It is common knowledge that French administrative law has initially influenced the structure of the Community courts and the permissible grounds of annulment under Article 230 EC. Thus, Article 230 EC allows a party to attack a Community act on four grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, misuse of powers. These terms are borrowed from French administrative law. However, these concepts have later been used and interpreted by the Community courts far differently from the French administrative courts.

<sup>30</sup> The regulator may subsequently take a new decision, exempt from the illegality.

<sup>31</sup> See Case T-111/05 *UCB S.A. v. Commission* [not yet reported].

<sup>32</sup> The law instituting the regulator must provide for that possibility. Otherwise, it would be unconstitutional, as explained by the Constitutional Council in its Decision 88-8 DE of 17 January 1989.

<sup>33</sup> With the possibility of fines up to 5% of the annual turnover in case of a second offence.

### 3 ECJ case law on judicial review and its relevance for the French courts

#### 3.1 Standard of judicial review applied by EC courts

In its most recent judgments to date, the ECJ has – often implicitly – lambasted the Court of First Instance ('CFI') intrusive scrutiny of the Commission's decisions and, in particular, of the Commission's economic assessments.<sup>34</sup> In what appears, at times, inscrutable court-speak, the ECJ defined in *Commission v. Tetra Laval* a more traditional,<sup>35</sup> arguably moderate,<sup>36</sup> standard of judicial review compared to the stringent appraisal performed by the CFI in the *Airtours*, *Schneider*, and *Tetra Laval* merger cases.<sup>37</sup> Whilst the ECJ recognized that the EC Courts can review 'the Commission's interpretation of information of an economic nature',<sup>38</sup> it endorsed a system of 'selected' review, whereby the EC Courts' scrutiny only targets a limited set of features of the Commission's decisions.

'[T]he Community Courts [must], *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess

<sup>34</sup> In its appeal in *Tetra Laval*, the Commission criticised the CFI for having exceeded the judicial review standard laid down in former case law by examining the Commission's economic analysis too closely. See Case C-12/03 *Commission v. Tetra Laval BV* [2005] ECR I-987 at paras. 25 et seq. See, for a description of this stringent standard, Petit (2007) at Chapter III. See also Sibony (2008) at paras. 1221, 1237, 1246 and 1285. A number of scholars considered that the standard of judicial review performed by the CFI was overly intrusive. See, amongst others, Bailey (2003) p.845; Siragusa (2004).

<sup>35</sup> This standard seems more in line with its earlier case law (see for instance Case 42/84 *Remia BV and others v. Commission* [1985] E.C.R. 2545 or Case C-68/94 *Kali und Salz* [1998] E.C.R. I-1375).

<sup>36</sup> But the ECJ refused to uphold the minimalist standard of review proposed by the Commission and AG Tizzano. See Opinion of AG Tizzano at para. 89: 'The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly – as I have just said – to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution'.

<sup>37</sup> Case T-342/99 *Airtours plc v. Commission* [2002] ECR II-2585; Case T-310/01 *Schneider Electric v. Commission* [2002] ECR II 4071; Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381.

<sup>38</sup> See Case C-12/03 *Commission v. Tetra Laval BV* [2005] ECR I-987 at para. 39: 'Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature'. The Court also insisted on the importance of such review in the context of merger control: 'Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect'.

a complex situation and whether it is capable of substantiating the conclusions drawn from it [...].<sup>39</sup>

To focus only on a few salient points, three conclusions can be drawn from this judgment. First, the EC Courts' judicial review should be confined to whether the substantive economic analysis, the facts and evidence convincingly characterize, as a matter of law, the infringement sanctioned by the regulator. Second, the EC Courts should seek to ascertain whether the economic evidence which supports a legal characterization of infringement is accurate, reliable, consistent and exhaustive. Third, annulment proceedings do not constitute a second chance for disappointed parties to change the Commission's substantive findings. In fields involving substantial economic analysis, the EC Courts must not perform a *de novo* investigation, and therefore cannot substitute the Commission's analysis – and in particular the theories of competitive harm – with their own assessment. For instance, in the case of a merger that has been prohibited on the basis of a unilateral effects theory of harm, the CFI cannot substitute a finding of coordinated effects.

Most of these principles were subsequently endorsed by the CFI in its notorious *Microsoft* judgment of 2007. Drawing the lessons from *Tetra Laval*, the Court held that:

'although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, *their review of complex economic appraisals made by the Commission is necessarily limited* to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers;

Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's.

However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is *factually accurate, reliable and consistent* but must also determine whether that evidence contains *all the relevant data* that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (*emphasis added*).<sup>40</sup>

<sup>39</sup> See Case C-12/03 *Commission v. Tetra Laval BV* [2005] ECR I-987 at para. 39.

<sup>40</sup> See Case T-201/04 *Microsoft Corp. v. Commission* [2007] ECR II-3601 at paras. 87-89. See, similarly, Case T-340/03 *France Télécom SA v. Commission* [2007] ECR II-107 at para. 129: 'As a preliminary point, it should be recalled that, as the choice of method of calculation as to the rate of recovery of costs entails

Finally, in *Bertelsmann AG and Sony Corporation America v. Impala*,<sup>41</sup> where the Court had to rule on the CFI's judgment invalidating the Commission's *Sony/BMG* merger clearance decision, the Community judicature found it necessary to – yet again – rehearse the above principles. In the judgment, which is already widely interpreted as a striking piece of judicial deference,<sup>42</sup> the ECJ sought to preserve the Commission's discretion when carrying out complex economic assessments.<sup>43</sup> However, this self-imposed limited power of appraisal entails the risk that the Commission's broad powers in the field of competition law<sup>44</sup> are not sufficiently counterchecked. The risk of abuse is even recognized by the Chief economist of the Directorate General for Competition himself.<sup>45</sup>

### 3.2 Relevance of the EC standard of judicial review in the French courts system

The standard of judicial review promoted in *Commission v. Tetra Laval* does not compare one on one with any of the standards of judicial review prevailing until then under French law as described under section I.<sup>46</sup> A former French judge at the CFI has nonetheless attempted to reconcile both standards,

a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion [...]. The Court's review must therefore be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers'. Finally, in the *Alrosa* case, the CFI further suggested that, whilst under Article 81 and 82 EC judicial review of complex economic assessments should necessarily be limited, in the field of merger control, the intensiveness of judicial review could even be lower. See T-170/06 *Alrosa v. Commission* [2007] ECR II-2601 at para. 108: 'the level of review carried out by the Court of the analyses carried out by the Commission on the basis of the competition rules of the Treaty must take into account the margin of discretion which underlies each decision under consideration and is justified by the complexity of the economic rules to be applied. Having regard to the effect of decisions taken under Articles 81 EC and 82 EC on the fundamental economic freedoms guaranteed by the Treaty, cases involving a limited review must be restricted to those in which the contested decision is based on a complex economic assessment, save in fields, such as concentrations, where the existence of a discretionary power is essential to the exercise of the powers of the regulatory institution [and where it could be lower, implies the Court in quoting *Tetra Laval*].

<sup>41</sup> See Case C-413/06 P *Bertelsmann AG and Sony Corporation America v. Impala* [not yet published].

<sup>42</sup> See *Brandenburger* (2008); *Hirsbrunner* (2008).

<sup>43</sup> See *Hirsbrunner* (2008) at p.19.

<sup>44</sup> See *Geradin* (2005).

<sup>45</sup> See *Neven* (2008).

<sup>46</sup> In the *Remia*, *Matra Hachette* and *Kali und Salz* cases, the ECJ had promoted a standard of judicial review that bore close resemblance with the standard applied by the Council of State when reviewing decisions taken in the context of "discretionary powers". The Court confined its review to: "verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been

In a somewhat stylized reasoning. If we follow H. Legal's interpretation of *Tetra Laval*, complex economic assessments are subject to a control that, without amounting to a *contrôle normal* ('standard review'), nonetheless goes beyond the *contrôle restreint* ('marginal review') and by the same token of the 'manifest error of appraisal'.<sup>47</sup> Put simply, the standard hinges on reviewing 'the consistency, relevance of the reasoning and sufficiency of the documentation on the sides of facts'.<sup>48</sup>

In spite of this, however, it remains unclear whether the ECJ ruling in *Commission v. Tetra Laval* holds the potential to influence the standard of judicial review applied by the French courts and, in particular, the Council of State, whose reluctance to developments in EC case law is notorious.<sup>49</sup> Indeed, no single piece of EC legislation expressly requires national courts to abide by specific standards of judicial review when examining competition authorities and regulators' decisions. Moreover, it is doubtful that the general principles of EC law, such as the duty of loyal cooperation or the principle of *effet utile*, entail an obligation on national courts to follow the standards of judicial review applied by the Community courts. On the contrary, in its recent *Arcor* judgment, the ECJ – albeit implicitly – held that the principle of national procedural autonomy took precedence over other EC law rules and principles in so far as judicial review is concerned:

'Community law does not lay down any rule requiring the Member States to put in place a specific means of review with respect to decisions of the NRAs [...] It follows from all of the above considerations that the answer to Question 3(d) must be that it is a matter solely for the Member States, within the context of their *procedural autonomy*, to determine, in accordance with the principles of equivalence and effectiveness of judicial protection, the competent court, the nature of the dispute and, consequently, the detailed rules of judicial review with respect to decisions of the NRAs (*emphasis added*)'.<sup>50</sup>

In addition, certain endogenous features of the French courts system appear manifestly incongruous with the principles enshrined in *Commission v. Tetra Laval*. Of particular importance is the fact that the intrusive standard of judicial review applied by the Paris Court of Appeal is consubstantial to the constitutionally protected right of appeal. Any lowering of the Paris Court of Appeal's standard of judicial review could thus entail a violation of the French Constitution.

any manifest error of appraisal or a misuse of powers". See Case 42/84 *Remia BV and others v. Commission* [1985] ECR 2545 at para. 34.

<sup>47</sup> See Legal (2005) at pp.114-115.

<sup>48</sup> See Legal (2005) at pp.114-115.

<sup>49</sup> Until 1989, the Council of State for instance refused to abide by the case law principle of primacy of EC law (see Council of State, 1 March 1968, *Syndicat Général des Fabricants de Semoules de France* [1970] CMLR 395). Concretely, the Council refused to set aside French legal provisions that infringed EC law.

<sup>50</sup> See Case C-55/06 *Arcor AG & Co. KG v. Bundesrepublik Deutschland* [not yet reported] at paras. 169-170.

#### 4 What is the standard of judicial review in France post-*Tetra Laval*?

The present section seeks to determine empirically whether, since the adoption of the *Commission v. Tetra Laval* judgment, the French Courts have applied in their jurisdictional practice the standard of judicial review established by the ECJ and, by the same token, whether they have departed from the principles outlined under Section I. To that end, we have reviewed a number of recent decisions of the Council of State and the Court of Appeal of Paris, rendered since February 2005.

Our overall finding is that of a clear divide between competition law and sector-specific regulation. In the field of national competition law, French courts have maintained a standard of judicial review that is clearly more stringent than the principles enshrined in *Commission v. Tetra Laval* (sub-paragraph A below). By contrast, decisions of NRAs in the field of sector-specific regulation are subject to a marginal, cursory, review by the French courts, which seems slightly lower than the standard promoted in the ECJ judgment (sub-paragraph B below).<sup>51</sup>

##### 4.1 Intensive standard of judicial review in national competition cases

The cases reviewed below provide undisputable evidence that in the aftermath of *Commission v. Tetra Laval*, NCA decisions rendered in the entire spectrum of national competition law remain subject to a *contrôle normal* ('standard review'), remote from the ECJ judgment. To start with the area of merger control, a field in which the Council of State holds jurisdiction, the Minister's decisions have been persistently subject to a high degree of judicial scrutiny.<sup>52</sup> In the *De Longhi* case, the Council of State rejected an annulment action brought by De Longhi,<sup>53</sup> a manufacturer of small household electrical equipment, against a decision of the minister re-authorising a concentration between two compet-

<sup>51</sup> It ought to be noted that it is uneasy to interpret the extent of judicial review performed by the Courts on the basis of a reading of a judgment. French courts usually deliver very short rulings, and their reasoning is subject to the customary rule, '*Imperatoria brevitatis*'. See, on this, Pacteau (2001) at p. 358.

<sup>52</sup> In the past, the Council of State has examined: the legal qualification of the factual situation (for instance whether the transaction is a "concentration" (Council of State, Sect., 31 May 2000, *Société Cora and Société Casino-Guichard-Perrachon*, Lebon p. 194); the minister's concrete appraisal of the economic setting (relevant market, anticompetitive effects, efficiencies generated by the operation (Council of State, Sect., 9 April 1999, *Société The Coca-Cola Company*, Lebon p. 119; Council of State, Sect., 6 October 2000, *Société Pernod-Ricard*, Lebon, p. 397); the proportionality of the remedies imposed (Council of State, Sect., 9 April 1999, *Société The Coca-Cola Company*, Lebon p. 119); the minister's application of the criteria of the *failing firm* defense (Council of State, Sect., 6 February 2004, *Société Royal Philips Electronic et autres*, Lebon p. 28).

<sup>53</sup> See Council of State, Sect. 13 February 2006, *De Longhi*.

ing French manufacturers, Seb and Moulinex.<sup>54</sup> In doing so, the Council of State carefully reviewed the Minister's competitive assessments and agreed that the merger would not significantly lessen competition in the market. A perhaps more telling illustration is the *Fiducial* case, where the Council of State had to rule on annulment proceedings against the Minister's clearance of the merger between CEGID and CCMX.<sup>55</sup> *Fiducial*, a competitor of the merged entity, claimed in its application that the decision was vitiated by a number of economic contradictions. Chief in these allegations was the fact that the Minister had cleared the concentration although it had acknowledged that the merged entity would hold a market position three times larger than its closest competitor and that no entry had taken place on the market. The Council of State subjected the Minister's decision to a *contrôle normal* and ultimately decided to quash it. It is noteworthy, however, that the apparent reasoning of the Council of State's ruling bears an intriguing optical resemblance to the *Commission v. Tetra Laval* judgment. In particular, the Council of State observed that the Minister's analysis lacked 'consistency' and, as a result, it was 'unconvinced' that the transaction would not stifle competition.<sup>56</sup>

In the area of antitrust law, i.e. the national equivalents to Article 81 and 82 EC, the Paris Court of Appeals has sustained its traditional standard of judicial review, engaging into a meticulous examination of the Competition Council's decisions. In the *Sandoz* case – which involved the Competition Council's decision finding Sandoz guilty of abuse of dominance for bundled rebates in the pharmaceutical sector –<sup>57</sup> the Court scrutinised every single step of the Competition Council's analysis.<sup>58</sup> The Paris Court of Appeal in particular departed from the Competition Council's geographic market definition. Upon examination of the relevant facts, the Court substituted its own economic assessment of the relevant market as national in scope, and found that the Competition Coun-

<sup>54</sup> The Council of State had indeed annulled the first clearance decision on the basis that the minister's decision had not fulfilled all the criteria of the 'failing firm' defence (Council of State, Sect., 6 February 2004, *Société Royal Philips Electronic and others*, Lebon p. 28). However, the decision of the Council did not lead to the de-merger of Seb/Moulinex. This case is also interesting in that the Council of State was given the opportunity to review the concrete effects of a concentration on competition on the basis of historical data and not on the basis of prospective data, as is usually the case in merger control.

<sup>55</sup> See Council of State, Sect., 20 July 2005, *Société Fiducial Informatique and others*.

<sup>56</sup> Faced with a difficulty of appraisal, the Council of State required the Competition Council to issue an advisory opinion on the concentration. Later on, in another decision, the Council of State rejected the complaint after an in-depth analysis of the economic and competitive state of the market (Council of State, Sect., 13 January 2006, *Société Fiducial Informatique and others*).

<sup>57</sup> See Competition Council, 24 July 2003, decision no 03-D-35, *Holopanoramme*.

<sup>58</sup> From relevant market to dominance and abuse. In other words, on the basis of the facts of the case, whether the latter has correctly defined the relevant market or the anticompetitive effects of a practice, whether it has adduced enough evidence of an infringement etc.

cil's determination of a relevant local market was incorrect.<sup>59</sup> The *Pharma-Lab* case<sup>60</sup> is another example – albeit less explicit – of the Paris Court of Appeal's intensive review of the Competition Council's legal and economic determinations.<sup>61</sup>

This being said, the most interesting – and perhaps most conclusive – evidence we have found that the ECJ ruling in *Commission v. Tetra Laval* has not altered the French courts' standard of judicial review originates from a judgment of the Supreme Court of Appeals (which, in the same way as the ECJ, occasionally formulates the applicable principles governing lower courts judicial duties). In *Bouygues Télécom*,<sup>62</sup> the Supreme Court of Appeals quashed a judgment of the Paris Court of Appeals upholding a Competition Council's decision that had sanctioned an information exchange agreement between firms active on an oligopolistic market.<sup>63</sup> Of importance is the fact that the Supreme Court of Appeals admonished the excessively lax standard of judicial review applied by the Court of Appeal.<sup>64</sup> It came to the view that the Court of Appeals duty of

<sup>59</sup> See Paris Court of Appeal, 30 March 2004, *SAS Novartis Pharma v. Competition Council*. The Competition Council had concluded that the relevant geographic market was local in scope, being limited to the demand of each of the customers (hospitals) concerned by the rebates. The Court of Appeal, after reviewing the facts of the case concluded that the geographic markets were not local but, on the contrary, were national in scope.

<sup>60</sup> See Paris Court of Appeal, 20 December 2005, *Pharma-Lab*.

<sup>61</sup> The Paris Court of Appeal dismissed annulment proceedings brought against a decision of the Competition Council which had found no objections in respect of the following practices of pharmaceutical laboratories (i) to implement a quota system with regard to drugs supplied to wholesale distributors which had distribution activities within and outside France and (ii) to refuse to supply drugs at the price fixed by the State to those distributors which exclusively re-exported the drugs outside of France. The Court found that, on the basis of the evidence of the case, the Council was right to conclude that there was no agreement contrary to Article 81 EC (the quotas resulted from a unilateral act); and that the pharmaceutical laboratories' refusal to supply was not an abuse under Article 82 EC and was justified by their right to defend their 'commercial interests'. In doing so, the Court of Appeal carefully examined the Competition Council's economic and legal reasoning.

<sup>62</sup> See Supreme Court of Appeal, Commercial Chamber, 29 June 2007, *Mobile Telephony*.

<sup>63</sup> See, on this, Petit (2008) p.5.

<sup>64</sup> The Supreme Court of Appeal apparently reached a similar conclusion in the *France Télécom and SFR* case. See Supreme Court of Appeal, Commercial Chamber, 10 May 2006, *X France and Minister of Economy v. France Télécom and SFR*. In *France Télécom and SFR*, the Supreme Court of Appeals reversed a decision of the Paris Court of Appeals which annulled a decision of the Competition Council on the basis that there was insufficient evidence of an abuse. The case concerned two vertically integrated operators in the fixed and mobile telephony markets who had implemented 'price squeeze' practices by offering retail 'landline to mobile' services to firms at prices that did not cover their costs of supply. This prevented non-vertically integrated rivals from offering competitive services to these customers by 'direct' interconnection (i.e. by directly routing the call from the landline network to the mobile network). The Court of Appeal annulled the Competition Council's decision on the basis that the Council had not adduced sufficient evidence that rival operators had no other choice but to opt for the



Judicial review entailed a concrete determination as to whether the impugned conduct could likely allow anticompetitive coordination. It furthermore noted that the Court's duty – arguably much like a second-level regulator – should carefully review the characteristics of the market, the nature, the level of aggregation of the data exchanged as well as the periodicity of such exchange.

#### 4.2 Marginal standard of review in the field of sector-specific regulation

In contrast to the situation in the field of competition law, both the Council of State and the Paris Court of Appeals have subjected NRA decisions to a much laxer standard of judicial review. Most, if not all, the judgments rendered in the field of sector-specific regulation display a striking degree of judicial deference to the regulators' economic assessments, and accordingly do not go beyond a marginal review which hinges on verifying whether the NRA made a 'manifest error of appraisal'. This finding holds true for the entire range of issues dealt with by NRAs: dispute settlement issues,<sup>65</sup> market definition, designation of SMP operators, remedies,<sup>66</sup> market authorisations and licences,<sup>67</sup> and public service obligations.<sup>68</sup>

A judgment handed down by the Council of State in December 2007 has nonetheless created the optical illusion that the applicable standard of judicial review had been elevated. In *Région Rhône Alpes*, the Council of State held that ARCEP's (the French electronic communications NRA) decision to dismiss the *Région Rhône Alpes*'s application to use radio spectrum resources was not vitiated by any 'error of appraisal', implying that it scrutinised the adequacy of ARCEP's economic assessment.

Yet, we believe that the surreptitious semantic shift from 'manifest error of appraisal' to 'error of appraisal' does not conceal any elevation of the standard of judicial review in the field of sector-specific regulation. A careful reading of the judgment indeed reveals that the Council of State simply did not review ARCEP's economic assessment. Rather, the Council stressed that the data submitted by the *Région Rhône Alpes* in support of its application was so cryptic, that the NRA was simply left with no choice but to dismiss it. In other words,

direct interconnection solution. See Paris Court of Appeal, 12 April 2005, *France Télécom and SFR v. Competition Council*. The Supreme Court of Appeal rejected the Court of Appeal's analysis in that it had not examined whether the Competition Council had sufficiently demonstrated that the "price squeeze" practices had an anticompetitive object or effect on market.

<sup>65</sup> See Paris Court of Appeal, 28 May 2002, *France Télécom v. Free Télécom*; Paris Court of Appeal, 30 January 2007, *SFR v. Afone*.

<sup>66</sup> See Council of State, 29 December 2006, *Société UPC France*; Council of State, 25 February 2005, *France Télécom v. Telecom Regulation Authority*.

<sup>67</sup> See Council of State, 29 December 1999, *Société Viatel Operations v. Telecom Regulation Authority*.

<sup>68</sup> See Council of State, 10 July 2006, *Cégétel and other v. Telecom Regulation Authority*; Council of State, 25 April 2007, *Bouygues Télécom and others v. Telecom Regulation Authority*.

no 'error of appraisal', let alone no 'manifest error of appraisal', could have been made by ARCEP in the present case.

## 5 Conclusions

To conclude, we would like to formulate two remarks. First, the rationale for different standards of judicial review in French competition law and sector-specific regulation remains obscure. In particular, most of the tentative explanations for this appear at first glance unconvincing: *ex post* nature of competition law vs. *ex ante* nature of regulation,<sup>69</sup> *sector-specific* nature of regulation vs. *general* nature of competition law,<sup>70</sup> etc.

Second, at the core of the debate on the intensiveness of judicial review in economic regulation is a trade-off between, on the one hand, the risk of arbitrary/biased regulatory decisions in fields involving debatable economic assessments and, on the other hand, the risk of regulatory inefficiency, if courts can – and do – systematically second-guess NRAs and NCAs decisions thereby delaying the entry into force of regulatory measures and weakening the legal value attached to them in the first place.<sup>71</sup>

In the context of the French legal order, one may argue that both concerns are adequately addressed through a set of particular institutional features. To be clear, French regulatory authorities are composed of many individuals that are drawn from the highest civil and administrative courts.<sup>72</sup> As a result, regulators' decisions are already subject to a certain degree of internal judicial scrutiny, which arguably would eradicate the risk of regulatory abuses.<sup>73</sup> The upshot of this is that the standard of judicial review in France should primarily be tailored with a view to mitigating the risk of regulatory inefficiency. Accordingly, a

<sup>69</sup> In sector-specific regulation, NRAs also intervene *ex post*, in the context of their dispute settlement duties. In competition law, NCAs intervene *ex ante* in the field of merger control, but also Article 82 EC, when they sanction abuses on the basis of their likely effects.

<sup>70</sup> One could argue that sector specific regulation requires so much technical, expert knowledge, that the discretion of the NRA shall be guaranteed, whilst competition law involves less intricate technical assessments. It goes without saying that NCAs also deal with complex technical matters, for instance in fields involving high-technology markets. Furthermore, most of the concepts applied by NRAs originate in general competition law (significant market power, market definition, etc.).

<sup>71</sup> This is, for instance, a serious problem in the US where the rulings of the federal agencies often give rise to lengthy litigation. In addition, it could be considered that courts of law are ill-equipped for evaluating technical and economic regulatory acts. See Geradin (2004) p. 137.

<sup>72</sup> For example, the settlement dispute resolution body of the Energy Regulator ('CRE') is composed of two judges at the Council of State and two judges at the Supreme Court of Appeals. This indicates that decisions are already taken by judges, and therefore may limit the extent of subsequent judicial review. The Competition Council, which is composed of 17 members included 5 former administrative or civil law judges in 2008.

<sup>73</sup> See Marimbert (2003) pp. 26-37 who speaks of regulators as 'quasi-judges'.

moderate standard of judicial review – such as the standard promoted by the ECJ in *Tetra Laval v. Commission* – should prevail in order, amongst other things, not to create too many incentives for litigation against regulators' decisions.

Whilst it is not the purpose of this contribution to take a position on this issue, we believe that what primarily matters in fields involving complex economic assessments, is the possibility to submit decisions taken by NRAs and NCAs – and in particular, their economic components – to a second, impartial and novel, examination. This also guarantees that the parties will have their legal situation properly and fairly reviewed, in line with the principle of right to appeal laid down by the European Court of Human Rights.<sup>74</sup> This outcome could certainly be attained through the institution of review panels within regulators. Yet, no such institutional setting is ever capable of providing as many guarantees against abuses/mistakes as the possibility to challenge a decision before an independent, distinct court. Internal peer review mechanisms are indeed fraught with numerous shortcomings, such as, for instance, biases affecting the review panels' decisions,<sup>75</sup> lack of transparency, etc.

Moreover, to ensure the efficacy of this institutional setting, we believe that an intensive standard of judicial review – such as the one applied by the French courts in the field of competition law – is warranted as a necessary 'checks and balances' mechanism against the broad powers enjoyed by NRAs and NCAs. There are several reasons for this. First, by virtue of their independent nature, the French NCA and NRAs are (legitimately) insulated from any form of political control and subject to no other scrutiny than judicial review. Second – and maybe more importantly – once adopted, NCA and NRAs decisions over complex economic issues (e.g., delineation of the relevant market(s), findings of dominance/SMP, applicable cost-benchmarks) exert a significant precedential influence in subsequent proceedings before other *foras* (such as, for instance, courts and authorities from the same or other Member States). In the course of their daily activities, national ordinary courts often refer to rulings previously adopted by NRAs and NCAs.<sup>76</sup> We thus believe that it is legitimate – and desirable – to allow for an in-depth review of NRAs and NCAs' decisions which, often, will produce long-lasting and widespread 'sunshine' effects over other organs.<sup>77</sup>

<sup>74</sup> See Geradin (2005).

<sup>75</sup> Be it a 'favourable' bias arising from the coalitional spirit of the reviewers, or an 'unfavourable' bias arising in the case of internal agency competition between the reviewing and reviewed organs.

<sup>76</sup> To take only one example, in the context of its efforts to promote the private enforcement of EC competition rules, the Commission has proposed that decisions taken by a NCA finding an infringement of the EC competition rules be accepted as an 'irrefutable proof of the infringement' in subsequent civil litigation. In addition, such decisions should be deemed to constitute evidence of 'fault', for the purposes of claiming damages. See White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165, 2 April 2008.

<sup>77</sup> See, for a discussion of the concept of 'sunshine' enforcement and effects, Petit (2009). The effects of such decisions also are also likely to influence firms other than the regulated entities, when designing their legal strategies.

Finally, the usual concerns associated with intensive standards of judicial review are not necessarily present in the case of the French courts. In France, courts indeed appear well-qualified to review complex economic assessments as they are increasingly composed of economists.<sup>78</sup> In addition, issues such as regulatory lags or disruptive litigation are of little concern since annulment proceedings before the French courts have in principle no suspensive effect.<sup>79</sup>

<sup>78</sup> F. Jenny, a notorious competition economist, was previously a judge at the Paris Court of Appeals, and now sits with the Supreme Court of Appeals.

<sup>79</sup> In French public law, decisions taken by the French administration are presumed legal as a result of which administrative decisions are immediately applicable. This principle has been recognized as a "fundamental principle of public law" by the Council of State in *Huglo* (Council of State, 2 July 1982, *Huglo and others*). For this reason, judicial review can only take place *a posteriori* and appeals before the administrative judge have no suspensory effects (see Chapus (1997) at para. 1021). However, it is possible to initiate summary proceedings before the administrative judge to request a stay of execution if certain restrictive criteria are met (see Article L511-1 of the French code of Administrative Justice). For instance, the Council of State in *Fiducial* (Council of State, 19 May 2005, *Société Fiducial Informatique*) suspended the decision of the minister authorizing the merger on the basis that the decision did not provide sufficient justifications as to why the merger would not foreclose new entry on the market. Similarly, appeals to the Paris Court of Appeal with regard to decisions taken by the Competition Council have no suspensory effect (see Article L464-7 of the French Code of Commerce). However, it is also possible to be granted a stay of execution of the Competition Council's decision (see Article L464-8 al.3 of the French Code of Commerce). For instance, a stay of execution was granted in a case where the *rapport* (a document representing an important procedural stage in the procedure before the Competition Council) had not been notified to the concerned parties (see Court of Appeal of Paris, 23 January 2007, *Eiffage Construction*).

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