III-3.11: La neutralité dans les systèmes de régulation économique

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MAIN INFORMATION

The Journal of Regulation's annual symposium on March 17, 2011 examined the theme of Neutrality in systems of economic regulation. After preliminaries on the definition of neutrality and neutral action, which were the common theme linking all speakers' contributions, the first part of the colloquium explored the general aspects of neutrality in regulated industries, such as the neutrality of standards or the relationship between neutrality and legal categories, impact studies, or procedural techniques.

The second part of this event raised more specific points, such as the interference between neutrality and the globalization of regulated industries, the question of regulators' neutrality, and of net neutrality that some regulators wish to raise to the level of a general principle.

CONTEXT AND SUMMARY

The first part of the symposium dealt with the general issue of neutrality in systems of economic regulation. It was chaired by Yves Gaudemet, Professor of Law at *Université Panthéon-Assas* (Paris 2). He stressed that the concept of neutrality is not widely used in law, except to refer to being exterior to any given situation, for example when in public international law a state does not interfere in a conflict opposing other states. Yet, neutrality is going to be discussed more and more, as will legal security, because companies ask the regulatory state and its judges to be neutral. There is a link made between neutrality and impartiality, which is a constitutional principle.

The first speaker was a philosopher, Jean-Michel Roy, Professor of Philosophy at the *Ecole Normale Supérieure de Lyon*. He used epistemology in order to define neutrality, and used the example of a disagreement between neighbors that was brought to court. He showed that three possible, distinct positions must be identified: the involved party, the indifferent observer, and the observer who gets involved. He concluded his analysis by applying this situation to regulated industries: neutrality means not getting involved and staying outside the regulated system, and especially means that the observer should not force his own values upon the involved parties.

Marie-Anne Frison-Roche, Professor of Law at Sciences-Po Paris and Director of The Journal of Regulation, defined "neutral action" by saying that at first glance, the only way to be neutral is to remain outside the system, which means being inactive. Therefore, neutral action would be an oxymoron. But, she argues that, first of all, because the State carries out society's choices for the future, it is rightly able to act in a non-neutral fashion towards industries by taking them out of the instantaneousness of the market and forcing an industrial policy upon them. However, even though they behave in a strategic fashion, companies simply seek more profit, and therefore act in a neutral fashion. However, the speaker asserts that regulators and judges must be neutral in regulated industries since they lack the political legitimacy necessary to develop long-term strategies whose goals they have developed themselves. The difficulty is that everyone knows that neither regulators nor judges are neutral, which requires the system to "neutralize" their action, in order to make them politically tolerable. This neutralization takes place thanks to the relationship between impartiality, accountability, objectivity, and discursive rationality, which obliges the decision-maker to say why he chose a particular solution, and why he abandoned other potential solutions, which is a method that produces neutrality. This method makes the judge the paragon of neutral action and allows us to say "to regulate is to judge."

In order to address the general principle of neutrality in economically regulated industries, Jérôme Haas, President of the *Autorité des normes comptables*, discusses the principle of the neutrality of

standards using the example of accounting standards. He believes that such standards are not neutral, for they are fickle and complex, and are created by public authorities and private organizations. Indeed, such standards not only influence behavior and structure markets, but they also can be designed in such a way as to take into account the strategies companies use to present their economic and financial situation. The standard-setter cannot therefore claim to be neutral. The speaker especially drew upon his international experience in order to say that this observation does not affect his job or his legitimacy. Indeed, he proposes a return to the key notion of the general interest. According to him, the standard-setter and the regulator are responsible for furthering the general interest, which means they have to cause a convergence between the interests of all parties involved in regulation.

As for Laurent Vidal, co-director of the public economic law department at the *Université Panthéon-Sorbonne* (Paris I), and Lawyer at the Paris Bar, he explained how regulation neutralizes traditional legal categories, both in private and in public law, which partly explains why legal scholars have a hard time with the concept of regulation. We can observe the destructive effect of regulation's indifference towards law by directly considering the phenomena of supervision, market abuse, merger review, access to networks, etc. But, at the same time, the speaker demonstrated that law is revivified by regulation, because it makes the law better able to take economics into account.

After this very general presentation, Mr. Philippe Poiget, Director of the *Fédération française des sociétés d'assurance*, used the concrete example of the insurance industry to discuss how impact studies should be used in regulated industries. He first pointed out how companies have trouble keeping up with the complexity and the constant fluctuation of the rules, which is most handicapping for international corporations that have to simultaneously obey various national regulations. Performing impact studies before adopting new rules should greatly contribute to the much-abused art of rule making. Impact studies are greatly used when drawing up European Union legislation, especially when preparing the Insolvability II Directive.

Thierry Fossier, who was at that time still Chief Justice of the Competition and Regulation Chamber of the Appeals Court of Paris, departed from the question of the regulator to discuss the role of the judge in regulated systems. He stressed that Parliament would prefer to see judges intervene minimally, in order for the law to reign supreme, which is doubtlessly a sometimes illusory concept. But judges cannot remain neutral, and economic actors expect the judge, above all, to enforce the law and the rules of due process. This is why corporations have more strictly legal expectations than the legislature. The rigor with which judges apply Article 6.1 of the European Convention on Human Rights pleases businesses, because the culture of impartiality that judges have forced upon the regulator is an essential guarantee. The true issue is the creation of common procedural rules for regulators and the judges who review their decisions, whether they be administrative or civil judges. The speaker continues his analysis by saying that the essence of procedure lies in the treatment of evidence: the admissibility of evidence should go hand in hand with the efficiency, discussion, and inquisitorial system that characterizes the inquest. Thereby, the judge will ensure that fundamental values are respected by the regulator, and far from neutralizing regulation, will use his power of judicial review to reinforce the regulator's legitimacy, enabling him to be taken seriously.

The second part of the colloquium bore on a set of more specific questions. The first contribution focused on the interference between the globalization of regulated sectors and the principle of neutrality. As such, Pierre de Lapasse, a magistrate at the Ministry of Justice, showed that international corporations have at their disposal an efficient tool to avoid national legal systems, which are overly-political, too disparate, and which go contrary to their free will: international contracts and, to resolve disputes, international arbitration. International arbitration has placed the principle of neutrality at the heart of its philosophy by removing parties from national law, even though the execution of an arbitral award requires the support of a government's public force. Arbitration law has been moving towards ever-greater neutrality towards national legal systems, thanks to the new powers that have been given to the arbitrators by statute or by case law, such as the autonomy of the arbitration agreement, or the power of the arbitral tribunal to rule on whether it has jurisdiction to try the case. However, France's Court of Cassation's *Inserm* decision stopped the impermeability between international arbitration and national law, which applies mostly to regulatory and antitrust cases. Indeed, when a dispute concerns the general interest, the State and its national judges intervene to forbid recourse to the neutrality of arbitration and put an end to the power of the

parties' free will. The respect of the general interest is capable of reinforcing the legal security of national markets.

The national specificities that remain in regulatory systems, however technical they might be, were revealed by the contribution of Eric J. Pan, Associate Professor of Law, Cardozo Law School, and an Academic Fellow, Office of International Affairs, US Securities and Exchange Commission (SEC). He explained the conditions under which the United States applied the lessons learned from the financial crisis through the Dodd-Frank Act, which created tools to mitigate the next crisis. He stressed that this Act attempts to protect investors in a novel fashion, by considering them to be consumers of financial instruments, rather than as speculators in a risky environment. He also pointed out the structural need for supervision of market intermediaries, both in carrying out transactions and in providing information, especially as concerns credit rating agencies. He therefore repeated the affirmation made by the previous speakers, saying that regulation is not neutral because it tries to implement a goal on the markets it supervises, and that this absence of neutrality explains why regulation differs from country to country.

Michel Prada, former Chairman of the *Autorité des Marchés financiers* makes the same observation, while stating that the goals, especially the goal of financial stability, are shared by all market regulators because of the domino effect. Nonetheless, there is a difficulty that arises due to the fact that regulation is not neutral, even though there is a need for regulations to be designed that, even if they are not identical, are at least compatible. According to the speaker, improved institutional mechanisms have allowed governments, regulators, and economic agents to remain in permanent contact with one another, even though informal contacts have also played an important role. The essential element required is for Europe or even the Western world to accept the idea of a rule of common behavior. The European Pact for Financial Stability goes in this direction with the budgetary rules it sets for member states.

The symposium continued with a panel discussion during which the chairpersons of the second part of the proceedings, Professors Laurent Benzoni and Marie-Anne Frison-Roche, asked each speaker his opinion on what role neutrality plays in the carrying-out of a regulator's functions, and if neutrality does play a role, does the regulator have the means necessary to implement it?
Joëlle Toledano, Member of the *Collège de l'Autorité de régulation des communications électroniques et des postes* (ARCEP), and President of The European Regulators Group for Postal Services (ERGP), said that the ARCEP is in charge of network neutrality in strict accordance with statute. Internet neutrality is a question that has been grafted on to this larger issue, and the ARCEP issued a recommendation concerning this subject in 2010. But beyond these specific cases, the question of a regulator's neutrality is hardly important, because regulators have a strong influence on markets and market players. Regulators must be evaluated in terms of impartiality, and the regulators have the means at their disposal to be impartial. Jean-François Vilotte, President of the *Autorité de Régulation des Jeux en Ligne* (ARJEL), discusses why the French Parliament created a regulator for online gambling before other countries. The idea was not to liberalize the gambling industry, but rather to legalize the de facto liberalization that had taken place on the Internet, by implementing regulations that the market would not have devised by itself, and counterbalancing the dynamism of competition on this market with the protection of public safety. This is why the ARJEL is a regulatory authority. Because these are questions of public safety, the ARJEL cannot have neutral goals. It is neutral because these goals were set by Parliament. During the debate with the panel, Jean-François Villotte more specifically discussed the budgetary means needed to implement neutrality, and said that he believed that having his budget included in the general government budget was not a threat to regulatory independence, because it prevents the regulator from being captured, unlike other sources of funding that rely upon the industry, and allows agencies that belong to the public sector and act in the name of the State to remain neutral in their actions, and to act in an impartial manner. Jérôme Haas, President of the *Autorité des Normes Comptables* (ANC), also discussed the question of the funding of regulatory agencies, which is the essential element in the battle for independence and impartiality. He demonstrated, using the example of the financial market, that the question of funding is primordial, and that even though budgetary allocations are very important, the use that the agency makes of its available funding is most important. Regulators have great latitude in the use they make of their funding, and the fact that they are held accountable *ex post* to make sure they used it in the general interest is not a problem. Thus, the fact that regulators' budgets are determined by Parliament is not in itself an attack on regulatory

independence and neutrality towards the regulated industry. Edouard de Lamaze, Lawyer and Councilor at the European Economic and Social Committee, examined the question from a European perspective. He demonstrated that while it is easy for third parties and regulated industries to verify the independence of a regulator, it is much more difficult to know whether a regulator is neutral. Neutrality is checked essentially using mechanical rules, such as the prohibition on simultaneously being a regulator and working in a regulated company, or the differentiation between the people within an agency that investigate and that judge. But this is not always enough. Merger review is a regulatory function, yet it is regrettable that only questions of competition law are addressed, while social impact is never considered. As for the question of means, Europe has implemented banking and financial supervisory institutions, but it seems that in order to be economically neutral, the regulators would have to cease all activity. Lastly, the question of neutrality has not been fully addressed as concerns credit rating agencies, and their regulation is only beginning. David Dickinson, Attorney Advisor at the Office of Transportation and Air Quality, United States Environmental Protection Agency, and a Lawyer at the California Bar, addressed the same questions from an American point of view, and especially focused on the Environmental Protection Agency (EPA). He showed that regulators constantly have to deal with the industry, which is directly affected by the standards adopted. In this case, he referred to greenhouse gas emissions and their relationship to the American automobile industry. In the non-neutral task of setting standards, the regulator is also confronted with politics, which might have different goals. The speaker argues that the Clean Air Act only gave the regulator a mandate to enforce air quality standards, but that this simple goal was not shared by the other concerned parties, such as the industry, which must of course obey, but also politics, which can directly go against the regulator's decisions. The extremely technical game of standards and rules is, in fact, dominated by a never-ending game of power and influence, in which neutrality has very little place.

The symposium concluded with a "focus on the principle of net neutrality.' Dominique Roux, Professor of Economics at *Université Paris-Dauphine*, and Director of the Master of Telecommunications and New Media, revealed the state of economic thought concerning the so-called "principle" of net neutrality. He stressed that this question is not legal, and that the battle is not over law or fundamental rights, but rather it is a major economic issue for the coming years. He demonstrated that the investments required of the companies who build and maintain telecommunications infrastructures are extremely considerable. This is compounded by the fact that operators provide services, and the systems that allow users to navigate to various websites. These contain information. Access to information raises the question of how the Internet user will access one piece of information over another. This opens the question of whether internet service providers have the right to charge different prices for varying amounts of available bandwidth or not, or for more or less hierarchization of the bandwidth available for different websites, while physical companies are captured by a system that they no longer understand, especially as concerns advertising and selling. These issues of investment and the future construction of the Internet depend on the regulatory response that will be given to these questions. If the law invents a principle of net neutrality, implying either the prohibition of charging content providers for the cost of infrastructure construction, or the obligation of constructing the network in such a way that any user can access any information at any time without any sort of hindrance, the economics of the Internet become problematic.

The event concluded with the presentation made by Michel Riguidel, Professor *emeritus* at Telecom ParisTech (*Ecole nationale supérieure des telecommunications*). He believes that net neutrality, even though it is a constant subject of discussion, is a non-issue. According to him, what is important is that technological progress now allows data to be stored in unprecedented conditions and volumes, especially via cloud computing. Unlike the Internet, in which everything is fluid, these clusters of data are immovable and inaccessible to people whose personal data has been stored. This very important subject is hardly discussed at all, while net neutrality, a trivial topic, has diverted everyone's attention.

Marie-Anne Frison-Roche thanks all of the speakers and would like to point out that the Journal of Regulation's upcoming events will echo the subjects brought up by the participants in this colloquium. For example, the question of financial stability will be addressed during the colloquium to be held on May 20, 2011 on the future of regulation of auditing, and that the Journal's team is working on a symposium to be held in December 2011 on the theme of Personal Data and

Globalization: regulation and protection.