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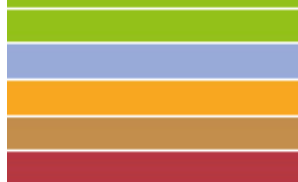
# CONSEIL D'ÉTAT

The Economic Action of Public Persons  
L'action économique des personnes publiques

## 2015 Annual Report

### The Economic Action of Public Persons

### L'action économique des personnes publiques



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The Conseil d'État's 2015 annual study was written by Charles Touboul, maître des requêtes, and deputy rapporteur général, under the supervision of Maryvonne de Saint Pulgent, President of the Report and Studies Section and Jacky Richard, Deputy-President of the Report and Studies Section.

The annex entitled "What remains of Colbertism?" was written by Camille Pascal.

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# Foreword

*by Jean-Marc Sauvé,  
Vice-President of the Conseil d'État*

Firmly defended since the start of the free-market revolution of the nineteen eighties, but never actually fully adhered to, the idea that in the economic field, public persons should refrain from acting or, at the very least, confine themselves to the most indirect and the least intrusive forms of regulation in market mechanisms has clearly been in retreat in the past few years. The recent crisis, first financial and then economic, has confirmed that States, including those which are considered to be the most free-market, have real power to intervene to correct systemic malfunctions, stimulate the competitiveness of their country and defend their strategic activities and that, when appropriate, they are determined to use them. Today, still less than in previous times, it is not a question of putting one's trust in an illusory "invisible hand" to ensure economic processes run efficiently and support sustainable economic growth. A closer look reveals a transformation of the instruments of public action over nearly fifty years: behind the "State as a rescue service" and beyond "the Welfare State", there has indeed been a "strategist State", proactive and firmly committed to promoting national interests whose actions are felt. Its action has not receded from the economic field; on the contrary, it has been reorganised into new channels, with new priorities, as trade and production methods have been globalised and European integration has deepened. Far from opposing each other, the roles played by the State as "regulator" and "interventionist" complement each other, just as, without being absorbed, the national framework fits into the European and international framework. This reorganisation does not reflect a distortion of the fundamental missions of the public persons, but it is testimony to their ability to adapt to the new challenges they must meet. However, their economic action has become considerably more complex and diversified, in an environment that has itself become more fluid and complex.

In this report, the Conseil d'État therefore seeks to clarify and secure the foundations and the scope of this action, but also to evaluate how it should be implemented. By doing so, our institution fulfils its role: with respect to these issues, it provides a twofold vision in its capacity as advisor to the public authorities and the supreme court over administrative matters, striving to be a useful source of analyses and proposals. As such, it contributes a certain doctrinal voice to the public debate,



the fruit of its experience and its ability to listen to the various national and European stakeholders. According to this approach, which aspires to be interdisciplinary, the study covers the whole spectrum of the economic actions of public persons – whether they intervene within the market, as sponsors or economic operators, with regard to its operation, as regulatory authorities or regulators, or, using these mechanisms, to influence the behaviour of economic actors for a general interest purpose. Understood in this way, public action, whether or not it pursues an economic goal, in whole or in part, has an influence, in particular through the effect of its externalities, on the competitiveness of companies, the development of future sectors, the framework of economic activity and the attractiveness of the regions.

The various component parts of public law have incorporated and consolidated this renewal in the relations between public persons and the sphere of economic activities. This consolidation, as in other fields, has had a twofold effect; greater prominence given to law making – in particular at the constitutional level – and a diversification of sources, with the continuous development of European legislation and international standards. Therefore an exogenous legal system has not crept into our legal tradition, because European Union law is our law too since we take part in preparing and implementing it and it is used to promote our interests. Through various channels, economic analysis has become a central part of legal reasoning and, in particular, constitutionality and legality checks. In this regard, one simply has to realise the weight given to entrepreneurial freedom in the contemporary case law of the Constitutional Council, or to observe the growth in administrative litigation relating to economic regulation: the administrative court has become the economic court of the economy. A sign of this “overriding economic focus of administrative law” is seen in the spread of the examination of proportionality in the form of cost/benefit reviews and, in a more general way, in the increased protection of the principle of legal security, and henceforth, of legitimate expectations. The development of public business law requires particular vigilance in this respect: in the economic field, more than elsewhere, the threat of a lawmaking inflation must be averted and the legal constraints weighing on both private and public initiative must be loosened whenever they are shown to be unnecessary or excessive. To achieve this, public persons must have greater expertise available to them, both prior to the lawmaking processes, when new rules are adopted, and afterwards, when they are implemented. In this respect, the Conseil d’État’s study recommends that a prior assessment be made mandatory of the economic, financial and social impacts of amendments of government origin and to strengthen this requirement for the preparation of ordinances, while recommending, moreover, the use of this procedure to prepare legislative proposals. In addition, the study proposes to entrust the exercise of “external” control on the quality, comprehensiveness and sincerity of the prior assessments to a dedicated authority.





The effectiveness of economic public action requires, further downstream, better coordination between the various entities responsible for its implementation. The latter have multiplied at the local and national levels, in particular in the form of independent public authorities. This multipolar governance is justified by the increased requirements of expertise, impartiality, proximity and transparency. However, it inevitably increases the needs, already high, for inter-institutional coordination and steering and it increases the risk of an entanglement of economic competencies and a dilution of public responsibilities. To the threat of lawmaking embolism, can thus be added the danger of organisational entropy. In accord with the reforms already undertaken, the Conseil d'État's study makes practical recommendations in this regard, to identify the most suitable level of intervention and promote operational groupings and partnerships. The greatest benefits must be derived from a reasoned and pragmatic application of the principle of subsidiarity. This requirement applies at the national level as it does at the level of the European Union and the euro zone. Within this regional space, we have to build on the transfers of competencies granted with regard to monetary matters and to apply the rules of budgetary governance in a concerted way. We shall only achieve this by strengthening our presence and having more weight in the various European dialogue and negotiation arenas. But, to make our presence felt effectively, we must also have thorough and certain knowledge of the tools that are available to public persons. This study contributes to this objective, by proposing a practical guide that classifies these tools into eight "families" and subdivides them into twenty-four summaries, which are designed to be used as memory aids in preparing and conducting economic projects by public persons and which will be regularly updated in line with lawmaking and case law developments, at both the national and European levels.

Because it combines different forms of rationality, in particular legal and economic ones, public action is a melting pot where knowledge and experiments meet and are confronted, hybridised and translated into concrete results serving the general interest. The contemporary reorganisation of this action in the economic sphere is a tangible expression of the principle of mutability and adaptation which exemplifies it and which must result in public persons better exercising their missions, while remaining faithful to their history and their values.





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# In short

## 1. A study by the Conseil d'Etat on economic activities of public bodies: why, how ?

What can public bodies do in terms of economic action?

This simple question, albeit vast and controversial, is the subject of the Conseil d'État's 2015 annual review. It replies to this question in a manner appropriate to its function, i.e. without taking sides in terms of the government's choices or making economic policy recommendations but rather by analysing public decision-makers' room for manoeuvre from a legal and institutional point of view.

- The thesis of this study is that there is substantial room for manoeuvre.

The economic activities of public bodies are as important as they have ever been despite the monetary and fiscal transfers on a European level, the globalization of economies and the dilution of economic issues among the various public policies.

These activities are based on solid legal foundations, at once constitutional, legislative and regulatory, but also and more so than one might think, on conventional foundations with European Union law in particular offering numerous possibilities.

To be efficient, these activities must comply with certain methodological precepts: have recourse to a small number of players; take account of the complexity and specific timing characteristics of economic issues; choose the most relevant tools to achieve the goals pursued.

- The importance of the choices underlying the economic activities of public bodies is not fully appreciated by these same public bodies.

This review sets out **52 proposals** to help public bodies use or regain control over their capacities to act.

One of them is implemented in the very framework of this review: a "*Guide to economic action tools for public bodies*" has been drafted and is available as of now to public bodies. It will continue to be enriched and updated over time.



## 2. How can France carry out economic action now that the major monetary and fiscal macroeconomic levers have been substantially transferred to the European level ?

Monetary and fiscal policies are the two traditional attributes of national sovereignty, but also the two main cyclical macroeconomic levers. It is not surprising therefore that the transfers in these two areas in favour of European institutions have given rise to fears in France, as in other Member States of the euro zone, that economic policy would lose its independence at a national level.

This fear is however unfounded.

- The transfer of monetary authority does not prevent Member States from determining and conducting their own economic policy.

The treaties set the priority objective of price stability for the ECB, but this does not mean that monetary policy is isolated from economic policy. The ECB is directly involved in the real economy, as shown yet again by the unconventional policy it implemented in 2015 to ward off the risk of deflation.

The sovereignty transfers granted for the purpose of creating the euro do not deprive France of its room for manoeuvre in conducting economic policy. This has even been strengthened by the stability provided by the single currency. But to fully benefit from this, it is important to ensure that the effects of this policy are “passed on” to the French economy in the best possible conditions, without excessive interference from certain laws and regulations (**Proposal No. 1**).

- The enhanced surveillance of fiscal policy on a European level does not deprive States of their powers.

However, it is necessary to reflect on the consequences for national economic policies of the emergence of an autonomous EU budgetary lever.

The financial crisis led to the development of a monitoring framework resulting from the *Six-pack* in 2011, the Treaty on Stability, Coordination and Governance (TSCG) in 2012 and the *Two-pack* in 2013, which helped cope with emergencies but which is as yet unfinished. While too recent to be reformed, it can still be interpreted flexibly, building on the initiatives taken by the European Commission and the recommendations in the report of the “five presidents” in June 2015 (**Proposal No. 2**).

This enhanced coordination at a European level does not take away fiscal responsibilities from national authorities. These responsibilities must be conducted in line with a more restricted process, marked by numerous external controls, leading to the timetable being revised (**Proposal No. 3**).

- The emergence of a budgetary lever specific to the European Union.

The idea came about to complement this coordination with the Union’s own budgetary lever which may be called upon even outside the sharp crises that the European stability mechanism must help to address. This prospect of a stabilisation



budget is still far off but France should examine the conditions and consequences of this budget as of now **(Proposal No. 4)**.

For now, financial interventions by the Union to support the economy are gaining momentum with the new Commission's investment plan ("Juncker Plan") announced earlier this year. France will be all the more capable of taking advantage of these interventions to the extent that it has specified how this new European investment policy could interact with its national programmes (investments for the future in particular) **(Proposal No. 5)**.

### **3. How effective can economic action by public bodies be in the context of an open economy: global competition, competition between systems, defence of national interests ?**

While it is obvious that the internationalisation and globalisation of trade has changed the relationship, not to say the balance of power, between public bodies and economic players, public action is not however doomed to be impotent. Public bodies can still assert their authority even in the face of mobile players. France can also mobilise substantial diplomatic resources. Finally the economic activities of public bodies can boost the competitiveness and appeal of the country in international competition.

- Preserving territoriality of law and national interests

The mobility of players weakens the authority of the national framework. States are not neutral in this competition through law: they are the ones who determine the territorial scope of their rules and they may decide to include operations that only have a very weak connection to their territory, their citizens or their economy, as practised by the United States. The European Union has no instrument of comparable effectiveness to assert the economic law of the Union and Member States.

Furthermore, while economic patriotism that focuses solely on national operators is a dead-end both from a practical point of view (it becomes impossible to identify the nationality of operators) and a legal one (principle of non-discrimination, freedom of movement in the TFEU), the defence of strategic national interests in case of foreign investment is not prohibited by international and European law. It would be useful to provide for such strategic interest defence mechanisms throughout the Union, notably by setting up a watch on such investments in sensitive sectors and companies **(Proposal No. 6)**.

- Placing diplomacy at the service of the economy

France is a major diplomatic power and has gradually taken to using its network for economic purposes as economic power becomes an essential part of power itself.

France has strong advantages in a world of increasingly fragmented multilateral diplomacy between the large organisations (United Nations Security Council, IMF, WTO or OECD) and informal multilateral bodies (G20 and specialised technically oriented bodies that play a central role in preparing future international



“standards”). France’s influence within the economic giant that is the European Union is also a key asset.

Finally, it can benefit from its language links but also its legal ties with other states through bilateral diplomacy. Promoting continental law is becoming an important goal of economic diplomacy, especially to resist the bias of economic players in favour of *common law* (**Proposals No. 7 and No. 8**).

- Attractiveness and competitiveness policies but no “dumping”

International rankings exacerbate competition between systems. This is particularly true in terms of competitiveness with the World Bank’s “*Doing Business*” ranking. It is futile to fight the principle of these rankings. Efforts would be more usefully deployed by focusing on improving their methodology if necessary and promoting the performance of the French government and legal system (**Proposal No. 9**).

If it is necessary to further strengthen attractiveness and competitiveness, this should be done by maintaining a balanced approach without being drawn into a general weakening of the rules applicable to businesses or a race to be the “lowest bidder”. Aggressively pursuing this type of policy can quickly lead to forms of “*dumping*” that are potentially damaging for stakeholders as shown in the recent “*tax rulings*” events (**Proposals No. 10 and No. 11**).

#### **4. Why and how should the economic activities of public bodies be identified, measured and controlled ?**

The dilution of economic issues among all public policies could result in these precise actions being no longer distinguished and in deeming that attempts at overall management are vain. However this management is both necessary and possible, provided the scope of these activities is precisely identified and a stringent assessment of its results carried out.

- Formalising a national economic strategy

The “Nation plan” which first came about after the war started to decline in the 70s and totally disappeared in the 90s. But public prospective however remains very dynamic, especially in public institutions. Sector strategies exist (such as the 34 plans for the new industrial France in 2013) and formalised planning is being developed at the local level.

While the national economic strategy is discussed on numerous occasions, particularly in the context of the European Semester, setting it down formally in a document intended to be used as the reference for other sector-based programming or planning, while remaining flexible and adaptable, would have numerous benefits (**Proposal No. 12**).



- Mapping economic action for this purpose

For a lawyer, the economic activities of public bodies are defined by their purpose. The activity is economic when it has, at least partially, the aim of directly influencing the production, distribution, trade or consumption of goods and services.

Based on this criterion, it is possible to draw a concentric circle-based zoning system: the first circle includes action with companies and action on markets; the second circle corresponds more directly to mixed actions which pursue both economic and non-economic objectives, a mix characteristic of sectoral actions and policies; the third circle covers all actions that do not initially pursue economic goals but whose economic impact can be measured and taken into account as a positive or negative source of externalities.

Such mapping of the economic activities of public bodies is only useful if it is sufficiently precise to be operational. The development of this mapping can be based on initiatives and work already underway and can be conducted with the various stakeholders (**Proposal No. 13**).

- Clarifying the methods for assessing the overall performance of the economy

Despite the proven reliability of the statistical system, the debate over numbers is still a hot topic. But it has taken on a new dimension because of the role that the legal texts give to these figures. The necessarily “compiled” nature of statistics, based on conventions and corrections, and the ensuing use made of them, become the focal point of a legal and political debate.

The overall measure of economic performance that is GDP is also coming under increasing criticism. To explore these issues, a committee was formed in 2008 under the leadership of J. Stiglitz, A. Sen and J.P. Fitoussi. Their report, released in 2009, made a dozen proposals to improve GDP as a tool to measure economic performance, while adding other complementary indicators to it. But it was not until the Act of 13 April, 2015 that the inclusion of such indicators was prescribed. However the ways and means of taking account of them have yet to be found (**Proposal No. 14**).

## **5. What room for manoeuvre is provided by the constitutional framework in economic matters? In what areas is greater vigilance required ?**

The “constitutional block” is generally flexible and leaves Parliament with substantial elbow room when passing economic legislation. However this relative flexibility should not lead one to underestimate the requirements arising out of constitutional control over economic matters.

- A weighted economic constitution

The Constitution postulates the existence of economic action. Several of its provisions organise and steer economic actions by public bodies. The three declarations of rights that are part of the constitutional block (the Declaration of



26 August 1789; the Preamble to the Constitution of 27 October 1946 and the 2004 Environment Charter) are the three generations of fundamental rights whose inspirations (liberal, social, environmental) tend to balance each other out, thereby contributing to the **plasticity of the constitutional framework**. In any case these documents address the economic activities of public bodies in a relatively discreet manner. The debate on the need to complete constitutional texts, in particular in order to explicitly set down the right to free enterprise, however also remains very limited.

Meanwhile the constitutional court has always been careful not to oppose constitutional norms to the fundamental economic policy orientations taken by successive majorities. The **moderation of the constitutional court** in economic action issues was clearly shown in its attitude when dealing with movements that affected the size of the public sector (case law on nationalisation and privatisation). The principles established by the Constitutional Court also leave some freedom to the legislator, whether this be the right to free enterprise or the right to property, freedom to contract and the principle of equality in economic matters.

- Extensive constitutional control

The history of constitutional control has been marked by dramatic declarations of unconstitutionality on major aspects of economic policy. It is therefore necessary to better integrate the constitutional risk into the decision-making process, but also to learn the lessons of declarations of unconstitutionality both for the texts to which they refer and for similar texts (**Proposal No. 15 and 16**).

- A control made more demanding by Priority Questions of Constitutionality (QPC)

The introduction on 1 March 2010 of these Priority Questions of Constitutionality strengthened the grip of constitutional control over the economic activities of public bodies. Businesses rapidly took advantage of the QPC system to challenge the economic actions of public bodies.

The coming of this new remedy has not led to a disruption of economic constitutionality control, but it has helped deepen it. It is therefore necessary to take care to prevent the QPC risk through a more systematic examination of draft bills (**Proposal No. 17**).

## **6. European Union law against economic action ? A misperception.**

The position of conventional standards with regards to economic action has grown steadily over the last thirty years, mainly driven by European Union law and the dynamic of ever greater single market integration. A growing number of international standards also apply to public economic action, including the European Convention on Human Rights, increasingly referred to in economic disputes.





- European law is not hostile to States' economic activities

Economic activities by public bodies was at times perceived as challenging the very principles of European integration, both in their regulatory function with respect to the activities of economic players and when they act as market operators.

However European law has gradually evolved and the leeway for public bodies depends mainly on how the treaties are interpreted and applied, whether this concerns the content of the derived legislation (as in public contracts) or the Commission's approach with regard to State aid which is now refocusing on the most significant operations.

- Investing in the development of EU legislation and taking better account of it

France can first promote European law favourable to Member States economic activities through its contribution to the process of drafting European legislation but also to the development of case law by intervening in the procedure for preliminary issues (**Proposals 18, 19 and 20**).

It is also necessary to ensure that national measures comply with EU law from the time they are drafted without waiting for a possible litigation. An adaptation of the French system for coordination of EU affairs would serve this strategy of influence by associating companies and economic regulators more. A strengthening of French presence in European institutions would also be useful (**Proposal No. 21 and 22**).

Similarly, rather than entrust European issues to dedicated structures, it would be better to improve understanding of these issues by all agents through more robust initial training and more systematic continuing education, particularly in terms of State aid. More accessible European law would furthermore promote its recognition by French authorities (**Proposals No. 23, 24 and 25**).

- The rise of other international standards

The European Convention for the Protection of Human Rights and Fundamental Freedoms is integrated by public bodies into their economic activities through the very broad protection it offers in terms of property rights and the high level of its requirements as regards repressive procedural law which must be taken into account by economic regulators. It is therefore important that public bodies take full account of the requirements of this convention in their economic action (**Proposal No. 26**).

The proliferation of other acts, agreements or treaties in the economic arena also brings public bodies face to face with a large quantity of laws and rules of different origins, often applied transversally and that are difficult to be aware of and sometimes to reconcile. It is therefore again necessary to take better account of these international commitments to legally secure the economic activities of public bodies (**Proposal No. 27**).



## 7. How to reduce the proliferation and dispersal of rules and how to improve the handling of disputes with respect to economic action ?

The underlying overall design of national laws and regulations as well as administrative and judicial jurisprudence is broadly favourable to the very principle of economic action by public bodies. The main subject of concern is the mushrooming of applicable texts, the way they are articulated and their often uncertain scope and especially the increasingly intense jurisdictional control over public economic actions.

- Economic action has long been accepted by case law

At a very early stage, the courts accepted the principle of Public initiatives, be this a question of public bodies supervising private economic activities or themselves conducting economic activities.

But they remain vigilant as to attacks on freedom of trade and industry, in particular by ensuring that the rules set by public bodies do not excessively restrict private initiative and that public economic activities is justified by sufficient public interest. Any restrictions must also, to be lawful, respect other principles such as the principle of equality, the principle of non retroactivity and the principle of legal security that public bodies must now take fully into account (**Proposal No. 28**).

- Mushrooming of legislation

The legislation applicable to economic action by public bodies is highly dispersed. While a code of economic action by public bodies would not present a significant advantage, a minimum grouping of autonomous provisions would be appropriate. Moreover, the broadly sector-based approach to economic regulation has led to the adoption of a large number of texts in “silo” form from EU law. While it is not possible to effectively remedy this fragmentation by a purely national initiative, the way these rules interact must be improved.

The application of competition law to the actions of public bodies is now broadly covered by legislative texts and case law, but solutions are not so evident for other components of common economic law. The more systematic adoption of specific provisions on the conditions under which the law or the economic regulations apply to public bodies would help clarify the legal situation (**Proposal No. 29**).

- The increasing importance of litigation

Increasingly important and varied, litigation on economic action by public bodies is attractive to companies, particularly due to the increasing effectiveness of the courts with respect to economic activities.

Despite the technical nature of the litigation, the courts no longer hesitate to exert full control over the technical choices of the administration. The courts are increasingly present as a player in the process and are ultimately called on to rule on the relevance of economic action, by becoming a sort of ultimate regulator. The very technicality of these issues and the importance of the stakes in play argue in favour of increased specialisation of jurisdictions accompanied, if necessary, by



specific training for judges (**Proposal No. 30**).

Other ways to handle disputes are becoming increasingly important. This is the case of recourse to criminal courts but these remedies must remain exceptional. The non-judicial modes that are mediation and conciliation are also growing and should be encouraged (**Proposal No. 31**).

#### **8. Ministries, regulators, agencies, local authorities: are the number and competences of the various public players adapted to the needs of economic action ?**

The number of players is still very high on a national level but also at the decentralised level despite a consolidation effort. Between these two levels, the most efficient interaction has yet to be found.

- The risks of a proliferation of national players

Economic issues are fragmented in central government due to the fact that some of them report to the Prime Minister but also due to hesitation as to their distribution between economic ministries and sector-based ministries. In the economic field more than elsewhere, stability in the distribution of powers between different ministerial departments must however be preserved (**Proposals No. 32 and 33**).

Several independent or autonomous bodies also intervene in public economic action: the major historical institutions (Caisse des Dépôts et Consignations, Banque de France), independent regulators and state agencies. Their growth in numbers and resources affects the balances between the different players, creating boundary problems and may weaken the consistency of the government's economic actions. In this area it is important to maintain the necessary balance (**Proposal No. 34**).

- Better articulating “national” and “local”

The State must encourage and support local economic action and not hinder it through an excessively strict regulatory framework or excessive financial constraints. The subsidiarity principle must govern territorial economic action to prevent State territorial actions from competing with local economic actions. A clearer division of powers in the field of economic action is needed, similar to the way the NOTRe Act operates between levels of local government. State controls over local action must also be accompanied by support and backing for their economic action (**Proposal No. 35**).

It is on the regional level that the State's economic actions must be performed in tandem with those of local authorities in a partnership approach. This partnership takes shape through action, with an increased use of contracting and shared local planning, but also through the development of laws and regulations. It must also be based on increased financial responsibility for regions, either through the management of European structural funds, or by increasing the share of “economic taxation” in their resources (**Proposal No. 36**).



- A Region-city pair that will not solve all issues

While the regions have gradually established themselves as the leading local authorities in economic matters, the current movement towards “metropolisation of growth” reveals the strategic importance of large urban centres in economic development. This polarisation of economic action around the region/city pair organised by the NOTRe Act must be given every chance to succeed.

Other local authorities have powers that are of interest to the economic sphere and that could not be transferred to the regions. The negative effects of this dispersion may be contained by the development of pooling and sharing of projects or experiences (**Proposal No. 37**).

### **9. How can better decisions be made in economic matters? Evaluate, discuss, experiment**

Despite its political dimension and sometimes its media impact, economic decision-making is first and foremost technical and implies meticulous examination upstream. The decision-making process must be tailored to the recipient, in particular businesses. Once the decision is implemented, it is important that its effects be accurately assessed.

- Better appraisal of economic decisions

Economic decisions are still insufficiently scrutinised, for lack of knowledge about the work carried out by experts that is available or in progress. Access by examining departments and decision-makers to various reports, including those that are not made public, should be facilitated (**Proposal No. 38**).

The process of preliminary assessments of draft bills initiated by the constitutional revision of 2008 can be improved by strengthening the analysis made by these assessments of the economic impact of the project and by submitting them to some form of external quality control. The preliminary assessment approach could also be usefully extended, in an appropriate manner, to some proposed bills and amendments concerning the economic sphere, to orders, decrees and regulations of significant economic importance and finally to the most significant investments by local authorities (**Proposals No. 39 and 40**).

- Get businesses involved in decisions to enable them to anticipate them

To strengthen the quality and effectiveness of dialogue with companies, it is recommended that a single legal framework for all activities with public authorities by interest groups be defined (**Proposal No. 41**). The dialogue could also be strengthened by more frequent recourse to open consultations on draft texts that have an economic impact (**Proposal No. 42**).

The instability of law prevents companies from planning for the future and from reasonably anticipating the consequences of their management choices or the profitability of their investments. The remedies are to refrain from regularly tinkering with systems, to examine every alternative to modification when



carrying out preliminary assessments, including the “zero option” and to apply “moratoriums” to the most important economic systems (**Proposal No. 43**). On the other hand, economic action must be able to benefit from rapid decision-making and implementation processes when urgency so requires. In this regard, the negative effects of purely dilatory litigation should be contained, while respecting the right to appeal (**Proposal No. 44**).

To enable companies to prepare for the effective implementation of measures, we must pay special attention to the conditions in which legislation comes into force but also make efforts to support companies in enforcing this legislation. (**Proposal No. 45**).

- Developing testing and assessment ex post

Despite its usefulness, experimenting is only rarely used in the economic sphere. An expansion of his practice is possible without changing the legal texts. Experiments must also be conducted more meticulously: if the results prove to be below expectations, this is not a reason to discontinue them abruptly, thereby losing information that may have enabled a more suitable system to be developed (**Proposal No. 46**).

*Ex post* assessments, which are also too little used, could learn from the European practice of “review clauses” (or even “sunset clauses”) requiring a comprehensive assessment of economic mechanisms in order to change them if the assessment shows results are insufficient. *Ex post* assessments could be conducted by the department that devised the measure but based on an independent expert opinion, the results of which would be made public. This after-the-fact assessment could also be developed as an extension of the RGPP (general review of public policies) and the MAP (modernisation of public action) for regulated sectors, going as far as reviewing the appropriateness of recourse to a sector-specific regulation, in light of the goals already achieved (**Proposal No. 47**).

## 10. What tools for efficient action? A method and a guide

Choosing the appropriate tools is a prerequisite for efficient economic activities by public bodies. The very notion of tool is not the subject of a shared definition or classification. The palette of tools and their consistency are also very changing. They must regularly adapt to the changing context and needs. The wide range of economic action tools and their implications are not well known to the public bodies that use them. This is where the most significant progress can and must be made.

- Defining the concept of economic action tool

The tool is what remains of an action when we disregard the objectives pursued, the bodies or organisations who decide to take the action and the procedures followed to initiate it. Economic action tools are all the generic mechanisms that can be used by public bodies when developing specific measures in a given field and context to achieve microeconomic objectives.



These tools are very heterogeneous and many classifications are possible. The study proposes a typology organised around eight families: tax incentives, financial assistance, public ownership, conducting economic activities, public companies and investment, economic legislation and regulations, public declarations and support.

- Tools that are open-ended by nature and which must remain so

The range of tools must change with needs. These tools have evolved considerably over the past thirty years with the rise in regulation. The financial and sovereign debt crises since 2008 have led to a comeback for old tools but also to the development of innovative tools to address new risks. There must be awareness of changing tools in order to anticipate future developments. It is important to keep watch so the tools can be changed when necessary.

The tool framework also changes as demonstrated in several recent or current reforms. Other developments are needed, particularly with regard to public ownership (granting authorisations, intangible property) and public companies (governance and the “implicit guarantee” provided by public industrial and commercial companies, management and operating rules) (**Proposals No. 48 and 49**).

- More efficient use of tools

Two principles follow on from the “Tinbergen Rule” (Dutch economist) according to which economic policy must be based on as many instruments as it has objectives: firstly define the objective and only assign one objective to each tool used. The “Mundell rule” (Canadian economist) states that to achieve its objectives, economic policy must apply each instrument based on the comparative advantage it has over other instruments available. Yet while public bodies have a vision, albeit imprecise, of their economic objectives, they only have fragmentary information as to the range of tools at their disposal. The development of a guide to economic action tools would help remedy this problem (**Proposal No. 50, see sheet No. 11 for a detailed presentation**).

Furthermore, the comparative merits of each tool must be objectified. Indeed biases influence the choice of tools: fads or image, the temptation to avoid binding rules or to escape expenditure norms. This choice must instead be commanded by a rational analysis based on four groups of criteria: appropriateness to the objective pursued; the public resources mobilised; monitoring and assessment possibilities; scalability and reversibility of the tool (**Proposal No. 51 and 52**).



# The Economic Action of Public Persons







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# Introduction

Within a context of recovery from the very serious financial crisis of 2008, marked by long-term economic stagnation, particularly in Europe, questions about the situation in France have become much more pressing: it has slipped down from its place as fifth economic power in the world; the persistence of significant imbalances in the public finances is provoking tensions with its European partners; unemployment has never been so high; the decision-making centres of its very large enterprises are tending to go abroad.

Some see in these results the sign of a crisis in the French economic model and justification for a complete overhaul of it. The debate relates in large part to the role of the public sphere, considered by some to be excessive and by others insufficient. More generally, the political debate in France and within the European Union focuses on the limits of the economic action of public persons in relation to the constraints of globalisation.

It is obviously not the role of the Conseil d'État to enter into these debates regarding the legitimacy of the action of public economic persons which, in our democracy, fall within the jurisdiction of Parliament and the Government. This study is thus not intended to deal with the "why", but the "how".

The first problem is to define the economic action of public persons.

"Public persons" are clearly identified in law. They are legal persons governed by public law and comprise the State, local authorities and their public institutions, to which must be added *sui generis* public persons that are fairly present the economic area (Bank of France, Public interest groupings and independent regulatory authorities which have a legal personality).

"Economic action" is a concept that is a little less clear. It is firstly a set of measures consciously designed to achieve certain objectives that are characterised by the adjective "economic".

It is to this purposeful economic action that this report is mainly devoted, without neglecting the economic effects that certain activities or measures may have that were not originally designed for this purpose (the economic impact of the law and of other public policies, in particular social ones; the issue of the administrative burden but also the entire range of "positive externalities", etc.).



The economic action of public persons, even thus defined, remains huge and extremely diverse.

It includes economic *legislation and regulations*, whether for governing access to professions or activities and the conditions for exercising them, defining the structure of operators and their funding methods, or organising their relations or dealing with their problems. It encompasses *all economic regulations* whether for specific sectors (banking and finance, energy, electronic communications, etc.) or general (in particular competition). This concept also includes economic activities carried out by *public operators* themselves or by the structures that they constitute for this purpose (governance, public procurement, public enterprises) as well as their *interventions* both in the form of support – notably financial – to private actors and to instructions made to the latter.

The importance of the economic role of public persons in France is often presented as a legacy of history.

It is true that the first signs of it can be found in the Middle Ages, in particular with the corporations, and then starting in the 16<sup>th</sup> century, a theorising of the economic role of the State was sketched out with the development of bullionism and mercantilism. In France, the role of the State took on greater significance in the 17<sup>th</sup> century with Colbertism which emphasised regulation and the control of economic activities as well as on the promotion of manufacturing production. This experience left a lasting impression in people's minds and since then has contributed to the idea of an interventionist tradition.

#### **What remains of Colbertism?**

Although the word is an invention of the 19<sup>th</sup> century, it is only reasonable to enquire about the reality of the economic concept and policy that it covers. Colbert was not a theoretician but a statesman given responsibility for dealing with a given situation: enabling France to recover from the disasters of the previous era of revolt and funding the military policy of a “Warrior King”. To achieve this, he drew his inspiration from the thinking of the “mercantilists”. Certainly, the State has always intervened in the economy through minting money and levying taxes, but the theorising of “*conscious intervention of the State in economic life*” only first appears in the 17<sup>th</sup> century (See Annex 3, p. 239)

But this tradition was strongly contested from the middle of the 18<sup>th</sup> century by the surge in liberal ideas, embodied in the Declaration of the Rights of Man and of the Citizen. Indeed, the Revolution of 1789 was also an economic revolution: the free exercise of professions (Allarde Decree, Le Chapelier Act) and the removal of many barriers promoted private initiative. In many respects, throughout the 19<sup>th</sup> century, the functioning of the economy remained on the liberal model.

The role of the State increased considerably during the First World War, but starting in the 1920s, a movement in the opposite direction was seen and, to a certain extent, a return to the free market. France only truly returned to interventionism in the 1930s, with the beginnings of the Welfare State and the Popular Front.

This interventionism was transformed into a real dirigisme under Vichy. After the war, in a context where the determining factors of the rank and power of a State in international competition became more economic than military, the intervention of the State in France was characterised by reconstruction and its planning approach; Public persons retained a structuring role in a high-growth economy until the first oil crisis. Public action then became countercyclical in an attempt to contain the crisis, without however managing to achieve this ambition.

A new turning point towards the free market occurred in the middle of the 1980s, characterised by economic and financial deregulation and encouraged by the construction of the European single market. It put an end to this phase of the extension of the scope of the economic action of public persons, which ultimately only lasted fifty years.

Today it is difficult to define a “French model” which is fundamentally distinct from other major western democracies. Although the United Kingdom has an approach of the action of public persons that is more restrictive than in France, the same is not true of the United States, which intervenes strongly in certain strategic sectors of the economy (defence and aeronautics) while having a fairly protectionist approach, in particular in respect to public procurement. The German model is also that of fairly strong action in the public sphere (ordo-liberalism or social market economy) combined with a structuring of the economy around the *Länder* and dialogue between the social partners, achieving results that are close to those to which public action in France seeks to do. In many respects, the situation in France is also similar to that of the Scandinavian countries; with regard to the criterion of the amount of public expenditure in GDP, France, with a ratio of 57.7%, has now overtaken Sweden (53%).

No theory of the economic action of public persons exists that is specific to France. The great schools of economic thought (mercantilism, liberalism, Keynesianism) have inspired our country as other countries, with each nation adopting them according to its history and its culture.

This study does not therefore propose to build a theory of the economic action of public persons, but to understand within what framework and according to what methods it can be conducted, which presupposes responding to three series of questions.

First and foremost, the question of whether there is still a place for the economic action of public persons must be answered, due to the profound change in the macroeconomic frameworks, the effects of globalisation and the dilution of economic issues within public policies as a whole (I).

The second question is that of the bases of economic action. The law indeed is highly present in this field and protects private initiative that is essential in a market economy. But the economic action of public persons must be backed by basic rules which acknowledge its principle and allow it to be exercised effectively (II).



Finally, such action must above all enable results to be obtained. It is therefore important to study under what conditions it can be effective, as regards the organisation of the actors, decision-making procedures and deployable tools (III).



# What place is there for the economic action of public persons?

Public opinion is highly sceptical about the impact that the economic action of public persons can have. The dominant feeling is that European integration, globalisation and the increasing complexity of our economy weaken this action and that constraints on it create a stranglehold which now deprive it of any room for manoeuvre.

This perception is excessive.

The transfer of macroeconomic levers to the European level, although significant, still leaves wide scope to pursue a national economic policy **(1.1)**.

There is no incompatibility between proactive economic action by public persons and an opening up to competition, provided that it is assessed accurately and that one knows how to adapt to it **(1.2)**.

However, most public policies now affect economic activity, which complicates a definition of what the economic action of public persons covers, although this is necessary for its overall coordination **(1.3)**.

## 1.1. The transfer of major macroeconomic levers to the European level still leaves a large scope to pursue national economic policy

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Traditional attributes of national sovereignty, monetary policy and budgetary policy are also the two main cyclical macroeconomic levers. It is not surprising therefore that the transfers in these two areas to the benefit of the European institutions have given rise to fears in France, as in other Member States of the euro zone, that economic policy will lose its independence at the national level.



However, the now completed transfer of the monetary lever does not prevent the Member States from deciding and pursuing their own economic policies (1.1.1). And the reinforced monitoring that the budgetary lever now undergoes at the European level does not deprive the States of their competence (1.1.2). However, thinking is required about the consequences on the national economic policies of the emergence of an autonomous budgetary lever of the European Union (1.1.3).

## 1.1.1. The consequences of the transfer of the monetary lever to the European Central Bank

### 1.1.1.1. An independence and a mandate long misunderstood

■ *The specificity of the European Central Bank is based on the texts*

The European Central Bank has several specific features compared to its counterparts in other developed countries.

The independence of the European Central Bank, guaranteed today by Article 130 of the TFEU, is greater than that of other central banks of the developed countries. Within the context of the political agreement paving the way for the Treaty of Maastricht, Germany abandoned its currency in return for a single currency entrusted to a central bank designed on the original model of the *Bundesbank*, i.e. enjoying according to the texts and in practice very wide independence<sup>1</sup>. This is further reinforced by the absence of a European institution in charge of economic policy that can play the same role as the American government with respect to the Federal Reserve (*Fed*).

In contrast to that of other major central banks, in particular that of the *Fed*<sup>2</sup>, the mandate of the ECB is “*hierarchical*”<sup>3</sup>. In the United States the *Federal Reserve Act* of 17 September 1978 in particular assigns to the Fed the objective of ensuring simultaneously a maximum employment rate, price stability and low interest rates. As for the TFEU, it assigns to the European System of Central Banks a priority objective of price stability, even if responsible, without prejudice to this objective, for providing “*support to the general economic policies in the Union*” (Art. 127). Price stability is also one of the fundamental objectives affirmed by the Treaty on the European Union (Article 3.3)<sup>4</sup>.

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1. The *Bundesbank* enjoys a great deal of organic independence since the Act of 26 July 1957 (*Bundesbankgesetz*) which laid down its articles. See J. de Larosière 2012, “Central Banks and Monetary Policy, Towards a new framework”, *Revue Commentaire*, No. 130, pp. 333-338.

2. E. Le Héron, “Fed versus ECB, the history of a democratic issue”, *L'économie politique; Alternatives économiques*, No. 61, p. 95-107.

3. C. Bordes, *Monetary Policy*, Repères, 2008, p.22.

4. As the European Central Bank itself emphasises in its institutional communication: “*Price stability is not only the primary objective of the ECB's monetary policy, but also an objective of the European Union as a whole. Thus, the Treaty on the Functioning of the European Union and the Treaty on European Union establish a clear hierarchy of objectives for the Eurosystem, making it clear that price stability is the most important contribution that monetary policy can make to achieving a favourable economic environment and a high level of employment.*” (ECB website).

Its pre-eminence is confirmed by Article 219 of the TFEU which specifies that if the Council may under certain conditions formulate general directions for exchange rate policy vis-a-vis the currencies of third-party States, these directions “do not affect the main objective of the European System of Central Banks (ESCB), namely the maintenance of price stability”<sup>5</sup>. This prerogative of the Council has in any case never been implemented, because of the lack of consensus on the appropriate parity of the euro.

■ *European Monetary policy is not however an isolate of economic policy*

Despite differences in the descriptions of its missions, the obligation for the Fed to pursue competing objectives leads it to reconciling them, in the same way as the ECB provides the best possible support for the economy, in line with the requirement to maintain price stability. Maintaining price stability is not a requirement at every moment but a medium-term objective (2 to 3 years) compatible with temporary fluctuations in the rate of inflation around the 2% mark justified by cyclical events (for example, variations in the price of energy which have a significant impact on the general change in prices)<sup>6</sup>.

The independence of the ECB has never prevented exchanges with the other institutions of the euro zone, which have even become intense since the financial crisis<sup>7</sup>. The President of the Council of the EU may participate without a voting right in the meetings of the Governing Council of the European Central Bank and even submit a motion; reciprocally, the President of the ECB is invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB<sup>8</sup>. The President of the ECB is also invited to informal meetings of the Eurogroup<sup>9</sup>.

Moreover, the European central bankers are not in any way uninterested in the economic policies of the Member States, whose performance is taken into account for determining the direction of monetary policy. The speech made very freely at “*Jackson Hole*” on 25 August 2014 by the Governor of the ECB on the issues of economic policy is regarded as a turning point in this regard. A sign of the “dialogue” between the institutions, this speech was cited in the

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5. Paragraph 2 of Article 219 of the TFEU.

6. This legal rule of 2% became widespread at the end of the 1980s for most of the central banks of the developed countries on basis of empirical studies. As regards the ECB, it is not fixed by the treaties but by the Governing Council in a deliberation of 13 October 1998, stating that it should be assessed in the medium term.

7. The participation of the ECB in the meetings of the governing council of the European Stability Mechanism (ESM) as well as the “troika” as part of assistance to the countries of the euro zone in difficulty testify to this involvement. See, in particular, on this latter body, the inquiry report of the European Parliament No. 2013/2277(INI) of 28 February 2014 and the resolution of the Parliament of 13 March 2014 on this report.

8. Art. 284 of the TFEU.

9. Article 1 of Protocol No. 3 annexed to the Treaty of Lisbon on the Eurogroup. The President of the ECB may also be invited to the monthly meetings of the President of the Euro Zone Summit, of the President of the Commission and of the President of the Eurogroup (point 6 of Annex 1 of the Declaration of the Euro Zone Summit of 8 November 2011).



communication from the Commission of 13 January 2015 regarding the margins of flexibility of the Stability and Growth Pact, in conjunction with the “Juncker investment plan” announced on the same day<sup>10</sup> and the ECB publicly supported this plan<sup>11</sup>.

The ECB does not limit itself to a macroeconomic analysis of the euro zone. The very structure of the European System of Central Banks, which is the network formed by the national central banks and the ECB, as well as the participation of the national central bankers to the Governing Council of the ECB lead them to take account of national situations<sup>12</sup>. Besides, the ECB is not required to rigorously apply the same policy to the whole of the zone. If the interest rates are necessarily the same for all, the types of securities that it accepts as guarantees or repos allow it to undertake a certain form of modulation per country.

#### **Law and facts with regard to the independence of the Central Bank: foreign examples**

The letter of the texts does not always indicate the reality of the independence of a central bank. In Canada, the power recognised since 1985 (Art. 14 of the Act on the Bank of Canada R.S.C. 1985, c. B-2) of the Minister of Finance to give instructions to the Governor has never been implemented. Similarly, the Monetary Authority of Singapore which in the texts has only operational autonomy (*Monetary Authority of Singapore Act* of 26 December 1970) has never suffered from Government interference since its creation in 1971.

Relations may be more ambiguous. In South Korea, the articles of the central bank simultaneously lay down its independence and the conduct of its action in line with the policy of the Government provided the latter does not threaten price stability (*Bank of Korea Act* of 5 May 1950, Art 3 and 4) and in reality links are close between economic and monetary policy.

More extreme models are found. The Central Bank of China is not independent; the Chinese communist party takes the decisions which are then implemented by the government. On the contrary, in Switzerland, the crisis created on 15 January 2015 by the decision of the national bank to remove the lower rate of the Swiss franc can be regarded as the sign of insufficient consultation with the Government.

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10. Communication “Making the best use of the flexibility within the existing rules of the Stability and Growth Pact”, COM(2015)12 of 13 January 2015.

11. Press conference by Mr Draghi of 4 December 2014, at the end of the monthly meeting of the Governing Council.

12. Each central banker sits in the general interest of the monetary policy of the euro zone, but the episode of the non-standard measures announced by the ECB has shown the hold of national cultures in the internal discussions of the ECB. After the resignation of Axl Weber and Jürgen Starck, the German members of the ECB, during the first programme of debt repurchases in 2010-2011, the press echoed the negative vote of the two new German Members, J. Weidmann and S. Lautenschläger in January 2015 (*Les Échos*, “The choice of QE, a historic test for the ECB”, 19 January 2015).



■ *The change in the perception of the role of the ECB due to non-standard interventions*

While the sovereign debt crisis and doubts about the durability of the euro were behind a very strong increase in interest rates charged to the borrowing States in the euro zone, thus increasing the risk of a systemic crisis, the ECB announced on 6 September 2012 a non-standard programme of so-called security monetary transactions (*Outright monetary transactions* or “OMT”) consisting of buying in secondary sovereign bond markets, bonds issued by countries of the euro zone. This announcement was sufficient to put an end to the crisis.

Considering that this measure constituted a mode of indirect funding of States outside the mandate of the ECB as well as monetary financing of the debt of Member States prohibited by the Treaties, German applicants challenged the acquiescence of the federal government with this measure before the German Federal Constitutional Court. For the first time in its history the Constitutional Court of *Karlsruhe* brought a question for a preliminary ruling before the Court of Justice of the European Union to which the latter replied in a judgment of 16 June 2015 which affirms the legality of the OMT programme<sup>13</sup>. The conclusions that the Karlsruhe Court will draw in the light of its national constitutional requirements are still uncertain.

As of 9 March 2015 however, the ECB had effectively implemented the OMT programme but for different purposes from those for which it had been designed in 2012: to prevent the risk of deflation in the euro zone. The ECB made massive debt purchases motivated by the obligation that it has to act in order to maintain inflation in the euro zone at a level “*below but close to 2%*”<sup>14</sup>.

Although the ECB had made sovereign debt purchases beginning in 2010 in the context of the sovereign debt crisis<sup>15</sup>, the use of these non-standard instruments for an anti-deflationary purpose and for direct support of activity has changed the perception of European monetary policy and the ECB in the public opinion of the Member States: it has demonstrated its involvement in the real economy and the vital contribution that it makes.

***1.1.1.2. A monetary policy which leaves significant room for manoeuvre to national economic policy***

■ *France no longer has control of its monetary and exchange policy*

Beyond its symbolic dimension, monetary union resulted in a real loss of sovereignty that justified a revision of the Constitution prior to ratification of the Maastricht Treaty. The Constitutional Council ruled that this treaty provided

13. CJEU (Gd ch.), 16 June 2015, *Gauweiler v. Deutscher Bundestag*, case C- 62/14.

14. To take account of the deflation risk, the objective of price stability made by the Governing Council of the ECB in 1998 (cf. above) was clarified in 2003 to provide that the index should be “below but close to 2%”.

15. In 2010, the ECB had purchased Greek and Irish debt on the secondary market under the “*Securities Markets Programme*” (*SMP*). In August 2011, similar purchases were made on for Italian and Spanish debt securities.



for “the implementation of a single monetary policy and a unique exchange policy according to whose provisions a Member State will be deprived of specific competencies in an area where the essential conditions for the exercise of national sovereignty are at issue”<sup>16</sup>.

The strong reactions expressed in France against the transfer of monetary policy to the ECB are in part due to the history of the Bank of France, permanently marked by the spirit of the Act of 22 April 1806 which was to create an institution that “is sufficiently in the hand of the government, but not too much”<sup>17</sup>. The independence of the Bank of France vis-a-vis the government long remained confined to operating monetary policy without extending to the very definition of this policy. The Act of 4 August 1993 passed in anticipation of the Maastricht Treaty therefore constituted a real “break” with the French conception of monetary policy<sup>18</sup>, whose first version the Constitutional Council criticised on the grounds that the independence that it conferred on the Bank of France disregarded the general competence that the Prime Minister held from Article 20 of the Constitution to determine and lead the policy of the Nation<sup>19</sup>. It was only once the Maastricht Treaty entered into force that this independence was able to be fully affirmed in domestic law<sup>20</sup>.

#### ■ *Limited consequences for conducting national economic policy*

The independence of the central banker associated with a mandate structured around the objective of price stability and the prohibition of providing monetary financing became an international standard in the 1990s<sup>21</sup>, even before the Maastricht Treaty. It then imposed itself as an element of the credibility of monetary policy, even in a purely national context, so that it is likely that the Bank of France would have obtained its independence even without the creation of the euro and the European Central Bank, as has been the case for example beginning in 1997, of the Bank of England<sup>22</sup>.

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16. Decision No. 92-308 DC of 9 April 1992, *Treaty on the European Union*, cons. 43.

17. On this story and this sentence borrowed from Napoleon, see A. Plessis, *Stories of the Bank of France, Historic mission of the Bank of France*, Bibl. Albin Michel, Histoire, 1998.

18. B. Blancheton, “The independence of the Bank of France from the Great War to the Act of 4 August 1993”, *Revue d'économie financière* No. 2014/1, pp. 157-178.

19. Decision No. 93-324 DC of 03 August 1993.

20. The relevant provisions today appear in Article L. 141-1 of the Monetary and Financial Code. Its drafting remains fairly nuanced. Between a reminder of the membership of the Bank of France of the ESCB (1<sup>st</sup> paragraph) and that in exercising the associated missions, it can neither seek nor accept instructions from the Government or any person (3<sup>rd</sup> paragraph), the article provides that “In this context, and without prejudice to the primary objective of price stability, the Bank of France provides its support to the Government’s general economic policy”.

21. This standard, in the form of triptych, is based on the empirical observation that independence is a guarantee not only of the price stability objective but also of the prohibition on monetary financing of the States.

22. Independence announced by the British Government on 6 May 1997 and resulting in the *Bank of England Act* of 23 April 1998.

Likewise and almost 20 years before the creation of the euro, France made the choice of ensuring stable parity of its currency with the *Deutsche Mark* within the framework of the European monetary systems established in 1972<sup>23</sup> and 1979<sup>24</sup>. This choice in fact restricted the exercise of the monetary competence of the Bank of France even before its transfer to the European System of Central Banks. The latter brings to the French economy an essential element of security by protecting it, more effectively than the old systems against the exchange rate risk in respect of its major trading partners and against the instability of its currency in the markets.

Finally the conduct of national economic policy is not constrained by the ECB, which “*has neither the means to direct a national policy, nor those to correct its effects*”<sup>25</sup>. Moreover, given its size, the French economy has, except in exceptional circumstances, an economic cycle that is attuned to that of the whole of the euro zone.

France has thus since 1993 been able to conduct its own economic policy with probably a greater amount of freedom and discretion than without economic and monetary union.

#### ■ *Ensuring the conditions for the transfer of monetary policy*

To reap all the benefits of the monetary policy carried out by the ECB, the States of the euro zone, in conjunction with the European System of Central Banks, must ensure that this policy is “*transferred*” to their economy under good conditions<sup>26</sup>. Their own decisions and the organisation of their domestic market indeed affect the quality of this transfer and its real impact on the “*interest rate curve*” actually charged in their country.

This transfer has always been relatively weak in France, for several reasons. The French are generally less indebted than other Europeans and are often so at a fixed rate, which creates delay effects when the rates change. The French banks do not always pass on rate reductions due, in particular, to the regulatory environment and in particular to their macroprudential framework, i.e. the set of measures designed to ensure the stability of the banking system (such as the ratios of own funds or liquidity, mandatory reserves, sureties or the conditions

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23. Resolution of the Council and of the representatives of the governments of the Member States, of 21 March 1972, relating to the application of the resolution of 22 March 1971 regarding the achievement in stages of economic and monetary union in the Community, *Official Gazette* No. C 38 of 18 April 1972, pp. 3-4

24. Council resolution of 5 December 1978 regarding the introduction of the European monetary system (EMS) and related issues, *Journal of the European Communities*, December 1978, No. 12.

25. R. Hertzog “In search of a theory of the complex public financial system”, *Constitution et finances publiques*, study in honour of L. Philip, pp. 401-421, *Economica*, 2005.

26. The monetary policy “is transferred”, i.e. produces effects on the real economy of the Member States through different channels and, in particular, through interest rates (rate levels) and credits (the ability to grant loans) charged by the national banks.



for personal contributions for property loans)<sup>27</sup>. Although widely standardised<sup>28</sup>, this macroprudential framework contains elements of a purely national nature that influence the transfer of the monetary policy<sup>29</sup>.

Other factors are the level of regulated savings rates, whose divergence with the key ECB interest rates, justified by general interest reasons, could be considered as a barrier to the lowering of interest rates in France<sup>30</sup>. A more occasional factor affecting the transfer may be the disconnection of monetary policy in the Pacific zone, over which the Government retains control through the Institut d'émission d'outre-mer (Overseas Issuance Institute) (IEOM) - the institut d'émission des départements d'outre-mer (Overseas departments issuance institute (IEDOM) being on the contrary connected to the Bank of France and the European System of Central Banks.<sup>31</sup>.

Given the essential issues for the French economy of efficient transfer of the monetary policy of the euro zone, interference that may result from the texts of domestic law should be identified and analysed, to limit the effects as far as is compatible with the general interest objectives pursued by these specific texts.

**Proposal 1: Measure the interference generated by national laws and regulations in the transmission in France of the effects of monetary policy**

Entrust to a joint mission of the Ministry of Finance and Public Accounts and of the Bank of France the task of:

- 1) identifying the rules and procedures concerned and analysing their effects on the interest rate curve;
- 2) proposing changes to limit this interference without calling into question the general interest goals pursued by these rules and procedures.

*Means: a joint report of the Minister of Finance and Public Accounts and of the Bank of France (Minister of Finance and Public Accounts and Bank of France)*

27. A. Kelber, E. Monnet, "Prudential policies and quantitative instruments: a European historical perspective", *Revue de stabilité financière*, Bank of France, No. 18, April 2014.

28. See, in particular, the so-called "Basel III" regulations and directives regarding own funds applicable since 2014: Directive 2013/36/EU regarding access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV); Regulation (EU) No. 575/2013 regarding the prudential requirements applicable to credit institutions and investment firms (CRR).

29. Direction of forecasting, *Analyses économiques*, No. 47, September 2004.

30. See, in particular, the hearing of Ch. Noyer, governor of the Bank of France, by the Finance Committee of the General Economy and Budgetary Control of the National Assembly on 17 February 2015; Report No. 65.

31. Under the terms of Article L. 712-4 of the Monetary and Financial Code, the IEOM, which is a public establishment: "*implements, in conjunction with the Bank of France, the monetary policy of the State in New Caledonia, French Polynesia and in the Wallis and Futuna Islands*" (comp. for the IEDOM, Art. L.711-2 of the same code).

## 1.1.2. Exercising the budgetary lever in the context of the reinforced supervision of public finances at the European level

Historically, the building of Europe has emphasised the internal market and then the development of a single currency, without seeking to extend this process to budgetary policies left to the sole competence of the Member States. This trend was suddenly reversed with the financial crisis, which has led to the development of a framework which, although it has enabled emergencies to be dealt with, is still unfinished.

### 1.1.2.1. *The reinforced supervision of budgetary policies*

■ *The financial crisis has led to the adoption of a more sophisticated and binding framework*

The question of the coordination of the budgetary policies of the European States long remained secondary<sup>32</sup>, including when the process of economic and monetary union was set into motion<sup>33</sup> by the provisions of the Maastricht Treaty of 7 February 1992 that laid down the convergence criteria for the transition to the euro, already establishing rules in respect of an excessive deficit<sup>34</sup>. To ensure observance of these rules, a stability “and growth” pact was adopted in 1997<sup>35</sup> but its credibility was seriously undermined by its failure in 2003, when France and Germany convinced the Council not to carry out the procedures applicable to them<sup>36</sup>.

The financial and sovereign debt crisis changed this approach and led to a system being devised that is much more binding, based on three series of texts: the *six-pack* (8 and 16 November 2011)<sup>37</sup>, the Treaty on Stability, Coordination and Governance

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32. In the Treaty of Rome of 25 March 1957, the third part relating to the “policy of the Community” is very largely economic. Its Title II is dedicated to economic policy and Article 103 deals with short-term economic policy which it specifies is the competence of the Member States but asserts it as being of common interest. The concrete expression of these provisions has however remained limited.

33. N. Genestier, A. Pradié, “Currency and budget in the European institutional framework: what interactions highlighted by the crisis?”, *Revue de droit bancaire et financier*, March 2014.

34. Art. 121 paragraph 1 of the Treaty establishing the European Community (TEC). There are four criteria which concern respectively price stability, the situation of public finances (annual deficit of less than 3% and debt under 60% of GDP), the exchange rate and long-term interest rates.

35. Resolution of the European Council on the Stability and Growth Pact, 17 June 1997; Regulation (EC) No. 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EC) No 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the procedure for excessive deficits.

36. The Court of Justice, referred to with a challenge from the Commission, recognised the merits the legality of this decision of the Council: ECJ, 13 July 2004, *Commission v. Council*, C27/04.

37. Regulations (EU) No. 1173/2011, 1174/2011, 1175/2011, No. 1176/2011 No. 1177/2011 of 16 November 2011 and Directive No. 2011/85/EU of 8 November 2011 on the requirements applicable to the budgetary frameworks of the Member States.



the so-called “TSCG” (2 March 2012)<sup>38</sup> and the *two-pack* (21 May 2013)<sup>39</sup>, resulting in three major shifts.

In the first place, supervision of the budgetary policies of the Member States takes place as part of a **continuous dialogue** with the European Commission. The States submit their strategies and budgetary forecasts in early meetings, taking place in the first part of the year (the “European semester”) so that any necessary corrections can be taken into account in the budgets of the Member States in the second part of the year (sometimes called the “national semester”). At the same time, the Member States transpose this strengthened budgetary framework into their internal law, so that the budgetary debate can respond in complete transparency to comments and requests from the European institutions (improved reliability of the data, external controls, etc.).

Secondly, the **obligations** of the Member States themselves are much more numerous and precise than previously and are defined in relative and no longer absolute terms. A budgetary trajectory is determined according to the situation of public finances of the State in question, its economic prospects and the structural reforms that it must engage. This trajectory decided jointly must be respected, except in exceptional circumstances.

Thirdly, with the memory of the paralysis of the system in 2003 in everyone’s minds, an emphasis is placed on the **rules imposing sanctions**, even if they are designed mainly as a deterrent<sup>40</sup>. The system adopted, the so-called “reversed qualified majority” lays down that in the event of a breach by a Member State of its obligations, sanctions are imposed in principle, unless a qualified majority is opposed to them in the Council. The State in question must therefore obtain very broad support from other Member States to prevent sanctions being applied.

■ *An excessively cumbersome and complex framework*

Because of the inability of the Member States to be able to change primary law in a short period of time due to the reluctance shown by some of them<sup>41</sup>, the new monitoring framework is based in part on Union Law and in part on the Treaty on Stability, Coordination and Governance (TSCG) which is an international treaty. This “budgetary Schengen”<sup>42</sup> must therefore operate with a twofold institutional system and two legal orders which gives rise to problems of coordinating the provisions that fall to each of them<sup>43</sup>. Although the TSCG lays down that its stipulations must be

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38. Treaty on stability, coordination and governance within the Economic and Monetary Union signed in Brussels on 2 March 2012.

39. Regulations (EU) No. 472/2013 and 473/2013 of 21 May 2013.

40. And all the more so that in the event of a breach of the rules for keeping public finances in balance, the actual application of such sanctions, which are of a financial nature and are borne by the States concerned, could only mechanically worsen their problems.

41. The United Kingdom has refused to participate in the development of a strengthened budgetary framework whose principle was enacted at the summit of 9 December 2011.

42. N. De Sadeleer, “European economic governance, a Leviathan or a colossus with feet of clay?”, *Europe*, April 2012.

43. See, in particular, F. Fines, “The TSCG in European economic governance: towards greater budgetary integration?”, *Revue de l’Union européenne*, No. 563, December 2012.



interpreted in accordance with the law of the European Union<sup>44</sup>, this interpretation key does not resolve all the difficulties and the prospect of the absorption of the TSCG into European Union law remains uncertain<sup>45</sup>. And the difference in the rules specific to the member countries of the euro zone with those applicable to the other Member States is accentuated, which also constitutes an element of fragility.

These rules are moreover highly detailed, with the twofold objective of defining legal rules that are adapted as far as possible to the diversity of situations and objectifying all questions of assessment using predetermined criteria. Such an approach nevertheless quickly reaches its limits. Even after taking into account the use of aggregates or values that are difficult to calculate (see 1.3.3.1 below), the texts use concepts that are often hazy such as “structural reforms” or “effective action” or “exceptional circumstances” Debates over interpretation remain, as well as the temptation to negotiate or haggle. This results in a situation which is unclear, both for the European institutions and the Member States themselves<sup>46</sup>.

■ *A framework that is too recent to be reformed but which can be interpreted with flexibility*

Feedback is still lacking to measure fully the effectiveness of this new budgetary framework, recognised as such by the Commission and the Council, as part of the assessment which was carried out, as provided for in the texts themselves, at the end of 2014<sup>47</sup>. The European Council has since indicated that it was appropriate to continue with the technical review of its results<sup>48</sup>.

On 13 January 2015, however, the Commission issued a public COM communication (2015) 12 entitled “*Making the best use of the flexibility offered by the existing rules of the Stability and Growth Pact*”, in which it sets out three measures for softening the rules: neutralisation of expenditure for the European fund for strategic investments announced on the same day (investment clause); taking into account the positive budgetary effects of structural reforms; taking into account the economic situation (greater efforts when the economic situation is good, fewer when it is bad). The ongoing reflection opens up an opportunity for France to work towards greater relevance of the coordination mechanisms in relation to the objectives they pursue.

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44. Art. 2 of the TSCG.

45. It must in principle come about within a period of five years after its entry into force (Art. 16 of the TSCG).

46. A. de Streel, *The rules of the new European economic governance*, Reflets et perspectives de la vie économique, 2013/2, p. 13-49: “European Economic Governance reformed”, *RTD Européen*, 2013, p. 455.

47. As soon as his policy guidelines of 15 July 2014, had been made, J.-Cl. Juncker, a candidate to the presidency of the European Commission announced a review of the legislative package on economic governance (“*six-pack*”) and of the legislative package relating to budgetary supervision (“*two-pack*”), while specifying that this review was provided for by the legislation. The work carried out by the Commission, on 28 November 2014, led to a COM report (2014) 905 noting the efficiency and flexibility of the system but remaining brief, given the lack of feedback of any significance.

48. Conclusions of the Ecofin Council of 27 January 2015.





These prospects were completed on 22 June 2015 by the so-called “five presidents” report entitled “Completing Europe’s Economic and Monetary Union”, containing recommendations for longer-term reform, but whose first phase is due to be implemented in July 2015 on the basis of existing treaties. This report first proposes to renovate the European semester, the governance bodies of the budgetary supervision and their democratic control. In the longer term (by 2025) a change to the treaties could allow for substantive developments and the unification of different mechanisms (integration of the TSCG into Union law, but also of the European stability mechanism<sup>49</sup>, both designed in an intergovernmental manner). A white paper has been announced for the spring of 2017 to set out these later stages.

On 1 July 2015, the Commission organised an initial debate on these guidelines and invited all the stakeholders to participate actively in the work aimed at completing EMU. France, whose budget trajectory was approved by the Commission at this same meeting, is able to usefully support this process.

**Proposal 2: Work towards the simplification of budgetary oversight**

1) in the very near future use all the flexibilities opened up by the communication of the Commission of 13 January 2015;

*Means: Government action*

2) respond to the invitation of the Commission of 1 July 2015 by proposing the way in which the budgetary framework could be simplified within the framework of the current treaties;

*Means: Government action*

3) start the preparatory work for a simplification of the treaties and in particular the inclusion of intergovernmental mechanisms (TSCG, EMS) within the framework of European Union law.

*Means: Government action and then a new treaty  
(SGAE, Minister of Finance and Public Accounts)*

***1.1.2.2. A budgetary policy which preserves very significant room for manoeuvre in a normative and procedural framework to which one must still become accustomed***

■ *The national authorities are not divested of their budgetary competences*

Unlike other countries<sup>50</sup>, France has not chosen to implement a **golden rule**

49. See 1.1.3.1 below

50. More and more States have golden budgetary rules limiting the discretionary power of the competent authorities in preparing and voting on the budget. Most of these rules set out the objective of reaching a certain balance over the period. It is the period of the economic cycle which is chosen in Switzerland where a mechanism for putting a brake on indebtedness has been established since 2003 (Art. 126 of the Constitution), a model that has inspired Germany for its own system (see inset below). In Singapore, the period used is that of the term of office of the government which must have presented a balanced budget and not have drawn on the resources constituted by its predecessors (Art. 147



that is directly imposed on the financial legislator<sup>51</sup>. This was not the purpose nor the effect of the provisions of the penultimate paragraph of Article 34 of the Constitution inserted in 2008 which mentions, regarding the public finance framework laws, “the objective of keeping the accounts of public administrative authorities in balance”<sup>52</sup>. Started in 2011, the project to introduce the golden rule into the Constitution was unsuccessful<sup>53</sup>.

#### Golden budgetary rules – The example of the German “brake on debt”

The brake on debt rule (*Schuldenbremse*), passed in July 2009, amends Articles 109, 115 and 143 of the German Basic Law. It aims to provide a framework for the budgetary policy of the Federation and the *Länder* that is compatible with the European treaties.

Under the new Article 115 of the Basic Law, “income and expenditure must be balanced without income from loans”, this rule being regarded as satisfied when the structural deficit does not exceed 0.35 % of GDP.

Compliance with these rules relates to both the draft budget and its implementation. If the authorised ceiling is crossed, the corresponding loans are entered into a control account (*Ausgleichkonto*), identifying the differences between the maximum authorised loans and the result of the current budgetary year. When the amount in the control account reaches 1% of GDP, the Federation has a legal obligation to reduce it, but only during periods of growth (countercyclical logic).

Exceptions to the rule may be made in particular cases of a “critical situation”, by a majority vote of the members of the *Bundestag*. The law passed must then include a plan for the reimbursement of the additional deficits allowed, with the reimbursement having to be made within a limited period.

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to 148H of the Constitution). Other mechanisms are based on limiting expenditure in line with that of GDP, such as that established in Poland but also in Spain (“*regla de gastos*”, stemming from the Organic Law of Budgetary Stability and Financial Sustainability of 2012). In Canada, where rules already exist in certain provinces, a bill on budgetary balance would only henceforth authorise a federal deficit in the event of a recession or exceptional circumstances. Experience shows that strict rules are sometimes difficult to comply with; Argentina thus had to urgently repeal its “zero deficit” golden rule as it was unable to comply with it (*Ley 25561*).

51. Such a rule is not in the tradition of the finances of the State even if a precedent from 1926 exists, in quite a different form, with the constitutionalisation of the Caisse d’amortissement de la dette publique (Fund for the amortisation of public debt) and its resources.

52. Article 11 of Constitutional Act No. 2008-724 of 23 July 2008 for modernising institutions of the V<sup>th</sup> Republic.

53. Constitutional bill relating to keeping the public finances in balance, No. 3253, introduced on 16 March 2011



Such a direct constraint is not a result of the **new European budgetary governance**. Contrary to what it ruled for monetary policy, the Constitutional Council did not judge that the European framework of coordination and budgetary supervision infringed the essential conditions of national sovereignty, either during the examination of the Maastricht Treaty in 1992<sup>54</sup>, the Treaty of Amsterdam in 1997<sup>55</sup>, the Treaty establishing a Constitution for Europe in 2005<sup>56</sup>, or the Treaty of Lisbon in 2007<sup>57</sup>.

The Constitutional Council confirmed this position after the “*six-pack*” and the TSCG had significantly strengthened the binding nature of the budgetary legal rules<sup>58</sup>. Neither did it judge that the implementation of the stipulations of the TSCG on the rules on keeping public finances in balance in national law affected the prerogatives of the Government and of Parliament<sup>59</sup> while judging that regardless of the transposition of these rules in internal law, France will be bound by these rules through the principle of the superiority of treaties resulting from Article 55 of the Constitution<sup>60</sup>. However these rules cannot be the subject of a conventionality control, having regard to the particular mechanism provided for by the treaties and the derived European law, to which the TSCG refers.

Indeed, this mechanism, based on the annual submission by Member States of their stability programme and of their budgetary forecasts may only, in the case of a disregard by France of its obligations, lead to a sanction by the Council of the European Union at the end of a graduated procedure which is in no way automatic and may not even be referred to the Court of Justice of the European Union<sup>61</sup>. Although it is of a nature to exercise a very powerful incentive to do so, it does not relieve the national authorities from their budgetary competence nor subjects its exercise to a higher standard by legally ordering changes. The legal construction governing the supervision of budgetary policies can thus only find a solution in a decision of a political nature, that of the Council of the European Union<sup>62</sup>.

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54. Decisions Nos. 992-308 DC of 9 April 1992 and 92-313 DC of 23 September 1992.

55. Decision No. 97-394 DC of 31 December 1997.

56. Decision No. 2004-505 DC of 19 November 2004; treaty not ratified following the referendum of 29 May 2005.

57. Decision No. 2007-560 DC of 20 December 2007.

58. Indeed it ruled that the new rules “*do not result in transfers of competence in economic or budgetary policy and do not allow such transfers; that compliance with the new rules does not infringe the essential conditions for the exercise of national sovereignty, any more than the previous commitments to maintain budgetary discipline did*”, Decision No. 2012-653 DC of 9 August 2012, cons.16.

59. Same decision, cons. 19, 22 and 25.

60. Same decision, cons. 18.

61. Conseil d’État, Opinion of 23 September 2013, *The Finance Bill for 2014*, No. 387791.

62. Contrary to the initial wishes of the German government, the competency of the ECJ recognised by the TSCG is limited to the verification of the transcription of the control procedures ensuring balanced budgets into internal law and does not extend to compliance by the national budgets with quantifiable legal rules and with the correction mechanism itself.

Finally and especially, if the national authorities are thus placed under close supervision, this does not remove budgetary sovereignty from them<sup>63</sup>. These rules mainly concern the balances of public finances, i.e. what results from all the decisions taken by the financial legislator: only the overall outcome must comply with the budgetary trajectory that will have been agreed.

The State thus, in any event, remains in control of its decisions to allocate resources. This leaves it significant room to conduct national budgetary policy, which remains more constrained by the weight of certain expenditure that it is politically or technically difficult to reduce, than by the supervision made at the level of the European Union.

■ *Conducting budgetary policy is more complex and cumbersome*

Although the strengthening of European budgetary supervision does not remove the budgetary lever from national authorities, it carries with it significant risks of making budgetary policy more cumbersome and rigid.

The complexity of the legal edifice is not limited to the texts of European law. The choice made by the TSCG of “nationalising”<sup>64</sup> the supervision mechanisms leads to a **superimposition of domestic legal rules**. In addition to the constitutional legal rules, the discussion of financial laws must now comply with the provisions of the Organic Law No. 2012-1403 of 17 December 2012 relating to public finance programming and governance and be in line with the laws of public finance programming whose scope has been completely renewed<sup>65</sup>. The multiplication of legislative means relating to public finance (LFI - Initial Finance Act, LFR - Amending Finance Act, LFSS - Social Security Financing Act, now LPFP - Public Finance Framework Act) is such as to pose problems, in particular in order to take account their interactions and their respective contribution to the overall equilibrium, especially when they are moving in parallel<sup>66</sup>.

The **cumbersome nature of the budgetary procedure**, in the framework of the European semester, is a striking illustration of this new complexity. The Government must thus devote a significant amount of time to producing reports and analyses for the needs of successive meetings which often deal with the same issues.

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63. See on all of these issues, from the angle of national budgetary sovereignty: J.-P. Fitoussi, “The room for manoeuvre of the States. Democracies without sovereignty”, *Revue Pouvoirs*, 2012/3 No. 142; M. Sorel, R. Chemain (under dir.), “What budgetary sovereignty for the Member States? *Cahiers internationaux*, Pedone, Paris, 2013; G. Allemand and F. Martucci, “The new European economic governance”, *Cahiers de droit européen*, 2012.

64. In the sense that the TSCG relies mainly on the mechanisms of internal law to enforce budgetary discipline by the Member States.

65. E. Oliva, “The Organic Law of 17 December 2012 relating to the programming and governance of public finances: the inclusion in the national legal system of the rule of balance of public administrative authorities or the mountain which gave birth to a mouse”, *RFDA*, 2013, p. 440: “The organic law therefore adds an additional degree of differentiation between the various legislative scopes and specifically the financial ones. The legislative web could well quickly turn into an inextricable legislative tangle”.

66. The difficulty appears clearly when the Government, as in 2014, intends to introduce a finance bill on the basis of a new financial trajectory that has not yet been enshrined in a public finance framework act.



The budgetary timetable would benefit from being redesigned<sup>67</sup>, without this “reinvention” needing any significant change to the Organic Law of 17 December 2012: this timetable is mainly organised by a circular.

In addition, whereas the budget is a parliamentary competence *par excellence*, parliaments are little involved in the mechanisms of European budgetary supervision. Although the absence of direct involvement by the European Parliament is the result of the choice made when establishing the euro zone, the counterpart that should have involved national parliaments remains limited<sup>68</sup>. In France, the procedure of Article 88-4 of the Constitution is unsuited to an iterative process such as the European semester<sup>69</sup> and so specific initiatives have been taken to increase Parliament’s involvement in its main stages<sup>70</sup>. A fuller and more formalised involvement of the assemblies in the procedures for implementing supervision mechanisms would no doubt strengthen the influence of the French positions in its dialogue with the European bodies<sup>71</sup>.

Conduct of the budgetary procedure must finally take account of the implementation of deeper controls than in the past, in particular the creation of the **Haut Conseil des finances publiques** (High Council of public finances). This independent body gives a prior opinion about the macroeconomic forecasts on which the public finance framework bill and the finance and social security financing bills are based and it issues an opinion, within the framework of the correction mechanism, on the discharge act<sup>72</sup>. This body and the powers given to it are highly distinctive<sup>73</sup>, but the Organic Law grants it very short deadlines to issue an opinion according to the first president of the Court of Auditors who chairs it, and the administrative authorities are still reluctant to send it in good time all the information needed for its consideration, thus negatively affecting the accuracy of its findings.

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67. F. Quérol, “European budgetary integration or the gestation of new budgetary law”, *Revue française des finances publiques*, September 2012, p.147.

68. The constitutional bill No. 3253 of 16 March 2011 relating to ensuring public finances are in balance provided for the systematic transmission of the documents to Parliament.

69. The fear of removal of Parliament from the discussions organised for the needs of the European semester, in particular within the framework of Article 88-4 of the Constitution, led to a proposal for a Constitutional Law No. 2913 of 20 October 2010 by Mrs M. Billard, which however was not adopted.

70. The draft stability programme of Article 121 of the TFEU is sent to Parliament two weeks before it is passed onto the Commission (Art. 14 of Act No. 2010-1645 of 28 December 2010 of Public Finance Framework for 2011 to 2014). In addition, any procedure for coordinating economic and budgetary policies including the exchange of documents with the European institutions as well as all the Council’s decisions in relation to excessive deficits issued in the framework of Article 126 of the TFEU can give rise to a debate.

71. The above-mentioned report of the five presidents of 22 June 2015 suggests several avenues and in particular “model arrangements to make the interaction [of the Commission] with national Parliaments more efficient”, see point 5.

72. Art. 11 and following of Organic Law No. 2012-1403 of 17 December 2012 mentioned above.

73. The above-mentioned report of the five Presidents of 22 June 2015 appears to derive its inspiration from it by recommending “euro zone competitiveness authorities”, see point 3.

The opinion of the High Council must be issued before that of the **Conseil d'État**<sup>74</sup>, which can thus take it into account in its control of the sincerity of the finance bill which is submitted to it. The Conseil d'État may thus call to the attention of the Government the risks involved should there be a significant deviation from the trajectory leading to the medium-term objective of the public finances or clear non-compliance with the latest recommendations or warnings addressed to France by the competent bodies of the European Union<sup>75</sup>.

The **Constitutional Council** also conducts more in-depth sincerity controls of the finance laws, with a robust analysis table<sup>76</sup> which takes into account the opinion of the HCFP<sup>77</sup>. Deepening its control may also be an element for assessing the legality of the French transcription procedure of the TSCG into the internal legal system, which has led some commentators to say that the role of the Constitutional Council could evolve towards that of a “*financial regulator*” and a “*major player in the public law of the economy*”<sup>78</sup>.

**Proposal 3: Ensure optimal implementation of the European semester at the national level**

1) develop, in agreement with the services of the European Commission, a *common corpus* of the various French budgetary documents required for the European semester;

**Means:** Government action  
(SGAE, Minister of Finance and Public Accounts)

2) define the provisions for informing the National Assembly and the Senate, within the framework of the European Semester, where appropriate, in line with the conventions that could be proposed by the European Commission to the national parliaments;

**Means:** Government action  
(Minister of Finance and Public Accounts,  
Secretary of State for Relations with Parliament)

3) provide the High Council of public finances, as early as possible, with the elements that will better inform its assessment.

**Means:** Government action  
(Prime Minister, Minister of Finance and Public Accounts)

74. As stated by the Constitutional Council in its Decision No. 2012-658 DC of 13 December 2012.

75. See on these questions the opinions issued by the Conseil d'État (Standing Committee) on the finance bill for 2014 (Opinion No. 387791 of 23 September 2013), the RFLP 2014-2 (Opinion No. 389190 of 29 September 2014) and the public finance framework bill (Standing Committee Opinion No. 389238 of 29 September 2014).

76. Of judicial origin, control of the sincerity of the finance laws was recorded in the organic law relating to the finance laws and then the organic law relating to the social security financing laws before being mentioned in Article 47-2 of the Constitution in 2008.

77. See Decisions No. 2012-658 DC mentioned above and No. 2013-682 DC of 19 December 2013.

78. M. Lombard, “The future financial regulator role of the Constitutional Council”, *AJDA*, 2012, p. 1717.



### 1.1.3. The emergence of the European Union's own budgetary lever

#### 1.1.3.1. An outline for using the budget of the European Union for stabilisation purposes

■ *The economic limits of monetary unification without a central budget*

The Theory of Optimum Currency Areas (OCA) states that their cohesion depends on the mobility of the factors of production, in particular that of workers; failing this, a “central” budgetary capacity can play a palliative role<sup>79</sup>.

The low mobility of workers within the European single market, compared to that of many other currency areas, is not however made up for by the European Union's own budgetary capacity. The latter finances the operation of the institutions as well as interventions to support the economy (see below) but its volume, of around 1% of the GDP of the European Union, is tiny when compared to that of public expenditure within the Member States (nearly 45 % on average) and with the central budgets of federal systems (27 % in the United States)<sup>80</sup>. The European Union therefore does not currently have capacities that would enable it to play a role as budgetary stabiliser of the euro zone.

This option was assumed very early on by the proponents of Economic and Monetary Union. J. Delors stated in 1989 that: “ *The fact that the community budget submitted to central management will without doubt only represent a very small part of the total expenditure of the public sector and that the bulk of this budget will not be used for cyclical adjustments means that the task of determining a budgetary direction for the whole of the Community will have to be accomplished by coordinating national budgetary policies*”<sup>81</sup>. But strengthening coordination of the budgetary policies of the Member States does not correct the internal asymmetries of the zone<sup>82</sup> and the prospect of carrying out a more integrated macroeconomic policy, with, in particular, the creation of a “European Treasury”, is still a long way off<sup>83</sup>.

The idea then arose of supplementing the coordination framework with the European Union's own budgetary lever able to act in a counter-cyclical way. Work on this theme

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79. R. Mundell, “A theory of optimum currency areas”, *American economic review*, 1961.

80. “A budget for the euro zone”, *Trésor-Eco*, n° 120, October 2013.

81. Report of 12 April 1989, *L'Union économique et monétaire dans la Communauté européenne*.

82. This coordination has led to pro-cyclical restrictive policies for countries in crisis and the complexity and the lack of responsiveness of these mechanisms do not allow them to play the same role as that of the central budgetary lever in a federal system (*Trésor-éco*, *op. cit.*).

83. It is however explicitly mentioned in the above-mentioned five Presidents' report of 22 June 2015, point 5.

also suggests a pooling of public debt<sup>84</sup> and a better balance with monetary policy<sup>85</sup>. Despite the renewed interest that they generated after the crisis of 2010, only emergency arrangements have been put in place.

■ *The beginnings of financial stabilisation systems limited to cases of crises*

Since the Treaty limited itself to stating the principle of the absence of legal solidarity between the European Union and the Member States as well as between Member States, without prohibiting **voluntary mutual assistance mechanisms** in the event of a difficulty, the Brussels Summit of 9 May 2010 established, on the basis of Article 122 paragraph 2 of the TFEU, the European Financial Stability Facility with a regulation on the European Financial Stabilisation Mechanism, equivalent to what existed outside the euro zone. The decision of the European Council of 25 March 2011 adding to Article 136 of the TFEU a third paragraph, replaced this initial system with the European Stability Mechanism (ESM), designed as an international financial institution according to an intergovernmental framework fairly similar to the TSCG which was based on it<sup>86</sup>.

A second mechanism that is directed at the banks is intended to protect them against new effects of contagion by sovereign debt ("*Backstop*"): **The Single Resolution Fund established** by the Regulation of 15 July 2014 as part of the in the framework of the Banking union<sup>87</sup>. Although it does not constitute a European budgetary lever since it is funded by contributions from the banking sector, it shares with the EMS the logic of a massive financial resource, levied to ensure solidarity within the zone, in order to ensure its stability.

■ *The still distant prospect of a stabilisation budget in a non-crisis situation*

In the context of recovery from the financial crisis, the European Council of 28 and 29 June 2012 requested, on the basis of an interim report by H. Von Rompuy, a report on the building of a real economic and monetary union.

Presented on 5 December 2012, this report advocates providing the European Union with its own budgetary capacity able to absorb cyclical shocks<sup>88</sup>. At the same time, the previous European Commission submitted a "*blueprint*", in the form of a communication "for a deep and genuine Economic and Monetary Union: Launching a European debate"<sup>89</sup>, in which it examines the practical arrangements, including the legal ones, of creating such a capacity. This approach was received favourably by the European Parliament and also in France, by the National

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84. F. Allemand, "The legal feasibility of euro-bond projects", *RTDE*, 2012, p. 553.

85. *Trésor-éco*, *op. cit.*

86. Decision of the European Council (2011/199/EU) of 25 March 2011. This creation was validated, with respect to European Union law, by the *Pringle* judgment of 27 December 2012 (CJEU, Full Court, 27 November 2012, C-370/12), which found that it does not interfere with monetary policy and did not confer a new competence on the European Union.

87. Regulation (EU) No. 806/2014 establishing the Single Resolution Mechanism (SRM).

88. Report by the President of the European Council *Towards a Genuine Economic and Monetary Union*, 5 December 2012.

89. *Blueprint for a deep and genuine Economic and Monetary Union: Launching a European debate*, (COM 2012/777) of 28 November 2012.





Assembly<sup>90</sup> and the Senate<sup>91</sup>. The subject was returned to by the European Commission after the elections of 2014 in an analytical note of 12 February 2015, as well as by the five Presidents in their report of 22 June already-mentioned.

It suggests a “*budgetary stabilisation mechanism for the euro zone*” whose objective “*would not be to actively seek to adjust the economic cycle in the euro zone, but to mitigate the effects of wide-ranging macroeconomic shocks and thus to make the EMU more resilient overall*”<sup>92</sup>. It would thus be used to prevent crises and push back the prospect of having to mobilise emergency mechanisms such as the EMS.

France has always been at the forefront of developments in the euro zone and it would be in its interest, as of now, to investigate the arrangements and consequences of the possibility of the European Union’s own budgetary capacity<sup>93</sup>.

**Proposal 4: Evaluate the conditions and the consequences, with regard to the financial and legal aspects, of the European Union possibly having its own budgetary capacity.**

*Means: Government action  
(SGAE and Minister of Finance and Public Accounts)*

### ***1.1.3.2. The increase in financial interventions in support of the economy***

#### **■ A bold deployment of funds and specific programmes**

The five “European Structural & Investment Funds” (ESIF)<sup>94</sup> are now deployed in a single strategy, called “Europe 2020”, designed to ensure that their use is in line with the economic policy objectives of the Union<sup>95</sup>. Other mechanisms have been developed more recently, like for example the “Horizon 2020” programmes

90. The National Assembly has even asked the European Council to be “*more ambitious in projects for deepening Economic and Monetary Union, with for medium-term prospects (...) the establishment of a budgetary capacity playing a counter-cyclical role, the possibility of issuing common debt and creating a European Treasury*”. Resolution of the National Assembly No. 204 of 11 August 2013 on deepening Economic and Monetary Union (confirmed by the Resolution No. 284 of 30 January 2014 on the progress of the Banking union and economic integration within Economic and Monetary Union).

91. The Senate has recommended that ultimately the budget of the euro zone should have “*significant funding*”, European resolution by the Senate No. 73 (2013-14) of 4 February 2014 on deepening Economic and Monetary Union.

92. Above-mentioned report of the five Presidents of 22 June 2015, point 4.2.

93. The positions expressed by the President of the Republic on 14 July 2015 on the “*economic government of the euro zone*” are in this direction. See also the contributions of Christian de Boissieu, p. 245. below.

94. They include the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund (CF), the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF).

95. Their use is decided as part of partnership agreements between the Commission and the Member States, with that of France having been adopted on 8 August 2014. In accordance with the provisions of Act No. 2014-58 of 27 January 2014 for the modernisation of territorial public action and the affirmation of the big cities, their management will be transferred to the regions (see 3.1.2.2. below).



in favour of research and innovation and “COSME”, a European multi-annual programme for the competitiveness of enterprises and SMEs with a budget of EUR 2.3 billion for the 2014-2020 period which seeks to promote access by SMEs to financing and markets as well as the promotion of entrepreneurship.

Through the combination of these various mechanisms, the European Union manages to promote, with non-negligible resources, sectors or projects that it considers to be priorities with respect to its economic objectives.

■ *A fresh mobilisation for investment*

Until very recently, investment at the European level was primarily the business of the Member States which finance the European Investment Bank (EIB), even if projects backed by the EIB must be part of the essential objectives of the Union.

With the European Fund for Strategic Investments (EFSI) whose creation was announced by the new European Commission (regulation proposal of 13 January 2015<sup>96</sup>), the European Union will now have its own significant capacity for financing investment<sup>97</sup>. It will allow it to pursue its own direct investment policy: although the EIB plays the role of funding body and expert in this mechanism, responsibility for the plan is that of the European Union.

■ *The interplay with the national programmes*

The Commission has asked the Member States to supplement the resources provided by the “Juncker Plan” for the European Strategic Investment Fund with voluntary contributions in order to increase its leverage effect. It has undertaken not to count these contributions in the expenditure objectives of these Member States<sup>98</sup>. France has indicated that it would respond positively to this invitation through the Public Investment Bank and the Caisse des Dépôts et Consignations, i.e. not by contributing to the fund directly, but by supplementing the funding of the projects which will have benefited from the resources of the EFSI, which allows it to ensure coordination of the latter with its own national objectives<sup>99</sup>.

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96. Communication COM 2015 (10) *Proposal for a regulation of the European Parliament and of the Council on the European Fund for Strategic Investments and amending Regulations (EU) No. 1291/2013 and (EU) No. 1316/2013.*

97. The amounts announced amount to 315 billion euros, of which 75 billion for SMEs and mid-caps and 240 billion for long-term investments. The plan is based on quite an ambitious lever effect of 1/15, allowing 21 billion to be contributed to the Fund (of which 16 to constitute the European Union guarantee, with its resources) and 5 billion provided by the EIB.

98. Above-mentioned communication of 13 January 2015.

99. What could be interpreted as the desire to allow projects followed by the BPI and the CDC only to benefit from these extra funds, i.e. essentially French projects, whereas direct contributions to the EFSI could have meant that projects with no direct link to France could have benefited.



This coordination must be carried out as a priority with the investments for the future (investissements d'avenir) mechanism managed by the investment commissioner general, a plan whose inspiration is very close to that of the Juncker plan<sup>100</sup>. For this purpose, the assistant to the investment commissioner general has been appointed as coordinator of the Juncker Plan for France. A doctrine for the use of each mechanism has also been outlined by the investment commissioner general, according to the size of the projects, their object, the usable financial instruments, etc.<sup>101</sup>.

The task of ensuring the best possible complementarity between these two mechanisms, and beyond this, with the national investment mechanisms, is the natural extension of the coordination missions which have just been entrusted to the General Commission for investment. It could be made explicit in the texts.

**Proposal 5: Ensure the European Investment Plan complements the national investment plans and mechanisms by assigning this mission to the General Commission for investment in addition to its existing missions.**

*Means: Organisational decree of the General Tax Code  
(General Commissioner for investment)*

## 1.2. The economic action of public persons, in order to retain its scope, must take into account the requirements of an open economy

Although it is obvious that the internationalisation and globalisation of trade have changed the relationship, not to say the power relationship, between public persons and economic actors that are increasingly mobile and powerful<sup>102</sup>, it does not mean that public action is powerless to deal with this new situation. Public persons retain the ability to assert their authority even when dealing with mobile actors (1.2.1). France can moreover harness significant diplomatic instruments (1.2.2). The economic action of public persons can ultimately be a powerful lever for the competitiveness and attractiveness of the country in international competition (1.2.3).

100. Decree No. 2010-80 of 22 January 2010 relating to the investment commissioner general

101. See, in particular, the hearing of L. Schweitzer, investment commissioner general, 18 March 2015 before the Finance Committee of the Senate.

102. Independently of the classic problem of the loss of efficiency and effectiveness of budgetary policies in the open economy and the externalities that they produce on the other countries.

## 1.2.1. The consequences of the opening up of economies in relation to the territoriality of the law and the defence of national interests

### 1.2.1.1. The mobility of actors undermines the authority of the national framework

■ *Economic operators make the law and the systems compete with each other*

The globalisation of trade and their new-found mobility means that companies can choose the “place” of their business and thus the legal framework which applies to them, which is no longer a fact with which they must deal with, but a parameter, forming part of a strategy of optimisation of costs.

The choice of the rule applicable by businesses or “*law shopping*”<sup>103</sup> has thus become an object of competition between States to which it is possible to transpose the analyses of classic competitive markets, whether they are optimistic - competition would encourage the convergence of the systems towards a certain economic optimum, a (“*race to the top*”) or pessimistic - it would lead to the lowering of demands to attract businesses (“*race to the bottom*”)<sup>104</sup>.

The analysis of this phenomenon was first developed in the United States with regard to “The Delaware Effect”, the name of this small American state which due to legislation that is highly favourable to businesses, has sucked in the registrations of over half of companies listed in the United States. But this practice has also aroused a broad debate within the European Union, particularly in the wake of the “*Centro*” case by which the Court of Justice accepted that Danish nationals can found a company in the United Kingdom whose activity is almost all located in Denmark, thereby evading the application of the rules for incorporating companies which are more restrictive there in respect of the paying-up of share capital<sup>105</sup>.

The concerns are fed by the converging practices of certain companies (revealing in particular the attractiveness of the company law of the Netherlands)<sup>106</sup>

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103. “*Forum shopping*”, when it is used in relation to substantive law is in reality “*law shopping*” (see L. Usunier, “Competing jurisdictions in Europe and legal strategies in private international law, Competing jurisdictions and legal strategies under international law private”, as part of the symposium *Legal strategies of companies in Europe* (dir. A. Masson, University of Luxembourg, 5 December 2008), published in *Les stratégies juridiques des entreprises*, Larcier, 2009, pp. 433-45).

104. See S. Hanray and J.-S. Bergé, “Economic analyses of legal competition: a tool for modelling European law”, *RIDE*, 2011/2, p. 165-192.

105. ECJ, 9 March 1999, *Centros Ltd*, C-212/97; the Court ruled that Articles 52 and 58 of the EC Treaty for this reason precluded a Member State from refusing the registration of a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office without it actually carrying out business activities there. It recalled, however, that this interpretation did not exclude the authorities of the Member State concerned from taking any measure to prevent or punish fraud. Also see on these questions Ch. Pochet, “Federalism, company law and corporate governance: what lessons can Europe learn from the American experience?”, *RIDE*, 2006/3, p. 285-316.

106. The attraction of the Dutch “NV” is well-known, including for companies of French origin, of which some have a public participation: Euronext, EADS, Renault-Nissan. See in particular on these questions: Report No. 2250 of 8 October 2014 by the commission of inquiry of the National Assembly on the exile of stakeholders.



and taxation in Ireland and Luxembourg), and more generally by the advantageous legal and tax conditions offered by certain European states seeking to promote the establishment of companies on their territory.

■ *The choice of the judge and the extraterritoriality of economic law*

For economic operators, the actual conditions of application of the law and therefore the choice of the court are even more important. If there is a “law supermarket”<sup>107</sup>, there is also a supermarket of the courts: “forum shopping”<sup>108</sup>.

With some exceptions, the litigant cannot choose the law that applies to his case<sup>109</sup>, but the latter may have several potentially competent courts, given the differences in the rules of conflicts of jurisdiction according to the Member States. Companies can then seek to take advantage of this situation to choose the judge who will best serve their interests (in particular in terms of speed or means of evidence)<sup>110</sup>.

This usage is growing strongly in the business world<sup>111</sup>.

Besides the domiciliation of convenience of a company, “forum shopping” may foster a **decorrelation** between the applicable law, the competent court and the territory on which the contested activity takes place, as several cases where French companies have been targeted before the American courts has shown<sup>112</sup>, in particular in the case of group actions initiated in the United States, even though most of the victim shareholders were not Americans. The Supreme Court of the United States is trying to discourage this trend through its case law on the misuse of forum shopping<sup>113</sup>.

The debate has been restarted by the free trade agreements that have been adopted or are being negotiated and, in particular, the proposed transatlantic agreement (TTIP) whose mechanism for the settlement of disputes between investors and States (ISDS), leads to doubts about the ability the actors will keep to assert their rights before the national courts<sup>114</sup>.

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107. M. Delmas-Marty, *Pour un droit commun*, Seuil, 1994, p. 210.

108. “Forum shopping” is more widely accepted by the texts than “law shopping”: See in particular the so-called “Brussels I” Convention (Regulation (EC) No 44/2001 of the Council of 22 December 2000 on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters).

109. There are some notable exceptions, beginning with that of international contracts.

110. See proceedings of the symposium *Efficient economic courts in competition: Placing national legal systems in competition*, organised by the Centre for Research in Business Law of the CCIP of 4 December 2007 (online).

111. D. Cohen, “Business litigation and misuse of forum shopping”, *Dalloz*, 2010, p. 975

112. See as a reminder of several of these cases, the contributions by J.-M. Sauvé, “Territoriality of the law, introduction to the internetwork meetings at the Collège de France”, April 2012 and “Understanding and regulating globalised law or how to tame the illusion?”, 20 May 2015 (website [www.conseil-state.fr/actualites/Discours-Interventions](http://www.conseil-state.fr/actualites/Discours-Interventions))

113. *US Supreme Court*, 26 July 2010, *Morrison v. National Australia Bank*, 08-1191; see E. Gaillard, “Foreign cube, the Supreme Court of the United States obliged to give a ruling”, *JCPG*, 2010, p. 366. France, having intervened in the proceedings, argued its fairly reserved position on these aspects of extraterritoriality.

114. This clause of the TTIP project also gave rise to a European Citizens’ Initiative (ECI) which the Commission opposed in September 2014, while taking into account the misgivings surrounding this treaty through the launch of a “transparency initiative” in November of the same year.

The Member States are not neutral in this competition through the law: it is they who determine the territorial scope of application of their rules and they can decide to attract businesses with only a very tenuous link to their territory, their nationals or their economy. They can also directly encourage this extraterritorial application by taking legal proceedings against third countries.

American law is a characteristic example of this<sup>115</sup> and the federal authorities have not hesitated to use it to penalise foreign companies which have disregarded their embargo decisions<sup>116</sup>, including BNP Paribas. In this specific case, there were no judicial proceedings, but a simple threat from the American public prosecutor to initiate them, which forced the company to compromise, recognising the facts and accepting several elements connecting them to the American legal system<sup>117</sup>. “The projection effect” of American law which emerges from this episode, on a question also closely linked to its foreign policy choices, contrast sharply with the situation which prevails in Europe.

Indeed, the European Union does not have an instrument of comparable effectiveness to assert the economic law of the Union and the Member States when dealing with international companies, except in the area of competition law. The project of creating a European Public Prosecutor, confirmed by the new European Commission, does not specifically have this as its purpose<sup>118</sup>. In the case of serious violations of the integrity of the single market or to the financial stability of the euro zone, responses remain essentially national and their deterrent effect is accordingly limited.

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115. A number of American texts expressly provide for their extraterritorial application (*Foreign Account Tax Compliance Act; Patriot Act; Sarbanes-Oxley Act* etc.). While respecting international law, the U.S. legal framework incorporates the principle of “objective territoriality”. This concept stemming from the “theory of effects” introduces an exception to the principle that laws have an effect only within the territory of a State: a State may be competent to legislate in respect of actions carried out abroad that produce effects which are “*direct, substantial and predictable*” on its territory, or even on its nationals abroad. From this approach, the broad concept of “*US Person*” is derived which applies not only to nationals, but also to companies or their subsidiaries in which Americans own a majority stake.

116. “Helms-Burton” and “d’Amato” laws for companies violating the U.S. embargo on Cuba, Iran or Libya. See S. Battini, “*Globalisation and extraterritorial regulation: an unexceptional exception*”, *IRPA*, 2011.

117. See, in particular, regarding this case Ph. Athanassiou, M. Prokop and A. Theodosopoulou, “Extra-territorial effects of American law on non-American financial institutions, an overview”, *RDBF*, Sept. 2014, Study 20; Y. Quintin, “At the frontiers of law: the United States embargoes and the BNP Paribas case”, *Ibid*, Study 21.

118. Draft regulation of 17 July 2013 establishing a European Public Prosecutor, based on Article 86 TFEU (COM(2013) 534). The European Public Prosecutor will have the mission of seeking, prosecuting and committing for trial, where appropriate, the perpetrators of offences prejudicial to the financial interests of the EU. The creation of this Public Prosecutor's Office was confirmed in the policy guidelines of J.-Cl. Juncker of 15 July 2014.



It is therefore essential to study ways of ensuring the effectiveness of European Union law and observance of it by the most internationalised firms, for example by establishing for this purpose a European authority responsible for coordinating repressive measures in the European Union or in the euro zone.

### ***1.2.1.2. The defence of the economic interests of the Member States and of the European Union still remains possible***

■ *The dead-end of “economic patriotism” directed exclusively towards the protection of national operators*

In an open economy, “economic patriotism” reflects the idea that, although it is no longer possible to close the borders to products or to foreign companies, it remains possible to defend national economic interests in a more diffuse form.

Depending on the case, the economic players (companies, consumers) are called on to demonstrate good citizenship by choosing national production as their preference, or public persons are asked to favour the interests of the national economy or national operators.

Economic patriotism however comes up against a **problem of a material kind**: “How to promote economic patriotism when the internationalisation of production processes often makes it impossible to identify even the nationality of the products and firms”<sup>119</sup>. The internationalisation of companies makes their attachment to a specific country invisible, in the absence of a convergence of the different possible criteria (place of registration, nationality or residence of the founders, the main shareholders, the principal officers, the employees, etc.). The internationalisation of markets and the growth in international intra-group flows mean that a growing share of imported products are reimports of products originally exported while exported products are themselves widely derived from initially imported products<sup>120</sup>.

Economic patriotism is moreover prohibited or significantly limited by the non-discrimination principle and by the prohibition of measures with an effect that is equivalent to customs duties, which the public authorities must abide by both under international trade rules and European law (particularly with respect to the principles of free movement of capital and freedom of establishment)<sup>121</sup>.

Mechanisms designed to encourage companies or sites to stay in France or that are in the hands of French shareholders have however been adopted because they were not legally linked to nationality. This is the case for example regarding the obligation of heads of companies to seek a buyer before closing a site, established by the Act of 29 March 2014, inspired by the closure of the Florange site by Arcelor-Mittal but which also applies to any French company that would like to take the same decision without reorganising its activity abroad. This is also the case with the

119. J.-M. Siroën, “Economic crisis, globalisation and protectionism”, *Politique étrangère*, No. 2012/4, p. 816.

120. *Ibid.*

121. See regarding these principles and requirements arising from European Union law, below, 2.2.2.1. and following.

establishment, by the same act, of double voting rights in favour of shareholders who have held shares for over two years, which limits, with other anti-takeover mechanisms, the risk of a foreign takeover and applies to all companies regardless of their nationality<sup>122</sup>.

■ *The defence of strategic interests is still however possible*

The defence of national interests is not excluded by international law<sup>123</sup> nor by European law. Article 65 (paragraph 1 b) of the TFEU in particular allows the Member States to adopt restrictive measures on the free movement of capital for reasons linked to “public policy or public security”. It is on the basis of these provisions that several mechanisms may be admitted such as the system controlling foreign investment in France<sup>124</sup>, the ability for the State to keep in certain privatised enterprises a “specific share” to which a certain number of prerogatives are attached<sup>125</sup> or to have a “Government commissioner” in the governance body of certain undertakings<sup>126</sup>, provided however it can justify the non-discriminatory nature, the appropriateness and the proportionality of each of the measures taken<sup>127</sup>. Implemented in compliance with these requirements, these mechanisms are entirely legitimate and are essential instruments for defending the higher interests of which the State is the guarantor.

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122. Provisions introduced into the Commercial Code and the Labour Code by Articles 1 and 7 of Act No. 2014-384 of 29 March 2014 aimed at reclaiming the real economy.

123. Control mechanisms on international investment are frequent including in countries reputed not to favour intervention. In the United States, under the *Exxon-Florio* amendment of 1988, the President of the United States has the power to prohibit any transaction that would result in the takeover of a U.S. firm. This power is exercised through the *Committee on Foreign Investment in the United States*, an inter-agency body created in 1975. At the end of the control procedure, the President of the United States may issue a favourable opinion, subject the transaction to certain conditions or decide to suspend or prohibit the transaction. Review of cases by the CFIUS is limited to national security considerations, although there is no precise definition of this concept. In Australia, any investment greater than AUD 250m or made by a foreign government or by a foreign public enterprise is subject to an in-depth study and approval by the *Foreign Investment Review Board*. Similarly, in Canada, foreign investment greater than CAD 369m is subject to a review having to demonstrate the benefit that it represents for the Canadian economy and restrictive rules exist for sectors related to national security.

124. The system last amended by Decree No. 2014-479 of 14 May 2014 relating to foreign investment subject to prior authorisation, on which the Conseil d’État issued an opinion on 13 May 2014, No. 388752.

125. Mechanism introduced by Article 10 of Act No. 86-912 of 6 August 1986 regarding privatisation arrangements; see the opinion of the Conseil d’État of 8 December 2014 made on the proposal to amend this article by the growth and activity bill, No. 389494.

126. See *Government commissioners in enterprises*, La documentation Française, 2015.

127. Other countries of the Union have developed or adapted their regulations in this area, in particular to comply with these rules. Italy has thus adopted a so-called “Golden power” mechanism to put an end to the infringement procedure opened by the Commission with regard to its “golden share” mechanism (Decree-Law No. 21 of 15 March 2012).





The deepening of the internal market, the competence of the European Union in the field of international trade and the regulations put in place at the European level in certain strategic sectors such as energy lead to questions about the interest that there would be in providing for such mechanisms for defending strategic interests at the level of the Union. Currently, the European institutions have no way of monitoring investments from third countries in strategic European companies. The very concept of a strategic company which is beginning to be the subject of thinking in France, is not considered at the European level. Without going as far as establishing binding procedures, organising intelligence watch of these investments in companies and sensitive sectors would be appropriate.

**Proposal 6: Better protect the economic interests of the European Union**

1) carry out an examination of the institutional mechanisms able to respond to threats to the financial stability of the Union or of the euro zone; consider for this purpose entrusting a European authority with the task of coordinating repressive measures at the level of the Union or the euro zone;

*Means: Government action  
(SGAE, Minister of Finance and Public Accounts, Minister of Justice)*

2) invite the European Commission to make proposals for monitoring foreign investment in sensitive sectors, in order to be able to take the necessary, adequate and proportionate measures; structure the mechanism at the national level by organising a monitoring mechanism for strategic enterprises.

*Means: Government action  
(SGAE, Minister of the Economy, Industry and the Digital Economy)*

## 1.2.2. The use of economic diplomacy

### 1.2.2.1. France has fully understood the importance of economic diplomacy

■ *A gradual conversion to economic diplomacy*

Economic diplomacy is defined “not by its instruments, but by the economic problems which give it its content”<sup>128</sup>. A diplomatic power, France has gradually become convinced that it needs to use its network for economic purposes<sup>129</sup>, since economic power has simply become an element of power itself<sup>130</sup>.

128. N. Bayne and S. Woolcock, “The new economic diplomacy, decision making and negotiation in the international economic relations, Aderchit, Ashgate,” 2003, p. 7-8, cited by L. Badel, “For a history of the economic diplomacy of France”, *Vingtième siècle, revue d’histoire*, 2006/2”, p. 169-185.

129. Around the outbreak of the First World War this action took form, under the impetus of Etienne Clémentel. Diplomacy was then mainly focused on foreign trade. The Embassies created a commercial advisor, a French originality. It was at this time that the debate on the role of foreign trade arose as a component of diplomacy or an extension of trade. See L. Badel, *ibid*.

130. J.-L. Carrière, “Economic Diplomacy, ‘a new frontier’ of French policy”, *Géoéconomie*, 2014/3, p. 9-22.



The financial crisis has moreover demonstrated the role of last resort of the States in the event of a systemic risk which companies are unable to deal with<sup>131</sup> and in the absence of effective international regulation<sup>132</sup>.

The State must therefore play a full role in economic competition between nations<sup>133</sup>, including at the highest level. The President of the Republic himself promotes foreign trade and encourages foreign investment, as shown by the expression - initially controversial but now well-established of - "President Sales Rep.". Moreover he participates, more and more often, as other heads of State do, in major summits defining the framework of world competition in the economic field.

■ *Persistent tensions between the political and economic aspects of diplomacy*

Experience shows that in a largely open economy, states have little influence over the attitude of resident economic agents in relation to third countries. Political **tensions** between countries thus have quite limited effects on the level of trade, including in the case of an explicit call for a boycott. Except during periods of major and long-lasting confrontation, trade generally shows itself to be fairly inelastic. Only the sectors in which the decision belongs to the public persons themselves, such as public contracts or defence contracts, are sensitive to the deterioration of relations between States<sup>134</sup>.

The recurring question of **economic sanctions** illustrates the link between the economy and politics. It is also significant that sanctions are above all imposed in the economic field. This however is not without contradictions when sanctions or even only tensions appear when previous commitments need to be honoured<sup>135</sup>. Economic diplomacy can thus be the hostage or the armed wing of diplomacy policy.

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131. J. Eatwell, "A new international financial architecture", *L'Économie politique*, 2009/2, No. 42, pp. 16-21.

132. T. Padoa-Schioppa, Per Jacobsson Lecture 2010, cited by A. Cartapanis, "The financial crisis and macroprudential policies, regulatory inflections or new paradigms?" *Revue économique*, 2011/3 vol. 62, p. 349-382.

133. E. Denécé, "Economic Diplomacy and competition of the States", *Géoéconomie*, 2011/1 No. 56, p. 71-78.

134. S. Meunier, "What is the economic impact of transatlantic tensions?", *Politique étrangère*, 2009/1, p. 87-101.

135. As the case of the "Mistral" helicopter carrier illustrates whose sale contract was concluded with the Russian Federation in July 2011 and whose delivery was suspended by decision of the President of the Republic in November 2014 in the context of the Ukrainian conflict.



More generally, the question of the interplay between economic diplomacy, which to be effective must avoid any interference, and the “values” upheld by so-called political diplomacy is a recurring debate<sup>136</sup>.

### 1.2.2.2. *France’s strengths*

#### ■ *France’s strengths in an evermore dispersed multilateral diplomacy*

France is lucky to be an influential member of all the **major multilateral organisations**, whether this is the Security Council of the United Nations (which may decide to impose economic sanctions), the IMF, the WTO or the OECD.

Multilateral diplomacy has undergone profound changes and transformations in recent years, particularly in the economic field, with the increasing weight of **informal** but influential **multilateral bodies**. The main one of these is the G20 to whose importance France has made a large contribution<sup>137</sup>. Alongside this political arena, specialised bodies with a technical vocation play a central role in preparing future international “standards”. These are instruments of soft law which, although devoid of mandatory effects, constitute very powerful references for the development of business law (Financial Stability Board<sup>138</sup>, “Basel Committee”<sup>139</sup> in the specifically banking area, “IFRS organisation” with regards to accounting, or ISO with regards to standards<sup>140</sup>). France must strengthen its presence in these specialised agencies in order to exercise technical influence, in particular on the future development of the international rules.

Another essential aspect of economic multilateralism is the growing role that **scientific meetings** play (symposia, conferences) often organised by “*think tanks*” where representatives of states, international organisations, companies and academics can debate and where shared analyses of the state of the world economy are built and the measures that are needed. It is therefore essential that French and European theses are expressed in them and that our administrations, universities and enterprises are able to put forward their point of view.

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136. L. Fabius, “France in the economic diplomacy battle”, interviews with P. Lorot, *Géoéconomie*, 2013/2.

137. This circle, created in 1999 at the level of the finance ministers to promote international financial stability, took on new importance in 2008, at the initiative of France, by bringing together heads of state and governments: see D. d’Amarzit, “The priorities of French economic diplomacy and the presidency of the G20”, *Géoéconomie*, 2011 No. 56, p.19-27; also see, “After the G20: an outline of economic regulation and new geopolitics of the powers”, 2009/5, Editorial, *Revue Esprit* p. 4-5; Kermal Dervi, “The global economic crisis: issues and reforms”, *Politique étrangère*, 2009/1, p. 11-22; F. Danglin “From the concert of nations to the cacophony of organisations: the new face of multilateralism”, *Géoéconomie*, 2011 No. 56, p.45-57.

138. J. Eatwell, “A new international financial architecture”, *op. cit.*

139. *Ibid.*

140. D. Danet, “Between spontaneous law and legislated law: the production of the law through standardisation”, *Économie publique, Étude et recherches*, No. 7, 2001/1, pp. 83-101.

Paris is one of the cities that hosts the most international public meetings in the world<sup>141</sup>. It is a major element of our diplomatic influence and our attractiveness in the economic field. It is desirable to strengthen this position by capitalising more on the presence in Paris of several international organisations (International Chamber of Commerce, International Energy Agency, European Space Agency, etc.), and especially the OECD which plays a crucial role in developing standards accompanying globalisation.

■ *The weight of France within the European Union, an economic giant, is a decisive asset.*

The competence to negotiate trading treaties belongs wholly to the institutions of the European Union pursuant to Article 207 of the TFEU. Several agreements have recently been adopted (Comprehensive Economic and Trade Agreement or CETA concluded on 18 October 2013 with Canada) or are still being negotiated (Transatlantic Trade and Investment Partnership (TTIP), with the United States). The European Union can also take *anti-dumping* measures with respect to third countries, as recalled by recent current events (taxation of steel imports from China in March 2015). This policy is however less within the framework of a mandate of the council, deciding depending on the subject with a qualified majority or unanimously, where France often has a decisive weight, which has allowed it for example to successfully preserve, up until now, the cultural exception and the agricultural exception.

France thus knows how to play on a threefold level to defend its positions in the world. This is especially true within the context of the **multilateral** forums as illustrated by the preparation of the climate conference or the presentation within the context of the OECD of the multilateral instrument to harmonise taxation on the profits of multinational enterprises<sup>142</sup>. Bilateral diplomacy may indeed be used to prepare for future major international negotiations, extend them or supplement them in the event of success or replace them in the event of failure.

Regardless of the forum in which economic diplomacy is exercised, involving **companies** in defining French positions can contribute to its success<sup>143</sup>. The Minister of Foreign Affairs now calls on companies to inform him of their proposals when preparing international discussions. This type of approach could be expanded to include all the issues which affect them<sup>144</sup>.

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141. See on this study by the Conseil d'État, *The establishment of international organisations on French territory*, La documentation Française, 2010.

142. The Franco-German partnership, with the support of the United States, already played a leading role in the choice by the G20 to make the fight against tax havens a priority, which led to the adoption within the framework of the OECD of the multilateral agreement on the automatic exchange of banking information.

143. See C. Revel, "Multilateral economic diplomacy and influence", *Géoéconomie*, Winter 2010-2011, p. 59-67; F. Pitti, "The economic diplomacy of enterprises", *Géoéconomie*, 2011/1, No. 56, p. 105-118.

144. Action Plan of the Ministry of Foreign and European Affairs and International Development (MAEDI website).



**Proposal 7: Strengthen the effectiveness of our economic diplomacy**

1) strengthen the presence of France in the bodies developing international technical standards;

*Means: Government action*

2) promote the role of Paris as one of the major capitals of economic diplomacy, in which the headquarters of the OECD is located; participate more actively in the work of this organisation;

*Means: Government action*

3) associate companies more closely in defining the position of France in international negotiations which relate to them;

*Means: Government action*

4) strengthen the presence of representatives of administrative authorities, universities and French companies in symposia and international meetings on economic issues and more particularly on the role of the economic action of public persons.

*Means: Government action*

*(Minister of Foreign Affairs, Minister of the Economy, other Ministers)*

■ *The importance of legal and linguistic links*

Economic diplomacy must also take advantage of the major asset that lies in the influence and prestige of our language and our law.

The economic links within the francophone community must be harnessed more effectively<sup>145</sup>. “Economic Francophonie” was the subject of a report in August 2014 issued at the request of the President of the Republic<sup>146</sup> and the International Organisation of the Francophonie, in November 2014, decided there should be an “economic strategy”<sup>147</sup>.

The promotion of our vision of the law alongside those nations which share it is also crucial at a time legal globalisation. France, which has inspired civil law systems, and forges partnerships with countries that share the same legal tradition (as for example in the context of the Organisation for the harmonisation of business law in Africa, OHADA). A steering committee on a strategy of influence through the law was established in December 2014, under the

145. Africa in particular. See H. Védrine, *A partnership for the future: 15 proposals for a new economic dynamic between Africa and France*, Report to the Minister of the Economy and Finance, December 2013.

146. Report submitted by J. Attali, *Francophonie and francophilia, engines of sustainable growth*, August 2014.

147. Document adopted at the 15<sup>th</sup> Conference of heads of state and government of the countries sharing the use of French, Dakar, on 29 and 30 November 2014.

co-presidency of the general directorate of globalisation, development and partnerships and the inter-ministerial delegation for economic intelligence, following on from an opinion of the French Economic, Social and Environmental Council (CESE) on this point<sup>148</sup>.

The promotion of continental law is becoming an important objective of economic diplomacy, in particular to withstand the bias in favour of economic actors using *common law*. This objective is also that of the foundation for continental law, established in 2007 at the initiative of the Ministers of Justice and of the Economy with the goal of contributing “to the reputation and international influence of the continental legal tradition and of French law, more particularly in the field of economic law and business law”<sup>149</sup> and which has carried out work of significant importance since its creation<sup>150</sup>. The resources allocated to it are not however commensurate with the ambitions which led to its creation, and they could be usefully complemented by non-budgetary arrangements such as those found to support the activities of other public initiative foundations<sup>151</sup>.

#### **Proposal 8: Promote linguistic and legal ties**

1) promote economic ties within the Francophone community;

*Means: Government action  
(Minister of Foreign Affairs and Business France).*

2) strengthen the resources of the foundation for continental law using innovative measures, on the model of those benefiting other public initiative foundations.

*Means: a law  
(Minister of Foreign Affairs, Minister of Justice and Minister of Finance and Public Accounts, in conjunction with the Foundation)*

### **1.2.3. Developing policies of attractiveness and competitiveness**

#### ***1.2.3.1. Stiff competition between state systems***

##### ■ *The extension of the rating and comparative assessment field*

Formed to assess the financial strength of an issuer in the financial market and its capacity to cope with its commitments, the rating agencies use an increasingly

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148. *The influence of France on the European and international scene through the promotion of continental law*, opinion submitted on 23 September 2014 by D. Gordon-Krief on behalf of the European and international affairs section of the CESE.

149. Art. 1 of the foundation’s by-laws recognised by the decree of 11 May 2007 as an establishment of public utility.

150. See below 1.2.3.1.

151. See for example, among various non-budgetary mechanisms from which the heritage foundation benefits the allocation of a portion of the proceeds of successions assigned to the State as dormant accounts (Article 13 of Finance Act for 2003 No.2002-1575 of 30 December 2002).



large number of parameters when their assessment relates to sovereign or private issuers. The ability of a State to repay its debt is thus assessed from its macroeconomic prospects, the environment that it offers to its economy and the reforms envisaged to improve them. Similarly, the financial situation of a company may no longer now be assessed without taking into account its economic prospects and accordingly its legal, administrative and fiscal “biotope”<sup>152</sup>.

The comparative merits of the national systems for the development of economic activities are also subject to regular assessments, either by international organisations - the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD), the European Commission, etc. – or by private companies.

■ *The growing influence of international rankings*

The comparative assessment of the systems feeds the profusion of international rankings specifically dedicated to the legal and administrative framework of the business world. Their strength lies in the concise nature of the ranking, which leaves its mark. They have precipitated awareness of the importance now represented by competition in this field.

Above all, the general competitiveness rankings have focused people’s attention and, among them, the *Doing Business*<sup>153</sup> ranking, assigned annually since 2004 by the World Bank. It ranks 189 countries according to a set of criteria organised around ten thematic areas: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.

This ranking has been **highly criticised**, particularly in France (ranked below 30<sup>th</sup> place), due to an ideological assumption that is hostile to the legal and administrative oversight of economic activities<sup>154</sup>. A prejudice against Roman law has also been noted<sup>155</sup> as well as a presupposition in favour of creditors rather than firms with respect to collective insolvency proceedings. Significant concerns have

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152. The growing influence of rating agencies is not unconnected with the strengthened oversight to which they are now subject in the United States and in Europe. The initial response to the new power of the rating agencies was to try to dilute their impact by encouraging their multiplication, or even to create public agencies. In Europe, the regulatory oversight solution prevailed, which was in any event necessary to ensure increased reliability of their processes and strengthen their ethics. This was achieved in three stages: 2009 (EU Regulation 1060/2009 of 16 September 2009), 2011 (513/2011 of 11 May 2011) and 2013 (EU Regulation 462/2013 of 21 May 2013). But this oversight also such that it strengthens their importance. In the United States, the regulation of these agencies began in 1975; the NRSRRO designation has encouraged the concentration and institutionalisation of the agencies, even if they remain private companies. Ultimately, regulation and the regulators have made them, in some way, “semi-public agencies”.

153. See also the world competitiveness ranking (“*Competitiveness Report*”) of the *World Economic Forum* (moreover the organiser of the Davos Forum), which focuses on the quality of institutions, infrastructure, the environment, education and the health system.

154. G. Diarra and P. Plane, “The World Bank and the genesis of the concept of good governance”, *Mondes en développement*, 2012-2 No. 158, p. 51-70.

155. Symbolised by a unfortunate phrase in the first report of 2004 “*one size can fit all*”. Direct criticism of Roman law disappeared in the editions after 2005.

also been raised in regard to the method used for this report<sup>156</sup>. Doubt has been cast about very relevance of its results by identifying , in a criticism similar to that made against the rating agencies, that there is no established link between the ranking of a state and its economic performance or prospects.

#### How states view the international rankings – Foreign examples

Most countries are attentive to their position in the international rankings.

Some have ranking targets: Japan aims to be in the “Top 3” of the *Doing Business* ranking; Russia aspires to be ranked among the top 20 countries by 2018 (after having risen from 112<sup>th</sup> to 62<sup>nd</sup> place between 2013 and 2015); in Italy, the Italian Prime Minister has stated his objective of getting Italy to rise by 50 places between 2014 and 2018.

Measures are taken specifically with the direct aim of improving the position in the rankings. Brazil has adopted two programmes for this purpose – “*Super Simples*” and “*Bem Mais Simples*” (“much simpler”). The bill for reforming the Polish Construction Code has been presented as having this specific objective. Israel, since 2009, has put the emphasis on dealing with its two weak points in *Doing Business* (time needed for starting a business and the registration of ownership). These initiatives are usually started and coordinated by dedicated structures such as a body dependent on the Ministry of the Presidency of the Government in Spain (*Marca España*) or the “*National Competitiveness Center*” in Saudi Arabia.

For those countries well ranked, the position in a ranking is an element they promote in their attractiveness policy, particularly in communication campaigns. This is particularly the case for Canada, well placed in many categories of these rankings or for South Africa with regard to the access to credit.

Formal challenges of these rankings by states remain rare. China proposed that *Doing Business* should be abolished in 2013, supported in this by a panel of independent experts but this initiative was not followed up.

Whatever the merits of this ranking, the impact that it has on the reputation of a country and on investors cannot be ignored. It is therefore pointless to combat the approach in its principle<sup>157</sup>, with the effort more usefully focusing on work of **conviction** regarding the methodological limitations of the ranking if they exist. The criteria used are not set in stone and the World Bank has accepted that they

156. See on this methodology. B. du Marais, D. Blanhet, A. Dorbec, “Indicators to measure the law? The methodological limitations of the *Doing Business* report”, La documentation Française, 2006; D. Cohen, “From the choice of assessment criteria to a conception of the function of the law”, G. Canivet, M.-A. Frison Roche, M. Klein, “Measuring the economic efficiency of the law”, *LGDJ*, 2005; in the same collection, C. Jamin, “The traps of the economic assessment of regulation”; A. Raynouard and A.-J. Kerhuel, “The assessment of the legal systems at the heart of the storm”, D. 2010, p. 2928; also see, L. Usunier, “The *Doing Business* report 2012, the competition of legal systems and the attractiveness of the French law of contracts”, *Revue des contrats*, April 1, 2012, No. 2, p. 575.

157. A. Raynouard, “The challenge of the *Doing Business* indicators: a political stance”, *PCPA*, 11 September 2009, No. 182.



can evolve; a review of them may thus provide an opportunity for a technical debate on the relevance of the criteria or sub-criteria<sup>158</sup>. This work of conviction may also be based on the development of alternative criteria or rankings, such as the index of legal security that the Foundation of continental law made public on 7 July 2015<sup>159</sup>.

As long as the *Doing Business* ranking occupies the place which it holds currently, efforts at making best use of it must be made. It assesses more, for example, the way in which business law is applied and therefore more the **administrative practices** than the substance of the law itself. More specific information on the actual performance of the French administrative authorities with respect to the various criteria and the targeted improvement efforts of some of them would therefore allow places in the ranking to be gained. The State could support the efforts made for this last point by introducing some of the criteria of the international rankings in the indicators of the performance goals of its services and its operators. The spectacular progress made on the trading across borders criterion, thanks to the involvement of the customs authority, show the benefits that can be derived from such an approach<sup>160</sup>.

**Proposal 9: Take better advantage of international rankings**

1) strengthen the French presence in the committees which define the criteria for international rankings where reservations can be made about them;

*Means: Government action  
(Minister of Foreign Affairs)*

2) raise awareness in the national administrative authorities of the consequences of the rankings;

*Means: Government action  
(Minister of Foreign Affairs)*

3) introduce the international rankings' criteria into the performance target indicators of the administrative authorities concerned.

*Means: Government action  
(Minister of Foreign Affairs,  
Minister of the Economy, Industry and the Digital Economy, SGMAP)*

158. S. Croci, one of the authors of the 2014 report has stated that “after ten years of study, thanks to the advice of a panel of experts, we have decided to improve the quality of 8 indicators out of 10. The process will be spread over two years” (*Les Échos*, 29 October 2014). See also, regarding the methodological developments of the 2015 report, the “update of the methodology” (World Bank website).

159. Press conference at the Ministry of Foreign and European Affairs and International Development on 7 July 2015. The creation of an international observatory of economic regulations was also announced on this occasion. The index was communicated to the World Bank in June 2015. It has been chosen for a presentation at the *Legal Week*, which will be held in Washington in the week of 16 November 2015.

160. DGDDI public report 2014.



### ***1.2.3.2. Strengthening attractiveness and competitiveness through a balanced approach***

#### ■ *Making attractiveness and competitiveness policies systematic*

An old concern<sup>161</sup>, the theme of the competitiveness and attractiveness of the French economy has in recent years taken on particular importance in political discourse and in the terminology used for public action<sup>162</sup>. Measures that are among the most emblematic of the economic action of successive governments relate to it: “competitiveness centres”, “competitiveness pact”, “competitiveness-tax credit”. Parliament itself has taken an interest in certain aspects of this issue<sup>163</sup>.

The policies of attractiveness and competitiveness are now entrusted to structures especially created or redesigned for this purpose<sup>164</sup>, such as the Directorate General of Competitiveness, Industry and Services (DGCIS, become DGE), the inter-ministerial delegation of development of the territory and regional attractiveness, the inter-ministerial delegation of economic intelligence or *Business France*<sup>165</sup>, and most recently the creation on 17 February 2014, reporting to the President of the Republic, of a “Strategic council on attractiveness”, bringing together the heads of 30 international companies. Currently well-established as part of the missions of public persons, attractiveness and competitiveness are embodied in a number of concrete measures.

Inspired by the thinking on “economic impact of the law” (“*Law and Economics*”)<sup>166</sup> and demands by companies, many simplification measures have been recommended by the simplification council created in January 2014<sup>167</sup>. An initial series of provisions were adopted in the act for the simplification of business life at the end of the same year<sup>168</sup>.

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161. See regarding the origin of this movement, B. du Marais, “Economic attractiveness of the law: can French law survive within the international competition? *Droit et patrimoine*, No. 170, May 2008.

162. 829 occurrences in the current texts for “competitiveness”; 230 occurrences for “attractiveness”.

163. Above-mentioned report of 8 October 2014 on the exile of stakeholders.

164. A certain number of countries have also created permanent structures specially dedicated to coordinating efforts in the area of competitiveness and attractiveness, such as for example the United States (*Export Promotion cabinet*), Switzerland (*Switzerland global enterprise*), Russia (*Russia invest*) and India (*Make in India; Invest in India*). China stands out quite clearly from this movement as regards attractiveness. The size of its domestic market is such that it feels little need to promote itself with respect to foreign firms.

165. This movement is also seen at the level of the European Union with the appointment of a Vice-President of the Commission responsible for these issues, the creation early in 2015 of a new branch of the Commission, “*Grow*” and, with regard to the European Council, the creation of a “competitiveness” council that will meet at least four times a year.

166. See B. Coeuré, “Legal systems and economic performance: efficient law or competitive law?”, *Le Cercle des économistes*, 18 June 2007

167. Decree No. 2014-11 of 8 January 2014 establishing the simplification council for companies.

168. Act No. 2014-1545 of 20 December 2014 relating to the simplification of business life and relating to various provisions of simplification and clarification of the law and administrative procedures.



In order to meet the concern expressed by companies on the instability of the social and tax rules, and whereas several major pieces of work had been carried out on this subject<sup>169</sup>, on 20 December 2014 the Government announced a Charter on new fiscal governance, in which, in particular, it undertook to limit tax retro-activity<sup>170</sup>.

The services which deal with companies have been encouraged to adapt their way of working by emphasising advice and assistance and not only on the relationship of authority. Centres devoted to large or international companies have also been formed to meet to their specific needs (contacts and one-stop shops, such as “the single entry point” created with the director general of public finance to receive and guide foreign investors on taxation matters which relate to them<sup>171</sup>). User satisfaction indicators are being developed to encourage a new attitude<sup>172</sup>.

Active communication policies encourage the foundation and development of businesses as well as investment, with the public authorities taking stock of the poor image that France has in this area<sup>173</sup>. At the same time, mechanisms are being put in place to attract foreigners to our country who have skills in strategic economic areas (for example, doctoral students) or to promote the return of expatriates.

Essential for facing international competition, this modernisation movement could be carried out in a much wider and more systematic way, in particular as part of the strategy for modernising public action (MAP), in order to reconsider all the public policies according to its yardstick.

Given their very object, it is essential that these policies are based on prior international comparisons, get their inspiration from good foreign practice and are designed to anticipate relevant developments so that the French economy is better equipped to face international competition in the future. These processes could also be more profitable by taking into account the “feeling” of companies and the business world in regard to certain laws and regulations, thereby contributing to the development of a climate that is conducive to economic initiative.

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169. See in particular the report of O. Fouquet, *Improving the legal security of relations between the tax authorities and taxpayers: a new approach*, June 2008.

170. Memo from the Minister of Finance and Public Accounts on the new fiscal governance (December 2014).

171. Press release of the Ministry of the Economy No. 1116 of 27 Feb. 2014.

172. See for example, the satisfaction surveys addressed to companies by the DGDDI which it features in particular in its annual reports.

173. See the previously-mentioned work of the Commission of Inquiry of the National Assembly on the expatriation of stakeholders, Report No. 2250 of 8 October 2014. See also the *White paper on the attractiveness of France*, published by Ubifrance and the French agency for international investment (AFII) in 2014. See also the statement of the Prime Minister, on 6 October 2014, during a speech made in the City of London: “*My government is pro-business*”.

**Proposal 10: Strengthen the objectives of competitiveness and attractiveness in the definition of the strategy for modernising public action (MAP)**

Make them the target of specific focuses areas of the MAP strategy and use international comparisons as well as the “feeling” of companies to define the content of these public modernisation focus areas.

*Means: Government action  
(SGMAP, France Stratégie)*

■ *Preventing “dumping”*

As necessary as they are, policies of attractiveness and competitiveness must not lead to a general weakening of the rules applicable to companies as part of a “race to the bottom”.

Firstly, the effectiveness of these policies is not unlimited. France cannot be competitive in all areas or attract foreign firms in all sectors<sup>174</sup>. Moreover, one must not underestimate the attachment of companies, even those which have moved out of French territory, to their national environment. With regard to international contracts for example, it is undisputed that the parties, which are able however to choose the applicable law, often prefer, not the system of law or jurisdiction that is the most effective or most efficient, but the law that they know and that gives them a sense of security<sup>175</sup>.

Secondly, the legal, fiscal and administrative rules are not designed for the sole purpose of promoting economic activity. They seek to strike a balance, that is particular to each society according to its culture and its traditions, between various public and private interests (entrepreneurs, consumers, employees). In this regard, care must be taken to avoid going down the road of a “law of attractiveness” which would only be a distorted form of the legal system of the state in question, having abandoned its own requirements and specificities<sup>176</sup>.

Moreover, aggressive enacting of this type of policy can quickly lead to more or less marked forms of “*dumping*”, potentially very damaging for the stakeholders, as the recent tax news demonstrates.

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174. Moreover, the fight against “*dumping*” also includes action seeking upwards harmonisation of social and environmental standards, so that economic competition is fairer.

175. L. Usunier, *Competing jurisdictions in Europe and legal strategies in private international law*, *Op.cit.*

176. M. Snoussi “The legal strategies of transnational companies: the example of transfer prices”, *RIDE*, 2003, p. 445, citing Ch.-A. Michalet, *The seduction of nations or how to attract investment*, *Economica*, 1999.



The abuse of “tax rulings”<sup>177</sup> and the erosion of the tax base of companies<sup>178</sup> within the European Union demonstrate that this risk must be taken seriously. The combination of an integrated economic area and the almost total absence of harmonisation of direct taxation creates conditions for harmful tax competition between Member States<sup>179</sup>. France itself is not immune to this type of temptation, even if it gives into it in a more limited way<sup>180</sup>.

On 18 March 2015, the European Commission proposed a package of measures to improve transparency and combat tax evasion, including in particular a system for the exchange of information between Member States on tax rescripts. On 17 June 2015, it presented an action plan on the taxation of companies one of the essential elements of which is the revival of the project for a common consolidated tax base for corporation tax (CCCTB) submitted in 2011 and which until then had been unsuccessful. These initiatives are in line with the French positions and France should therefore contribute actively to their implementation.

**Proposal 11: Prevent dumping practices**

1) systematically check that the measures taken for improving competitiveness and attractiveness, respect the other interests that are present (social, environmental, etc.) and prevent the risk that they are regarded as an unfair practice within the Union by consulting the European Commission as needed (see Proposal 19);

*Means: Government action*

2) combat tax competition between the Member States of the EU by supporting the initiatives of the European Commission in the field of tax transparency and harmonisation of the corporate tax bases.

*Means: Government action*

*(SGG, SGAE, France Stratégie, Minister of Foreign Affairs)*

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177. The Commission opened several thorough investigations on the basis of Article 107 paragraph 1 on the “tax rulings” (see press release of 11 June 2014). Subsequently, the Commission opened an in-depth investigation on the system relating to “excess profits” in Belgium (3 February 2015).

178. See the work of the OECD on the fight against the erosion of the tax base, particularly with regard to corporation tax (Report of the OECD, *Addressing Base Erosion and Profit Shifting*, 2013).

179. See on these issues, Report No. 56 of the CAE prepared by J. Le Cacheux and Ch. Saint-Étienne, “Fair growth and tax competition” (2005). B. Delaunay, “European Union law and tax policy”, *RFFP*, 1May 2014, p. 126. A. Benassy-Quéré, *Strengthening tax harmonisation in Europe*, memo of the CAE No. 2014/4.

180. E.g. the favourable tax systems established to host major sporting competitions, in particular in the context of Article 51 of the Amending Finance Act 2014 No. 2014-1655 of 29 December 2014.

## 1.3. The dispersion of economic action in public policies does not exclude overall coordination

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Thinking about the economic attractiveness of the States could lead a distinction no longer being made between public economic action and all public policies and to considering that any attempt to implement overall coordination would be futile.

It is however necessary and possible (1.3.1.), provided the scope of this action can be identified precisely (1.3.2.) and a rigorous assessment of its results is made (1.3.3.).

### 1.3.1. Forms of coordinating the economic action of public persons

#### *1.3.1.1. General planning gives way to a highly dynamic foresight activity*

##### ■ *The loss of impetus of the national plan*

Although it was the subject of thinking as early as the 1930s and attempts by the Vichy government, and especially the work of the National Council of the Resistance, French planning only truly came about after the war, for the needs of reconstruction and the implementation of the Marshall Plan. It was part of a movement which was not really French to begin with but in which France showed particular interest, with some authors going so far as to have seen in it a “principle of our public economic law” since 1946<sup>181</sup>.

Although planning received a new impetus from General de Gaulle, who wished to give it enhanced authority and spoke about it as “*an ardent obligation*”<sup>182</sup>, French planning remained fundamentally at the level of incentives<sup>183</sup>, whereas its scope gradually widened in the 1960s. In a context of sustained growth and sound public finances, it aimed less to prescribe than to plan ahead. It then fulfilled a function of reducing uncertainty and acting as an “anti-chance” mechanism<sup>184</sup>.

The plan was subject to a profound questioning in the 1970s, through the combined effect of a greater free-market approach to the economy and the crisis which made future projections unreliable.

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181. A. de Laubadère and P. Delvolvé, *Droit public économique*, 1986, p. 425.

182. Address by the President of the Republic of 8 May 1961.

183. Case law has never recognised that the requirements of the plan have real legal force. See for example: Decisions No. 82-142 DC of 27 July 1982 ; CE, 25 October 1996, *Association Estuaire-Ecologie*, No. 169557; it nevertheless ruled that disregard of a contract plan by the State could involve its contractual liability with respect to the regions: CE, Assembly, 8 January 1988, *Minister responsible for the plan and development of the territory v. Urban Community of Strasbourg and others*, No. 74361.

184. P. Massé, *Le plan ou l'anti-hasard*, coll. Idées, Gallimard, 1965.



The socialist election victory of 1981 did not halt its decline, despite the Planning Reform Act of 29 July 1982 that for the first time laid down a clear legal framework relating to both the preparation procedure (leaving a large place to consultation, an essential part of a non-imperative plan) and to the content, which was enriched by a regional component: the State-region plan contracts<sup>185</sup>. These met with real success, due to decentralisation which moreover conferred economic planning competence to the regions<sup>186</sup>, but these were unable to constitute the desired regional relay for the National Plan which struggled to regain its position.

An attempt at reform made during the first cohabitation came to nothing<sup>187</sup> and the disappearance of the “plan” was completed during the second. At the request of the Prime Minister, a report was prepared by J. de Gaulle which concluded that planning was useful, but also that it needed to evolve<sup>188</sup>. The XI<sup>th</sup> Plan (1993-1997) prepared by the previous majority was not adopted and neither was any other plan subsequently, although the planning framework provided for by Article 70 of the Constitution<sup>189</sup> remains in force.

### ■ *The growth of public foresight*

Although national planning has ceased to exist with general scope<sup>190</sup>, the State has never stopped reflecting or projecting its actions into the future. But this exercise no longer results in the production of a single text laying down the general prospects of its action.

The General Commission of the 1946 plan<sup>191</sup>, beginning in the mid-1990s, developed into a foresight body well before the texts enshrined this evolution,

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185. Act No. 82-653 of 29 July 1982 relating to planning reform. One of the ambitions of this act is to clarify the responsibilities and authority of the plan. See in particular A.-S. Mescheriakoff, “French planning between centralisation and decentralisation”, *RFDA* 1995, 999.

186. See Acts No. 83-8 of 7 January 1983 relating to the division of competences between municipalities, departments, regions and the State and No. 95-115 of 4 February 1995 on a framework for planning and the development of the territory.

187. A bill to this end was examined by the Council of Ministers in February 1988.

188. J. de Gaulle, report on *The future of the Plan and the place of planning in French Society*, La documentation française, 1994. It may be noted that at the time of the commemoration of the fiftieth anniversary of the plan, on 23 and 24 May 1996, there was a consensus on the usefulness of maintaining a form of planning.

189. The category of planning laws has been recognised by the Constitutional Council and confirmed by the Conseil d’État: Opinion No. 381365 of 27 March 2008.

190. In other countries, although general planning remains primarily a characteristic of emerging countries, it can be seen in the more developed countries in a variety of forms. In addition to Canada's Economic Action Plan (see inset below), we can mention the case of the “Industrial Plan” of South Korea, as well as, perhaps closer to foresight than planning, the Intergenerational Report in Australia where every five years the Minister of Finance must prepare a report making forecasts over forty years on economic growth, investment, pensions, demography, etc.

191. Decree No. 46-2 of 3 January 1946 on the establishment within the presidency of the Government of a board for the modernisation and infrastructure plan and laying down the duties and functions of the commissioner general of the plan; Decree No. 47-119 of 16 January 1947 on the provisions for the implementation of the modernisation and infrastructure plan and laying down in this regard the powers of the Plan board and of the Commissioner General of the Plan.



through its transformation in 2006 into a “Strategic Analysis Board”, responsible for “intelligence, expertise and support for decision-making in carrying out public policies”<sup>192</sup>. Its 2013 transformation into a General Commission for strategy and foresight confirmed this direction, even if the terminology differs: “The General Commission provides assistance to the Government in determining the main directions of the future of the nation and the medium and long-term objectives of its economic, social, cultural and environmental development as well as in preparing reforms decided by the public authorities”<sup>193</sup>.

The body formerly in charge of planning has thus become the pivot of the nation’s foresight function. But the General Commission for strategy and future studies, which has since been renamed “France Stratégie” has returned to the method that made the General Planning Commission a success, based on a light structure, using the services of recognised specialists and experts and consulting the interested parties in order to arrive at shared findings. France Stratégie is moreover explicitly responsible for coordinating and working in a network with several expert bodies formed by the Government<sup>194</sup>.

Foresight also became widespread in the public sphere beginning in the 1990s<sup>195</sup>. Foresight departments then appeared in public institutions and enterprises and even private enterprises on issues that involve economic action. Although France Stratégie is not responsible for the coordination of all these foresight centres and is not designed to be, it could contribute to them being networked, in addition to its commissions and working groups, to promote the pooling of work on the major themes on which they work.

### ***1.3.1.2. Formalising choices in a reference document still remains useful***

From foresight to planning is sometimes just a small step. When France Stratégie, at the request of the President of the Republic, works on “France in 10 years’ time”<sup>196</sup> and sets out a series of strategic focuses and proposals on which it is then called on to make operational recommendations, this is a planning exercise, even if there is no formal validation of the chosen options, which is paradoxical because elsewhere many formalised sectoral or occasional planning exercises are being developed.

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192. Art. 1 of Decree No. 2006-260 of 6 March 2006 on the establishment of the Strategic Analysis Centre.

193. Art. 1 of Decree No. 2013-333 of 22 April 2013 on the establishment of the General Commission for strategy and future studies.

194. This is the Monitoring body on pensions, the Monitoring body on employment, the High Council of the family, the High Council for the future of health insurance, the High Council on the financing of social protection, the National council of industry and the Centre of future studies and international information (Article 3 of the same Decree).

195. In particular following the recommendations of the “State, administration and public services of the year 2000” commission of the XI<sup>th</sup> plan (the very one that was not officially adopted).

196. “France in 10 years’ time” is a process initiated by the Government Seminar of 19 August 2013. The report on this theme was delivered on 25 June 2014.



■ *Formalisation exists in many sectors*

The planning approach has inspired a large number of measures in sectoral areas<sup>197</sup>. They may take the form of “framework laws” based on the penultimate paragraph of Article 34 of the Constitution or “mixed” laws including framework provisions alongside normative provisions, for example in the area of international solidarity, urban policy, defence or internal security<sup>198</sup>.

Planning may also be formalised in documents not contained in legislative texts but expressly approved by the government, such as for example the “34 plans of the new industrial France” or the various “National strategies” with regard to research (SNR)<sup>199</sup>. These plans and strategies thus set out the priorities of the State over several years and give rise to precise monitoring of their implementation.

Formalised planning is also very dynamic at the regional level. In addition to the State-region contract plans, which have just been relaunched as part of the “2014-2020 generation”, there are also the regional economic development frameworks, the competitiveness clusters or even the “economic strategies” adopted by some large cities<sup>200</sup>.

In another area, the need for formalised planning was felt during the financial crisis and resulted in the adoption of the recovery plan for the economy in 2008-2009, as part of the European concerted action plan of 12 October 2008<sup>201</sup>.

**The comeback of planning logic: the example of Canada’s “Economic Action Plan”**

The Economic Action Plan (EAP) was initiated for the first time as part of the 2009 federal budget in order to combat the effects of the global recession.

The EAP is adopted within the context of the budget (it is included in its most recent form in Act C-59 of June 2015) and is therefore regarded as having legislative value. It undergoes revisions on the occasion of each annual and amending budget.

This action plan sets out the direction of the economic and social policy of the Government in the short and medium term. These result in a set

197. This phenomenon is found in a large number of other countries, such as in Spain, with fairly diverse sectoral plans: the “national integrated tourism plan”, the “efficient vehicles incentive programme”, the “Spanish digital agenda 2020”, etc.

198. Framework and Planning Act No. 2014-773 of 7 July 2014 relating to the policy of international development and solidarity, Act No. 2014-173 of 21 February 2014 of planning for the city and urban cohesion, Act No. 2013-1168 of 18 December 2013 relating to military planning for 2014 to 2019 and containing various provisions involving defence and national security.

199. Act No. 2013-660 of 22 July 2013 relating to higher education and research.

200. See for example, the “Economic strategy of Greater Lyon” (2008-2014).

201. See S. Nicinski, “The recovery plan for the economy”, *RFDA*, 2009, p. 73.



of measures, in particular *via* the federal budget that divides them into several specific programmes with a multi-year horizon. This plan is not akin to a contractual document. Operations co-financed with the infra-national level (provinces) are organised as calls for specific projects.

An advantage of this plan is to provide the public and private public operators with greater security by allowing them to plan ahead for the decisions taken on budgetary policy, infrastructure programmes, etc. Its results are regularly assessed and made public on a dedicated website ([actionplan.gc.ca/en](http://actionplan.gc.ca/en))

■ *Formalising national economic strategy still has to be developed*

National economic strategy used as a guide for the economic action of the State and other public persons is in principle set out in the declaration of general policy laid down in Article 49 of the Constitution and implemented every year in the guidelines that the Government sets out on the occasion of the finance bill.

The new framework resulting from the strengthening of monitoring of budgetary and macro-economic policies (see 1.1.2. above) also results in the Government updating its multi-year economic strategy as part of the public finance framework law provided for by the final paragraph of Article 34 of the Constitution and, several times per year, as part of the European semester, which besides the budgetary aspects alone, includes an increasingly significant component on the balances and macroeconomic prospects, as well as on the projects of reform<sup>202</sup>.

Given their object and their number, these various interventions before Parliament or the European Commission can hardly constitute the reference document for national economic strategy, even if they can contribute to it.

The formalisation of such a document, which could be entrusted to France Stratégie would have benefits. It would first, without however taking the form of a plan or planning act, associate parliamentarians more closely – as well as the CESE and representatives of local elected representatives, including the regions and cities – by getting them to participate in a general debate on the economic strategy and its concrete measures. Its preparation would lead to broad consultation with the social partners as existed for the national Plan<sup>203</sup>. This consultation would give additional legitimacy to the economic strategy, of particular solemnity and with a knock-on effect that could contribute to its success.

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202. The above-mentioned report of the five Presidents of 22 June 2015 proposes to strengthen these elements for the purpose of deepening economic and monetary union.

203. The form of this consultation had changed in 1982. Under the terms of Article 6 of the Act of 29 July 1982 on the above-mentioned planning reform: “*For each plan, a National Planning Commission is created, of an advisory nature, responsible for leading the consultations needed for the development of the Plan and for participating in monitoring its implementation (...) The members of this commission shall be: each region, trade union organisations and associations*



This strategy, laid down at the beginning of the parliamentary term, should be flexible and adaptable according to circumstances. It would nevertheless be designed to be used as a reference document and be taken into account by the other framework or sectoral planning documents, whether these are contracts entered into by the State with the regions (CPER) or with its operators – public institutions, public corporations – (objectives contracts), and by the other framework or planning documents prepared by public persons.

As this was accepted for the plan itself, the national economic strategy would not be designed “to deal with everything” nor to deal with every issue of significance for the economy, at the risk of becoming incomprehensible. As proposed as early as 1994 by the report of J. de Gaulle, about the plan: “*The objective has changed: it now requires planning the necessary changes (...). Supported by assessment work, facing the challenges of the future by future studies, enriched by the points of view of the actors, the strategic analysis aims to identify priorities for action*”.

**Proposal 12: Better organise public foresight in economic matters and develop a formalised national economic strategy**

1) entrust France Stratégie with the role of being the main entity with regard to public foresight and networking the work of the future-studies centres;

*Means: Organisational decree for France Stratégie*

2) ask France strategy to develop a reference document on “national economic strategy” that includes the commitments made by France at the European level; define the areas of this national strategy that may be organised by other public persons, in particular local authorities; design this strategy to operate over a period of several years (3 to 5 years);

*Means: Organisational decree for France Stratégie*

3) organise a broad consultation on the contents of this strategy before a debate in Parliament.

*Means: Government action and inclusion on the agenda of the Assemblies (France Stratégie, Minister of Finance and Public Accounts, Minister of the Economy, Industry and the Digital Economy, Minister of the Interior, Parliament)*

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*representative of employees and employers, organisations representing agriculture, crafts, trade and the professions, the industrial and banking public sector, the co-operative and the mutualist sector, associative and cultural movements. It may be supplemented by qualified persons appointed by the Government.” This organisation has, however, proved to be disappointing. But nothing would require defining a rigid framework for this consultation, which could be organised according to terms defined if appropriate by the participants themselves.*

## 1.3.2. The necessary mapping of the economic action of public persons

### 1.3.2.1. Action seeking a conceptual framework

#### ■ *The approach of the doctrine*

The doctrine focuses first on the **foundations** of this economic action. For the economists this involves identifying the imperfections of the market. The reflection here is largely dominated by the founding analyses of Musgrave on the different functions of the State: resource allocation, income redistribution and macroeconomic stabilisation<sup>204</sup>. Besides the observation of the shortcomings of the market, jurists strive for their part, with, in particular, the concepts of public good and general interest, to find the foundations of the economic action of public persons in line with their public service missions<sup>205</sup>.

Doctrine then focuses on the **means** of the action. It involves identifying the institutions, procedures and instruments used to act on the economy.

The assessment of the **results** of the action is the particular field of economists, who seek to measure the concrete effects of each measure and to compare performance. As for jurists, they deal with this field from the angle of the procedures enabling the assessment to be made.

#### ■ *The economic objective criterion*

For the jurist, the economic action of public persons is defined by its purpose; it presupposes a desire to influence a given situation to achieve an economic objective. Economic means everything that relates to production, distribution, trade and the consumption of goods and services. Action is economic when it has, at least partially, the aim of directly influencing one or other of these elements.

The most difficult conceptual issue to grasp is that of **mixed actions**, which concurrently pursue economic and non-economic objectives. It is often impossible to reason according to blocks and to place a public policy entirely in the field of economic action or on the contrary remove it completely. And it would be questionable to deny the mixed nature of a large number of policies by seeking to classify them only according to the main objectives they pursue. To take account of this mix while arriving at an intelligible result, each public policy in the field of economic action can be classified, only *“insofar as”* it pursues an economic objective.

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204. R. Musgrave, *The Theory of Public Finance*, 1959.

205. See in particular A. de Laubadère and P. Delvolvé, *Droit public économique*, 1986, Dalloz, 5<sup>th</sup> ed., Coll. Précis, 1986 ; P. Delvolvé, *Droit public de l'économie*, Dalloz, 1998 ; B. du Marais, *Droit public de la régulation économique*, Presses de Sciences Po et Dalloz, 2004 ; R. Moulin and P. Brunet, *Droit public des interventions économiques*, LGDJ, coll. Droit des affaires, 2007 ; J.-Y. Chérot, *Droit public économique*, Economica, coll. Corpus droit public, 2<sup>nd</sup> ed., 2007 ; D. Linotte and R. Romi, *Droit public économique*, Litec, Manuel, 7<sup>th</sup> ed., 2012 ; S. Bernard, *Droit public économique*, Lexisnexis, Coll. Objectif Droit cours, 2<sup>nd</sup> ed., 2013 ; S. Nicincski, *Droit public des affaires*, 4<sup>th</sup> ed., LGDJ, 2014 ; J.-Ph. Colson and P. Idoux, *Droit public économique*, LGDJ, 2014 ; L. Rapp and Ph. Terneyre, *Droit public des affaires*, Lamy, 2014.



### ■ *The mutability of economic action*

The economic action of public persons is changeable by its nature. Thus, its field narrows or broadens according to whether the effects of the actions taken are positive or negative.

If this reasoning is pushed to its limits, a policy of attractiveness will lead to revising all public policies that have an impact on economic activity.

There are also significant shifts in direction linked to the economic cycle. Crisis situations have a considerable impact on the field of the economic action of public persons: exceptional circumstances may indeed lead to temporary prolongations of the action to deal with the necessities of the time. This phenomenon has become particularly clear since the start of the financial and sovereign debt crisis of 2008, which led in particular to the organisation of the rescue of large private financial institutions<sup>206</sup> and to the State taking a stake in large financially weakened companies<sup>207</sup>.

### ***1.3.2.2. The challenges of a mapping of this action***

#### ■ *The sketching of zoning in concentric circles*

Although the economic action of public persons enters into an ever-increasing number of public policies, the economic aspect of them is not always so significant. The economic objective criterion thus allows public policies to be classified according to the more or less large part that economic concerns play. It is thus possible to carry out a zoning of the economic action of public persons around three concentric circles.

**The first circle** includes the action relating to companies and that relating to markets.

Economic action focusing on companies accompanies them throughout their life cycle. These are first of all of measures in favour of starting a business (promoting entrepreneurship, encouraging financially or through advice business start-ups, simplifying administrative formalities), the definition of the rules relating to the constitution of the company (in an individual form or a distinct legal person, mainly companies) as well as its organisation and operation (commercial leases, business assets). This next concerns measures taken for the purpose of helping to grow and expand its activities (regimes specific to SMEs and mid-caps), of finding the funding it needs (banks or through the financial markets; public aid for innovation and investment) and of selling and exporting (support in certain markets,

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206. See in particular Finance Amending Act No. 2008-1061 of 16 October 2008 for the financing of the economy.

207. Acquisition by the State, *via* Sogepa, of an equity stake in PSA Peugeot-Citroen in April 2014, at the same time as that of Dongfeng. See report on the State shareholder, annexed to the finance bill for 2015, p.69.

in particular for export). Finally, it involves measures taken to help it to cope with problems (prevention and regulation both through the definition of a balanced legal framework and through mediation and support functions and specialised courts) or to continue in other forms or with other actors (assignments, transfers).

The general action relating to markets includes the rules regarding products (in particular to define what are or are not tradeable but also to standardise them), transactions (including how to carry them out and guarantee them), trading places (local, national markets, commercial permits), respect for the freedom of prices and competition and consumer protection. Actions relating to the organisation, to the control and to the promotion of international trade can also be added.

**The second circle** of the economic action of public persons corresponds more directly to mixed actions, which pursue objectives that are both economic and non-economic, a characteristic mix of the sectoral scope of actions and policies.

It firstly includes most actions relating to the so-called “regulated” sectors by independent authorities: banks, stock exchanges, insurance, transportation, energy, electronic and postal communications, audio-visual media and online games. Although largely economic, these regulations may not be reduced to this aspect alone, since the objectives are in reality more diverse than the simple harmonious functioning of the market, as revealed quite clearly from their statutory texts.

Other sectoral actions in areas where the economic dimension is significant, without necessarily being dominant, may also be classified in mixed activities. This is particularly the case of the housing sector (linked to construction), the health and social sector (the pharmaceutical industry, private for-profit institutions) as well as cultural, agricultural and defence products and markets, etc. Although in these sectors the action of public persons is not primarily guided by economic goals, they are far from being ancillary.

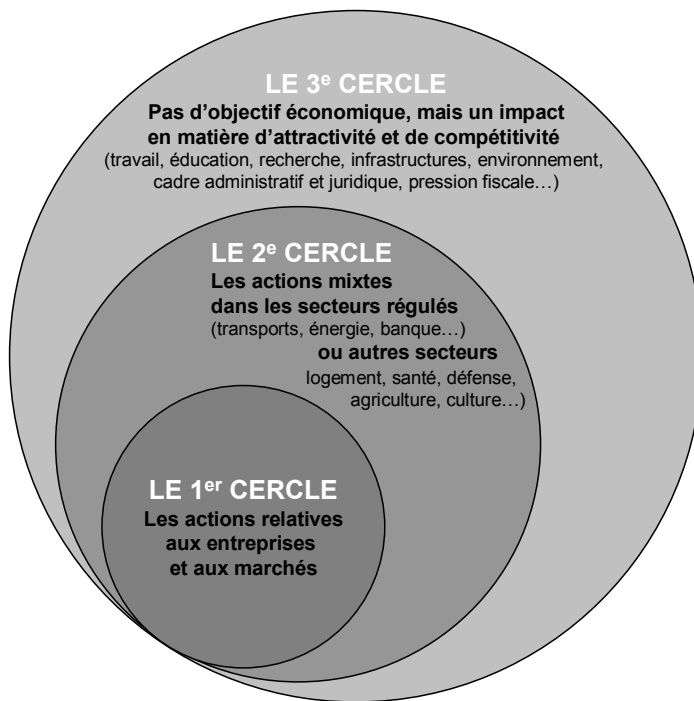
These mixed actions also include economic activities led by the public persons themselves. These are both for the production of goods and services by public persons, the enterprises that they constitute (public enterprises) or that they vest with this mission (delegations, public procurement), and the “consumption” of goods and services by these public persons (again public procurement). Indeed in most cases, public persons do not carry out these activities for purely economic reasons.

**The third circle** covers the whole range of actions which do not pursue an economic objective but whose economic impact can be measured and taken into account as a source of positive or negative externalities by the market as part of policies of attractiveness and competitiveness.



These are for example actions in favour of the quality of the education system, the health system, infrastructure, the environment or the cultural influence of the country, but also the simplicity, predictability and the accessibility of the administrative, legal, fiscal and social framework (labour law in particular) independently of that specifically applicable to economic activities. Actions conducted in these areas do not directly pursue an economic objective, but they are nevertheless part of the economic action of public persons, due to the positive or negative impacts that they may have on the attractiveness and competitiveness of a region or a nation.

But this third circle is not infinite and does not have the role of covering all fields of human activity. Not everything is economic and the law precludes some areas from becoming so, especially when it lays down that certain subjects or activities are “not tradable” (as for example products of the human body)<sup>208</sup>.



■ *Clarifying and sharing this zoning: an issue of operational capability*

Such mapping of the economic activities of public bodies is only useful if it is sufficiently precise to be operational. It must also be shared by the various actors and be able to serve as a reference when one intends to study and assess the economic action of public persons.

Although such a mapping does not exist at the present time, it could be based on processes and work **already begun**.

208. See in particular G. Canivet, “Contracts for non-tradable things: the example of contracts relating to human organs”, *Actes du Cycle Droit, économie et justice*, 25 September 2006.



The work of the national statistics office, INSEE, would obviously be of great help given its ability not only to survey economic activities but also to assess the impact of the action of public persons on these activities with the national accounting tools.

The work of the budget directorate. Within the framework of the provisions of the organic law on the finance laws (LOLF), the Government presents the State budget using a general mapping of its action built around missions, themselves divided into programmes, which are subdivided into actions. The same is true for the examination of the “performance component” of public expenditure. The assessment of the results obtained for each expenditure item is made in particular according to objectives defined on the basis of indicators.

This general mapping could serve as a basis **for work consisting of identifying the purely economic dimension** of each mission, programme and action of the State budget, with the assistance of the administrative authorities concerned. It would contribute to awareness or at least to a clarification of the contribution of each activity of the public persons to the economy, of use both to the administrative authorities and to the Government, which could thereby have a clear vision of what is covered by the economic policy of the nation.

Such an approach could then be applied to public persons acting within the context technical decentralisation (public institutions) or territorial (local authorities ) or be carried out *ab initio* with the latter in order to have a grid designed jointly.

**Proposal 13: Make an inventory of the economic action of public persons**

- 1) ask the INSEE and the budget directorate to make a detailed mapping of the economic action of public persons, if necessary, with support from France Stratégie and the inspectorates and auditing bodies concerned;
- 2) develop a reference document providing an overview of this action.

*Means: Government action  
(INSEE, France Stratégie, Budget Directorate,  
inspectorates and auditing bodies)*

### **1.3.3. Have available precise assessments of overall performance**

The assessment of the performance of the economic action of public persons can of course be made from a precise examination of the specific effects of a particular measure. But it is especially the overall assessment of performance that retains people’s attention and focuses public debate on the validity of the action implemented. This however is now being questioned on two fronts.



### 1.3.3.1. Limits inherent to statistics which raise new questions

#### ■ The interest and limits of aggregates

From the beginning of its scientific developments in the 18<sup>th</sup> century, statistics have played an essential role in the conduct of public action<sup>209</sup>, by measuring phenomena and drawing useful lessons<sup>210</sup>. But statistics are also essential for assessing the merits of this action and therefore its democratic control.

The law therefore very early on was concerned to attribute a certain amount of publicity to these statistics as well as independence to the institutions responsible for preparing them<sup>211</sup>. Given the importance of these rules for the smooth functioning of the European Union, they are now developed within this framework, even though the choice was made to leave primary responsibility for production of the figures to the national statistical institutes<sup>212</sup>. In line with the work carried out at the European level, an “authority for public statistics” has been established at the national level, whose independence and integrity are guaranteed<sup>213</sup>.

Despite the recognised reliability of the statistical apparatus, debate on the figures is still lively, whether they concern the growth rate, inflation and especially the trend in the number of the unemployed (with the particularity of different categories) and it focuses mainly on the relevance of the aggregates calculated.

Statistical relevance is a central issue and is part of the principles of the European good conduct guide, but as the INSEE recalls in relation to the systems implemented to satisfy this principle: *“There is no objective measure of the relevance of a given statistic. Relevance is assessed in relation to the use which is made of the statistic. In particular, relevance is the proximity between the concept that one wishes to observe and the result obtained. In this regard, the content given to a concept can vary greatly depending on the needs of the users and their assessment of the concept studied”*<sup>214</sup>.

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209. A. Desrosières, *The politics of large numbers, History of statistical reason*, La découverte, 2010.

210. First focused on population issues, statistics very quickly contributed to analysis and decision-making in the economic field. In this regard, the fact that in its very title, the INSEE, the main institution currently in charge of statistics, is at the same time responsible for economic studies, illustrates the proximity of these two fields.

211. Controls have moreover been established at the international level, especially for the member countries of the IMF. The Fund adopted for the first time on 1 February 2013 a “declaration of no confidence” against Argentina for a lack of reliability of statistics and a refusal to submit to the mandatory assessments in its capacity as a Member State.

212. European Statistics Code of Practice, adopted by the Statistical Programme Committee on 24 February 2005 (revised by the Committee of the European statistical system in Sept. 2011); recommendation of the European Commission of 25 May 2005 on the independence, integrity and accountability of the national and community statistical services (COM(2005) 217).

213. II of Article 1 of Act No. 51-711 of 7 June 1951 on obligation, coordination and secrecy in statistical matters in its wording stemming from Article 144 of Act No. 2008-776 of 4 August 2008 on the modernisation of the economy; Decree No. 2009-250 of 3 March 2009 relating to the public statistics authority.

214. See the INSEE website. The question of relevance is also addressed in point 11 of the above-mentioned European Statistics Code of Practice.



■ *New difficulties related to the role that the texts now make these aggregates play*

The incorporation of certain statistics into legal rules to have them produce legal effects is a fairly old trend, for example in the field of changes to rents. But it has taken on a different scale in the framework of European budgetary governance, because these aggregates are called on to play a decisive role<sup>215</sup>.

The necessarily “constructed” nature of statistics, based on conventions and corrections but also on the use made of them, are becoming the focal point of a legal and political debate<sup>216</sup>. It is fed by the complexity of the aggregates adopted by the European treaties<sup>217</sup>.

The mechanisms provided for by the European texts are in effect based on concepts<sup>218</sup> such as “*growth potential*”, which is not really measurable and can only be estimated “*to the point that some people wonder whether this concept can continue to be usable*”<sup>219</sup>. Similarly, the assessment of the deficit, of the balance or the “structural” effort (i.e. excluding cyclical factors), which are measured differently according to the statistical systems (UN, OECD, EU and IMF in particular), and the reliability of their measurement are the subject of disagreement, due in particular to their volatility<sup>220</sup>.

There is also a problem inherent in the technicality of these aggregates which does not facilitate the intelligibility and the acceptability of the mechanisms put in place by the European Union for parliaments and public opinion: “*Originally created by economists for economists, its use to determine when and at what threshold the deficit must be corrected has become the object of public discussions (...) Parliamentarians – who are not technicians – are rightly perturbed when they are asked to adopt a budget revision due to a change in an estimate. Not knowing the whys and the wherefores, they end up considering these revisions as a source of artificial instability*”<sup>221</sup>.

215. This evolution has also strongly contributed to the more general expansion of statistical legislation as emphasised in the communication of the European Commission regarding the method used to produce the statistics of the European Union: *A vision for the next decade*, COM (2009) 404 of 10 August 2009.

216. The debate is not confined to France. In Spain for example, a debate exists about measurement of the structural efforts within the context of the European semester and in particular the over-quantitative approach that the Commission is said to adopt with respect to the reforms made by this country.

217. See, emphasising the fact that the inadequacy of statistics can stem from the use of categories “*defined by lawyers and bureaucratic authorities*”, J. Bichot, “A need for economic governance: appropriate statistics”, *Les Échos*, 10 March 2014.

218. See moreover, on the use of imprecise concepts such as “structural reforms”, effective measures etc. which are designed to be implemented within the framework of these same procedures, 1.1.2.1. above.

219. See, referring to those responsible for economic policy, J. Pisani-Ferry, “Regarding the usefulness of potential growth”, *La tribune*, 8 April 2015.

220. Court of Auditors, *The situation and prospects of public finances*, 2012, p. 184 and Annexes VI and VII.; T. Guyon and S. Sorbe, “Structural balance and structural effort: towards a breakdown by sub-sector of the public administrative authorities”, *Cahiers-documents de travail de la DGTPE*, 2009/13, December 2009; J. Pisani-Ferry, *op. cit.*

221. J. Pisani-Ferry, *op. cit.*



### ***1.3.3.2. The specific debate around the general measurement constituted by GDP***

#### **■ *A growing criticism of GDP as a measurement of overall performance***

“Gross domestic product” measures the total production of resident units. Equal simultaneously to the sum of production, expenditure and revenue, it is most commonly defined as the sum of the value-added of resident operators<sup>222</sup>. This concept gradually emerged in the 1930s in the United States, at that time seeking a composite measurement of economic activity, before spreading to most developed countries after the war, with the growth of national accounts<sup>223</sup>. To ensure its comparability at the international level, it is defined under the United Nations System of National Accounts (SNA 2008); for the Member States of the European Union, it is the European System of Accounts (ESA 2010) which plays this role<sup>224</sup>.

This unit of measurement of the wealth produced by a country has come in for major criticism in recent years. To go further in examining these questions, a commission on the measurements of performance and economic and social progress was convened at the initiative of the President of the Republic in 2008, under the aegis of J. Stiglitz, A. Sen and J.-P. Fitoussi. Its report, issued in 2009, made a dozen proposals to improve GDP as a tool for measuring economic performance, while adding other complementary indicators.

#### **■ *Possible changes to GDP itself***

GDP first comes in for technical criticism in the economic field. It has been noted that it measures only flows of wealth and not of stocks. It thus ignores the question of assets, both in its asset part (property and wealth accumulated) and liability part (debt) and therefore gives a biased indication of the situation of a country by making for example “growth” appear whereas the value of its assets may have collapsed due to a lack of investment or its debt may be exploding. Furthermore, it does not know how to measure “*what has no price*”<sup>225</sup> and therefore finds it hard to value non-commercial services, whether this is domestic work or public services.

It is possible to respond to the criticisms regarding the economic dimension of GDP without radically questioning its basis. Other aggregates, such as that of investment or debt, allow its weaknesses to be overcome fairly easily. As regards the flows of wealth themselves, the rules for calculating GDP can be altered to take account of its shortcomings. They may only, however, evolve within an international or European framework. Thus, for example, within the framework for the European

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222. See web page: “Gross Domestic Product at market prices / GDP” (INSEE website).

223. See in particular F. Fourquet, *The accounts of authorities, History of national accounts and the plan*, Encres, 1980 ; A. Vanoli, *A history of national accounts*, La découverte, Repères, 2002, cited by D. Méda, “How GDP took power”, *Revue Projet*, No. 331, 2012/6, pp. 14-21.

224. Regulation (EU) No. 549/2013 of 21 May 2013 on the European system of national and regional accounts in the European Union.

225. J.-L. Tavernier and Ph. Cuneo, “We do not know how to measure things with no price”, *Revue projet*, No. 331, 2012/6, pp 22-25.

System of Accounts, “ESA 2010”, the future integration of the “underground” economy was decided.

■ *The addition of other indicators*

The second, more political, criticisms focus on the place taken by GDP itself which only measures economic results but ignores environmental impact or inequalities. These criticisms, which relate to a subject that is a little different from the first, by focusing on the question of the sustainability of growth and the perceived quality of life, have had non-negligible consequences.

Firstly, they have led the INSEE as of 2010 to calculate new indicators drawing directly on these recommendations; they have also contributed to inspiring a step taken by the European Commission<sup>226</sup> as well as the finalisation, by the OECD, of “Better Life” indicators<sup>227</sup>.

**Gross Domestic Product (GDP) and new indicators of prosperity (NIP) – Approaches made in other countries**

Although in a large number of countries there does not seem to be any real debate about GDP (United States, Canada, Mexico, South Korea, Singapore, Russia, Poland, South Africa), elsewhere this debate has taken on a certain magnitude following on from the *Stiglitz* report, particularly in Europe.

In Germany, a special commission of the *Bundestag* has developed 9 prosperity indicators but how they could be taken into account must still be clarified by the federal government. In the United Kingdom, a programme was started in 2011, including quantitative well-being indicators as well as more subjective indicators. These indicators are put online on a website and have a mainly political scope. In Italy, a report is published every year on “fair and sustainable well-being” measured using 134 indicators grouped into 12 areas.

This debate, however, is not particular to the European continent. Israel has developed a series of indicators for assessing quality of life, well-being and the socio-economic situation of the country. Australia has decided to publish aggregates other than GDP to measure well-being, particularly in relation to environmental and social issues. In China, the place of the growth of GDP is declining in the way Chinese leaders are assessed by the communist party and a circular of 2013 calls for the creation of more relevant and individualised indicators, in particular as regards sustainable development, social harmony and the protection of the environment. Gross regional product and its growth rate should no longer be the key indicators.

226. Communication COM (2009) 433 of 20 August 2009 of the European Commission, *GDP and beyond: Measuring progress in a changing world*.

227. See in particular on this work, the report *How's Life?* (year 2013), OECD, 12 December 2014.



Whereas it had been the instigator of some of these reflections, it was only at the end of 2013 that France decided to formally introduce these new indicators in the applicable texts. An initial draft organic law <sup>228</sup> was withdrawn in favour of a draft ordinary law that became Act No. 2015-411 of 13 April 2015. The sole Article of this Act lays down that: *“The Government presents to Parliament annually, on the first Tuesday of October, a report presenting the change, over previous years, of new wealth indicators, such as indicators of inequality, quality of life and sustainable development, as well as a qualitative or quantitative assessment of the impact of major reforms undertaken in the previous year and the current year and those planned for the following year, in particular as part of the finance acts, given these indicators and changes in gross domestic product. This report may be the subject of a debate before Parliament.”*

Contrary to the first draft of the text, the Act does not itself define what the indicators should be, in particular in order to be able to take account of the work undertaken on this point by the CESE and France Stratégie.

Their proposals were made public on 22 June 2015 and relate to 10 indicators, some of which are strictly economic: income inequality (ratio of the combined income of the wealthiest 10% to the poorest 10%); climate-energy (carbon footprint); investment (productive, physical and intangible assets, as a % of Net Domestic Product); labour-employment (employment rate of the active population); education (rate of higher education graduates among the 25-34 year age group), health (life expectancy in good health at birth); biodiversity (index of number of birds); financial capital (debt of the various non-financial economic agents, public administrative authorities, businesses, households, in relation to GDP); management of resources (rate of waste recycling); well-being (indicator of satisfaction with regard to life<sup>229</sup>).

Although the discussion of the legislative proposal gave rise to a very broad consensus about its principle, it also showed hesitations on the practical provisions for including these new indicators in the parliamentary procedures, particularly as regards the choice of presenting a report allowing them to be taken into account at the same time as the introduction of the finance bill, but separately from the prior assessment of the Finance Act.

The question of the ways and means of ensuring effective consideration of these new indicators in supplementing the understanding of economic performance therefore remains. It would be worth experimenting by including it in the impact study of the finance act. The objectives corresponding to these new indicators could also naturally be included in the national economic strategy which has been proposed (see proposal 12 above).

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228. Draft Organic Law No. 1628, amending the Organic Law relating to planning and the governance of public finances, aimed at taking into account new indicators of wealth, introduced on 11 December 2013 and withdrawn on 23 January 2014.

229. Indicator collected by *Gallup world poll* and used by the OECD.

**Proposal 14: Modernise the content and use of economic aggregates**

1) ask the INSEE to specify the method for using the main economic aggregates that takes into account both the uses envisaged and the scope of interpretation related to the scientific precautions needed to develop this document;

*Means: Government action  
(INSEE)*

2) initiate thinking on how to evaluate in the calculation of GDP, the activities of non-market services, in particular those of public services, not at their cost price but taking into account their real added and monetarised value;

*Means: Government action  
(INSEE)*

3) define the content of the new indicators stated in the Act of 13 April 2015 taking into account the objectives set out in the national economic strategy document (see proposal 12);

*Means: Government action  
(INSEE and France Stratégie)*

4) integrate the results of these new indicators in the prior assessment of the financial acts.

*Means: prior assessments of the financial acts  
(Minister of Finance and Public Accounts,  
Minister of Social Affairs and Health)*





# What are the legal foundations of the economic action of public persons?

The question of the foundations of the economic action of public persons and that of its conciliation with the respect due to private initiative is answered quite differently depending on which of the three main levels of legal rules is being considered.

Although the constitutional requirements applicable to economic action are in the first analysis more accommodating than the conventional requirements, constitutional control has nevertheless resulted in challenges to important provisions of economic policy (2.1). Conversely, the requirements of the Treaties and the Law of the European Union do not in any way mean that ambitious economic action needs to be abandoned, provided that it takes into account European law from the outset. The same applies to international law (2.2). Finally, the legal rules and principles of internal law would benefit from changing so that public persons have a clearer and more secure framework for conducting their action (2.3).

## 2.1. A flexible constitutional framework whose requirements for economic action must not be under-estimated

The “constitutionality block” is broadly flexible and leaves a large amount of discretion to Parliament in the area of economic legislation (2.1.1). This relative flexibility should not however lead to underestimating the requirements resulting from constitutional control in the economic field(2.1.2). These requirements are further reinforced today with the preliminary question on constitutionality that businesses have largely appropriated (2.1.3).



### 2.1.1. A balanced economic constitution

The concept of “economic constitution”<sup>230</sup> refers in a narrow sense to the constitutional provisions specifying the economic system or model of a country. No provision of this type exists in France which only has an economic constitution in the broad sense, i.e. rules at a constitutional level applicable to the economic domain (see inset below for the provisions at the constitutional level that are the most significant in the countries studied).

#### 2.1.1.1. Constitutional texts widely admit economic action

##### ■ *The Constitution takes into account economic action*

The Constitution of 1958 is primarily a text organising public powers and includes only a few elements on substantive rights. This observation also applies to the economic field, even if the first paragraph of Article 1 defines France as a “social” Republic, a description which does not determine an economic system that is imposed on the legislator<sup>231</sup>.

However, several constitutional provisions organise and oversee the economic action of public persons.

Thus, Article 34 includes in the area of the law, in addition to the rate and provisions for the collection of taxes of all kinds and the regime for the issuance of currency (paragraph 6), nationalisation of enterprises and transfers of ownership of enterprises from the public sector to the private sector (paragraph 11) and the regime of ownership, real rights and civil and commercial obligations (paragraph 16).

Other articles permit the use of a referendum for any bill on reforms relating in particular to economic policy<sup>232</sup>, provide for jobs or functions for which, because of their importance for the economic life of the Nation, their appointment by the President of the Republic is made after consultation of the Assemblies<sup>233</sup>, establish a social, economic and environmental council that can be consulted by the Government on any issue of an economic nature and to which any plan or planning bill of an economic nature is submitted for an opinion<sup>234</sup>.

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230. H. Rabault, “The economic constitution in France”, *RFDC* 2000, p. 708; J.-B. Auby, “A few comments on the Economic Constitution”, symposium *The Economic Constitution of the State, The constitutional economic order, 1958-2008*, PCPA, 22 January 2009, No. 16; P. Mbongo, “The economic neutrality of the Constitution in the era of European economic integration and globalisation”, *op. cit.* p.79; M.-L. Dussart, *Constitution and economy*, Nouvelle bibliothèque des thèses Dalloz, No. 144, 2015.

231. B. Mathieu, “The social Republic”, *The Republic in French law*, Economica, 1996, p. 175 s. The social Republic does not imply or authorise the socialisation of the economy (See below 2.1.1.2). It is not even a synonym for a “social market economy” which could be imposed on the legislator (expression used by the European Treaties, see below 2.2.1.1).

232. Article 11 of the Constitution in its wording stemming from the 1995 revision.

233. Article 13 of the Constitution in its wording stemming from the 2008 revision.

234. Articles 69 to 71 of the Constitution in their wording stemming from the 2008 revision.



■ *The declarations of rights address economic freedoms only relatively little*

Based on the reference made by the Preamble of the Constitution of 1958 to the Declaration of the Rights of Man of 1789 and the Preamble of 1946, the Constitutional Council has incorporated them in the constitutionality block<sup>235</sup>, to which the Environmental Charter of 2004 has been added<sup>236</sup>.

According to a presentation that has become classic, these three texts correspond to the three generations of fundamental rights whose inspirations tend to strike a balance, which contributes to the plasticity of the constitutional framework. But these texts address, in any event, in a somewhat unobtrusive way, the economic action of public persons.

The Declaration of the Rights of Man of 26 August 1789, of liberal inspiration, tends to moderate the action of public persons in general. It proclaims freedom (Art. 4) and property (Art. 17) in order to protect them from royal and arbitrary power, in the particular context of the Revolution, but does not however explicitly include economic provisions. It is only by consulting the debates to which it has given rise that one can discover the scope that its authors intended to confer on it, in particular with regard to economic freedoms<sup>237</sup>.

As for the Preamble to the Constitution of 27 October 1946, it is itself very marked by social concerns which are its major inspiration. It nevertheless contains a highly explicit economic provision which could be read as “*prescribing interventionism*”<sup>238</sup> in its 9<sup>th</sup> paragraph under which “*any property or any undertaking, whose operation has or acquires the nature of a national public service or a de facto monopoly, must become the property of the community*”. But the inspiration of this provision, which could have been interpreted as being designed to preserve general interest missions as much as preventing the market from being distorted by a dominant private operator, leads to an attenuation of its scope<sup>239</sup>.

As for the 2004 Charter, it aims to ensure the preservation of the environment by a number of cross-cutting provisions. Its Article 6, however, specifically refers to economic questions by stating that “*Public policies must promote sustainable development. For this purpose, they balance protection and enhancement of the environment, with economic development and social progress*”. Its Article 5, although not explicitly dealing with economic issues, has been perceived as having a direct impact on economic action by enshrining the principle of precaution.

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235. Decision No. 71-44 DC of 16 July 1971.

236. Its constitutional value was confirmed by Decision No. 2008-564 DC of 19 June 2008 and then by the CE Ass. decision, 3 October 2008, *Municipality of Annecy*, No. 297931, GAJA No. 114, Dalloz 2013.

237. See on this preparatory work, R. Fraisse, “The QPC and entrepreneurial freedom”, *RJEP*, August 2011, No. 689.

238. P. Delvolvé, *Public law of the economy*, Dalloz 1997, p. 170.

239. G. Quiot, “National public service and entrepreneurial freedom”, *The preamble to the Constitution of 1946, legal antinomies and political contradictions*, PUF, 1996, p. 187.



■ *A residual debate on the need to supplement the constitutional texts*

The absence of any constitutional provision explicitly dealing with relations between the State, businesses and the market economy, may be surprising<sup>240</sup>.

The debate on the advisability of enshrining these principles in the Constitution however remains fairly circumscribed. The question was not addressed during the last revision of the Constitution in 2008<sup>241</sup>. Neither did it have much importance in the work of the Committee established in 2009 on a possible enrichment of the Preamble of 1946, although the insertion of entrepreneurial freedom in the constitutional texts was raised<sup>242</sup>. This proposal, to which its proponents attached a mainly symbolic scope, was however not adopted by the committee, which, in any case, did not propose that any amendment to the preamble should be made.

The debate is not totally over today<sup>243</sup>. It should only be engaged with caution. A constitutional revision for merely symbolic purposes would not be of any real use and could conversely have unforeseen consequences with respect to constitutional requirements in the field of the economic action of public persons.

**The economic action of public persons in the Constitution: foreign examples**

**Germany**

*Art. 104 b:* To the extent that the current basic law entrusts it legislative powers, the Federation may grant to the *Länder* financial aid for the particularly significant investments of the *Länder* and municipalities (or groupings of municipalities) when these are necessary, 1. to counter a disturbance to the balance of the overall economy, or 2. to compensate for inequalities in the existing economic potential inside the federal territory, or 3. to promote economic growth. / As an exception to the first sentence, the Federation may grant financial aid without having legislative powers in the event of natural disasters or exceptional emergency situations that are beyond the control of the State and are causing significant harm to the situation of the public finances.

240. G. Carcassonne thus showed that “*the market economy, that allows and that reflects entrepreneurial freedom, is an integral part of the society in which we live. It is somewhat strange that no French constitution has gone as far as formally proclaiming it whereas no one really questions the principles of the market economy*”, “Entrepreneurial freedom”, proceedings of the symposium “*Enterprise and constitutional law*, CREDA of 26 May 2010, p. 80.

241. The report of the Committee of reflection and proposals on the modernisation and the rebalancing of the institutions of the V<sup>th</sup> Republic, focused on the organisation of the public authorities, does not dedicate any specific development to it: *For a more democratic V<sup>th</sup> Republic*, Report submitted on 29 June 2007.

242. Proposal made by L. Parisot on behalf of the MEDEF, see the report to the President of the Republic: *Rediscover the Preamble of the Constitution*, La documentation Française, 2009, p. 160.

243. See J. Peyrelevade, “The Constitution against the economy”, *Revue Commentaire*, 2013/4,

### *Spain*

*Art. 38:* Entrepreneurial freedom is recognised as part of the market economy. The public authorities guarantee and protect its practice and the defence of productivity in accordance with the requirements of the general economy and, if appropriate, of planning.

*Art. 128:* [...] 2. Public initiative is recognised as part of economic activity. A law may reserve essential resources or services to the public sector, particularly in the case of a monopoly situation and also decide to take control of companies when the general interest so requires.

*Art. 131:* 1. The State, through a law, may plan general economic activity to ensure collective needs, balance and harmonise regional and sectoral development and stimulate growth of income and wealth and their fairer distribution.

### *Italy*

*Art. 41:* Private economic initiative is unrestricted./ It cannot be practised in opposition to social usefulness or in such a way as to affect security, freedom or human dignity./ The law determines the programmes and the controls needed to ensure that public and private economic activity can be guided and coordinated to social ends.

### *Poland*

*Art. 20:* The social market economy based on the freedom of economic activity, on private property and solidarity, dialogue and cooperation between the social partners, is the basis of the economic system of the Republic of Poland.

*Art. 22:* The freedom to practice economic activities may be limited only by virtue of the law and only with respect to an important public interest.

### *Switzerland*

*Art. 27:* Economic freedom is guaranteed.

*Art. 94:* 1. The Confederation and the cantons respect the principle of economic freedom./ 2. They safeguard the interests of the national economy and contribute, with the private sector economy, to the prosperity and to the economic security of the population./ 3. Within the limits of their respective competences, they create a favourable environment for the private sector economy./ 4. Exceptions to the principle of economic freedom, in particular measures threatening competition, are allowed only if they are laid down in the Federal Constitution or based on the sovereign rights of the cantons.

*Art. 95:* The Confederation may legislate on the practice of private for-profit economic activities.

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p. 841s.; P. Delvolvé, V. J. Peyrelevade, "The Constitution and the economy", *Revue Commentaire*, 2014/2, p. 343s.



*Art. 100:* 1 The Confederation takes measures to ensure a steady evolution of the economic situation and, in particular, to prevent and combat unemployment and price increases. / 2. It takes into consideration the economic development specific to each region. It collaborates with the cantons and the economic circles. / 3. In the areas of credit and currency, external trade and public finance, it may, if necessary, derogate from the principle of economic freedom. / 4. The Confederation, the cantons and the municipalities set their budgetary policy taking into consideration the economic climate.

#### *Turkey*

*Art. 166:* The State has a duty to plan economic, social and cultural development, and in particular the rapid and harmonious development of industry and agriculture in a balanced manner at the national level, to identify and assess the national resources in order to plan their productive use and to create the structures needed for these purposes [...].

*Art. 167:* The State takes the measures able to guarantee and promote the smooth operation and the regularity of the money, credit, capital, goods and services markets; it prevents the formation of *de facto* monopolies and cartels in these markets or resulting from an agreement.

#### *Russia*

*Art. 8:* 1. The Russian Federation guarantees unity of the economic area, the free movement of goods, services and financial resources, support for competition and the freedom of economic activity. / 2. The Russian Federation also recognises and protects private, state, municipal and other forms of property.

*Article 34:* 1. Everyone has the right to use his capabilities and assets freely for a business activity and other economic activities not prohibited by the law. 2. Economic activity aimed at creating a monopoly and unfair competition is prohibited.

#### *China*

*Art. 6:* 1. The socialist economic regime of the People's Republic of China is based on public socialist ownership of the means of production, i.e. ownership by all the people and the collective ownership of the labouring masses. The public socialist ownership regime replaces the system of exploitation of man by man and applies the principle "of each according to his abilities and each according to his work" / 2. During the first stage of socialism, the State applies an economic system based on public property as a dominant factor with different sectors of the economy developing alongside each other, and a distribution system, with distribution according to the work as a dominant factor and the coexistence of several distribution methods.

*Art. 11:* The individual economic sector, the private sector and other sectors that do not belong to the public economy which exist within the limits defined by the law, are a major component of the socialist market economy.

### *South Korea*

*Art. 119:* 1. The economic order of the Republic of Korea is based on the respect for the freedom and the initiative of enterprises and individuals in the business world; / 2. The State regulates and coordinates economic affairs such as to maintain stable growth and the stability of the national economy, to ensure adequate redistribution of income, to prevent situations of domination or abuse of economic power in the market and to democratise the economy by ensuring harmony between the economic agents.

### *Brazil*

*Art. 173:* Except in the cases laid down in the present Constitution, direct exercise by the State of an economic activity is allowed only when it meets requirements of national security or a collective interest of primary importance, within the meaning of the law.

*Art. 174:* As a normative and regulating agent of economic activity, the State, according to the forms of the law, exercises monitoring, stimulation and planning functions; the latter is a requirement for the public sector and indicative for the private sector.

### ***2.1.1.2. Constitutional case law is historically moderated in the economic field***

The lack of a real “economic constitution” in France results above all from the moderate approach of the constitutional court which for a long time has ensured that it does not oppose constitutional legal rules against the substantive directions of the economic policies of successive governments.

#### ■ *Fairly remote constitutional limits*

The moderation of the constitutional court as regards economic action is illustrated in particular by the attitude it has adopted given the movements which have affected the size of the public sector. This classic presentation probably overemphasises one element among others of economic constitutional litigation<sup>244</sup>, but the boundaries laid down on this subject by the Constitutional Council are still today the “last buffers” with respect to the major changes of the scope of the public sector and, therefore, with respect to the place of private initiative in the economy.

The upper limit of the economic action of public persons was seen when the decision on nationalisations was made<sup>245</sup>. Indeed, the Constitutional Council asserted that nationalisations should not result in a socialisation of the economy such that it would call into question entrepreneurial freedom<sup>246</sup>.

244. P. Mbongo, *op. cit.*

245. Decision No. 81-132 DC of 16 January 1982.

246. “*There is a threshold of collectivism beyond which governments could not go without first triggering and obtaining a revision of the constitution*” (G. Vedel and P. Delvolvé, *Administrative law*, Thémis, PUF, Ed. 1992, volume 2, p. 640).



Symmetrically, when it examined the privatisations voted for by Parliament in 1986, the Constitutional Council, basing itself on the 9<sup>th</sup> paragraph of the Constitution of 1946, clarified what “*national public services*” and “*de facto monopolies*” could not be privatised<sup>247</sup> and therefore set the lower limit of the public sector.

But these buffers have proved themselves to be fairly soft.

With regard to nationalisations, control of “*public necessity*” that can justify them has been shown to be much less demanding than the public utility of expropriations. It indeed has only limited itself to clear errors of assessment and has left significant room as to the choice of the companies concerned in accordance with the principle of equality, in particular as regards the exclusion of foreign companies but also the inclusion of mutual societies<sup>248</sup>.

Similarly, with regard to privatisations, the case law of the Constitutional Council only really enshrines as intangible those public services whose necessity results from constitutional requirements (police, judiciary, army) and whose privatisation has, in any case, never been envisaged. With regard to national public services, the legislator can privatise them whenever it withdraws this attribute from them and in particular their *de facto* monopoly. Finally, the category of *de facto* monopolies has been reduced to little by the approach of the constitutional court, fairly removed from competitive analysis methods, even when it has been faced with the question of natural monopolies<sup>249</sup>. The 9<sup>th</sup> paragraph of the preamble of 1946 has thus been largely “neutralised”<sup>250</sup>.

■ *Constitutional principles leave a certain freedom to the legislator*

Within these ultimate boundaries, the legislator retains a fairly wide amount of discretion to define what the economic action of public persons must be. The case law of the Constitutional Council has in fact focused somewhat more on implementing provisions than substantive aspects.

**Entrepreneurial freedom** occupies a central and paradoxical place.

This central place is explained by the fact that it is the sole component of the constitutionality block that is particular to the economic field and that it was formed in the historical context which has just been recalled. It has been regarded by the doctrine as a “*basic*”<sup>251</sup> freedom, “*of general scope*”<sup>252</sup>, and “*the broadest and the highest of all economic freedoms*”<sup>253</sup>.

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247. Decision No. 86-207 DC of 26 June 1986.

248. B. Genevois, “Nationalisations and privatisation”, proceedings of the symposium *Enterprise and constitutional law*, CREDA of 26 May 2010, p. 92 s.

249. Decision No. 2006-543 DC of 30 November 2006.

250. See A. Cartier-Bresson, “‘Market’, ‘Competition’, ‘State shareholder’. What is said, unsaid and clearly constitutionally obscure”, proceedings of the symposium of 3 October 2008, *The economic constitution of the State, The constitutional economic order, 1958-2008*.

251. G. Carcassonne, *op. cit.*

252. S. Nicinski, *Public business law*, Montchrestien, 2014, No. 63.

253. P. Delvolvé, *Public law of the economy, op. cit.*, p. 86.

It has nevertheless also been regarded as an uncertain freedom, raising questions about both its textual sources in the Declaration of 1789 – it was thought that they would be found in Articles 2 (property) and 4 (freedom) before only the latter was adopted<sup>254</sup> – and in its links with other freedoms such as the freedom of commerce and industry. Today it is sometimes likened to the principle of free competition (which does not itself have constitutional value<sup>255</sup>) and the principle of contractual freedom.

But it is above all on the degree of protection which it enjoys in the eyes of the Constitutional Council that the doctrinal debate concentrates. Initially, the Constitutional Council had asserted that this freedom was “*neither general nor absolute*” and could “*only exist as part of a regulation established by the law*”, and it confined its control to that of a clear error of assessment. This restricted control is now limited to cases where the legislator must reconcile it with another principle or objective of a constitutional value, with the constitutional court carrying out a full check where the legislator limits entrepreneurial freedom when pursuing a simple general interest objective that does not have a constitutional basis<sup>256</sup>.

Although **other fundamental principles** govern the economic action of public persons<sup>257</sup>, constitutional case law has shown itself to be sufficiently flexible to leave room for manoeuvre to public policy makers.

This is particularly true for property rights, which cover an important field, in particular for businesses, further increased by a widening of the concept of assets to intangible assets. According to well-established case law, violations of the right to property are possible, but on the twofold condition, with regard to the pure and simple deprivation of property, of a public necessity legally observed and fair and prior compensation. The other restrictions in this regard are possible provided that they are proportionate to the objective pursued<sup>258</sup>.

Similarly, the principle of contractual freedom, formed gradually<sup>259</sup>, plays a considerable role in the economic field, with a contract being “*for the company, the privileged instrument of its activity, the legal garment of its organisation and*

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254. The wording of the decision of 16 January 1982 led to a belief that it resulted at least in part from property rights.

255. The principle of free competition can in reality converge with entrepreneurial freedom or extend the principle of equality. See in particular Decision No. 2014-434 QPC of 5 December 2014, *Company of medical biology laboratories Bio Dômes Unilabs SELAS*; see also on the idea that free competition could have belonged to the constitutionality block, D. Ribes, “Competition addressed by French constitutional law?”, note under CC, Decision No. 2002-460 DC, *RFDC* 2003, p. 168.

256. See R. Fraisse, *op. cit.*

257. Only the main freedoms with regard to economic action are mentioned here.

258. See for a “codification” of this case law, below 2.1.3.2.

259. Decision No. 2000-437 DC of 19 December 2000 relating to the freedom of Article 4 of the Declaration, after a refusal to recognise it in its Decision No. 94-348 DC of 3 August 1994 and an initial change in its Decision No. 97-388 DC of 20 March 1997.



*its performance*<sup>260</sup>. But it is not absolute and case law even allows the questioning of legally concluded agreements provided the violation of contractual freedom is not excessive<sup>261</sup>.

Finally, the economic action of public persons includes the principle of equality, especially where it uses mechanisms targeted on territories or on categories of activities or people which are all forms of selectivity, leading to disagreements about the distinctions thus made. Moreover, this principle is used in a specific way in some areas (equality before public encumbrances, equality before tax, equal access to public procurement, etc.). According to established case law, the legislator does not disregard the constitutional principle of equality when it regulates different situations in a different way nor when it derogates from equality for reasons of general interest, provided that each time, the difference in treatment which results from it is directly related to the purpose of its intervention.

## **2.1.2. A highly present *a priori* control of constitutionality**

### ***2.1.2.1. Extensive control over the economic action of public persons***

In the *a priori* control of constitutionality, the judge has more freedom to exercise his office than in a *a posteriori* control and this has significant effects with regard to litigation regarding the economic action of public persons.

#### **■ *Demarcation of the scope of control***

In the procedure of Article 61 of the Constitution, the scope of control is not constrained by the terms of the referral. Although the court is obliged to respond to the submissions and reasons presented, he can also raise **automatically** and at its discretion arguments and reasons relating to non-disputed provisions of the law which is referred to it<sup>262</sup>.

This power of the constitutional court has a significant impact on the economic texts, often large and dealing with very many questions, that it is not always possible for it to examine in a comprehensive way in the very short time allotted to him<sup>263</sup>. This phenomenon reaches its paroxysm in reviewing the texts on public finance (finance and financing of the social security, initial or amending acts) for which the actual time available to the constitutional court is sometimes reduced to a few days.

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260. N. Molfessis, "The contract", *The company and the constitutional law*, symposium of the CREDA of 26 May 2010.

261. See for example Decision No. 2009-592 DC of 19 November 2009.

262. Without it being possible, however, to infer from an absence of reasons or arguments raised automatically that a provision would not include a defect of constitutionality.

263. One month in principle, a period which may be reduced exceptionally to eight days under the 3<sup>rd</sup> paragraph of Article 61 of the Constitution.



This room for discretion by the constitutional court in the field of the contentious debate combines with the practice of “*narrow doors*”<sup>264</sup>, which allows any person to send it a brief informally to challenge a law referred to it by parliamentarians. Companies and their professional federations have been able to take advantage of this way open to them to draw the attention of the Council on provisions not criticised in the parliamentary referral. The “narrow door” thus constitutes a possible extension of the lobbying of the ministerial offices or parliamentarians carried out by these federations.

#### ■ *Elements of the control*

The control of constitutionality, objective litigation, is a **legal rule against legal rule** confrontation, both subject to the interpretation of the judge, who in the economic field has a significant amount of discretion.

Certainly the legal rules of reference used in the economic constitutional litigation stemming from the block of constitutionality have been clarified by case law but “*the grounds are collated and built from the reiteration of established case law formulas*”<sup>265</sup>. As is the case for most litigation concerning fundamental rights, the wordings thus necessarily remain general.

However these reference legal rules are set against controlled provisions of a technical nature and whose effective scope it is difficult, if not to fully comprehend, at least to measure. The judge can only try to anticipate what their scope may be within the framework of the *a priori* control: “*the constitutionality of the Act is considered in itself, disregarding any situation of practical application; the control is abstract. At most, occurrences of application and the consequences of the Act are imagined, speculated on, or anticipated*”<sup>266</sup>.

In addition, the legal rule against legal rule confrontation gives an increasingly important place to a third factor which is **the objective pursued by the legislator**.

In effect, the judge controls the act no longer only in relation to the principle or the constitutional rule but taking into account the goal that the legislator wishes to achieve, so that some commentators believe that it has become the real “*centre of gravity with regard to the control of constitutionality*”<sup>267</sup>.

However, the goals that the legislator is pursuing are not always clearly explained by the preparatory work. In this case, it is the responsibility of the constitutional judge to make up for this by seeking to identify these objectives himself for the

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264. According to the expression of G. Vedel, “Excess of legislative power and excess of administrative power”, *Cahiers du Conseil constitutionnel*, No. 1, December 1996.

265. G. Canivet, “Reflections on scarcity and abundance. Introduction to the debate on the multiple facets of constitutionality”, *The company and constitutional law*, symposium of the CREDA of 26 May 2010.

266. G. Canivet, *ibid.*

267. J.-B. Duclercq, *Changes in the control of proportionality in the case law of the Constitutional Council*, Paris 1 Thesis, 2014. Thesis Prize 2015 of the Constitutional Council; to be issued in the coll. “Constitutional library and political science” *LGDJ-Lextenso*.



needs of his control<sup>268</sup>. Since the review of these objectives, in many cases guides the outcome of the control, the legislator must keep control of them by explicitly stating them in the preparatory work and ensuring that the measure intended to achieve them is consistent with them.

This point must be checked in the impact study for bills. For bills and the provisions introduced or modified during the parliamentary debate, it is important that these objectives are specified either at the committee stage or in the public debate.

#### ■ *Changes to the control techniques*

Since the 2000s, the Constitutional Council increasingly favours a “proportionality” control, a generic term which covers a large number of control techniques of quite a diverse kind and scope.

It is neither the equivalent of the full control of proportionality practised by the administrative judge, nor the control of clear disproportions whose assessment by the legislator may be vitiated. It is rather more a non-systematic implementation of the “triple test” used by the European Courts, which deals successively with the adequacy of the measure (the appropriate character or otherwise of the measure with the objective pursued), the necessity of the measure (i.e. in particular, the absence of possible use of a less rigorous measure to achieve the objective) and its stricto sensu proportionality (the existence of a balance between the expected benefits of the measure and the constraints it imposes on the persons affected<sup>269</sup>).

This control is moreover **very thorough and more demanding**, in particular on the question of the appropriateness of the measure with the objective pursued, which is however not itself controlled, with the judge refraining from assessing the constitutional merit of a general interest objective<sup>270</sup>.

Control of the constitutionality of economic measures therefore henceforth takes into account many parameters, including “*the particularities of the situation that the legislator states as a premise for the rule of law, or which even underlies the legislative intervention*”<sup>271</sup>. It focuses on the various potential effects of the provision and relates to the entire measure examined, its logic, its mechanisms, its justifications and its consequences.

The legislator must thus be able, at the stage of the constitutional debate, to justify rationally, supported by figures and statistics, the economic policy choices that the text reflects.

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268. J.-B. Duclerq, *ibid.*

269. For the whole of this framework see R. Fraisse, “The Constitutional Council exercises conditional, diversified and adapted control of proportionality”, *LPA*, 5 March 2009, No. 46, p. 74s. ; see also V. Goesel-Lebihan, “the control of proportionality exercised by the Constitutional Council: general presentation”, *LPA*, 5 March 2009, No. 46, as well as “The control of proportionality exercised by the Constitutional Council, (Special feature: Realism in constitutional law)”, June 2007, *Cahiers du Conseil constitutionnel*, No. 22, June 2007.

270. D. Rousseau, *Contentieux constitutionnel*, 10<sup>th</sup> ed., 2013, p. 449.

271. N. Molfessis, *op.cit.*

### ***2.1.2.2. Better account must be taken of the risk of the unconstitutionality of economic texts***

#### ■ *The particular resonance of rulings of unconstitutionality in the economic field*

The history of constitutional control has been marked by dramatic rulings of unconstitutionality relating to **major aspects of economic policy** of the Government and Parliament.

These rulings have been based mainly on the violation of the principle of equality in tax matters and have focused on the degressive reduction of CSG (General social contribution) and CRDS (Contribution to repay the social debt) for the benefit of people on low incomes<sup>272</sup>; the extension of the general tax on polluting activities using fossil energy and electricity<sup>273</sup>; the tax credit for interest on loans contracted prior to the act which established it for the construction or acquisition of the main residence<sup>274</sup>; the carbon contribution with regard to the exemptions that it provided for<sup>275</sup>; the exceptional solidarity contribution called “75% tax”<sup>276</sup> or the degressive reduction of social security salary contributions for people on low incomes<sup>277</sup>.

More symbolic still, because directly affecting the place accorded to the economic action of public persons compared to private interests and in particular those of companies, cancellations based on a violation of entrepreneurial freedom are few but highly significant. Thus the Council ruled contrary to the Constitution the restriction made by the legislator on the possibilities of economic redundancy<sup>278</sup> and, more recently, the provisions relating to the refusal to sell a business due to close if a sale offer is made and a penalty in the case of non-compliance with the obligation to search for a buyer<sup>279</sup>.

These cancellations have a **resonance** that interferes with an analysis of their actual scope.

Given its temporality (it is exercised immediately after the parliamentary debate) and its mode of referral (legally reserved to political authorities and controlled in fact by the opposition), the *a priori* control of constitutionality is often performed in a sensitive context.

The decisions of the Constitutional Council thus have a media impact often disconnected from the reasons for the decision and raise, especially in the economic field, sometimes passionate comments about the legitimacy of the decision which limit the ability to understand and analyse precisely the grounds and the scope of the rulings of unconstitutionality<sup>280</sup>.

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272. Decision No. 2000-437 DC of 19 December 2000.

273. Decision No. 2000-441 DC of 28 December 2000.

274. Decision No. 2007-555 DC of 16 August 2007.

275. Decision No. 2009-599 DC of 29 December 2009.

276. Decision No. 2012-662 DC of 29 December 2012.

277. Decision No. 2014-698 DC of 6 August 2014.

278. Decision No. 2001-455 DC of 12 January 2002.

279. Decision No. 2014-692 DC of 27 March 2014, also based on the violation of property rights.

280. Including sometimes by the legal doctrine itself, see in particular for a recent case J.-P. Chazal, “Property and business: the Constitutional Council, law and democracy”, D. 2014,



■ *Better integrating the constitutional risk with the decision-making process*

Taking better account of the constitutional requirements when carrying out economic action is required.

As **preventive measures**, it is important first to devote the necessary time to examining questions of constitutionality prior to the final adoption of the texts by Parliament. This examination is organised for bills, even if it does not prevent all rulings of unconstitutionality from occurring. But this is not the case for amendments which the Government is increasingly using, either directly or through MPs, to complete its initial bill with provisions which are important for it but whose compliance with the Constitution it has not always sufficiently assessed. In addition to the reservations that it inspires with regard to the spirit of Article 39 of the Constitution, this practice increases the constitutional risk, especially with regard to provisions of an economic scope.

When a measure proposed to Parliament is not contained in a bill, it is always possible to submit it for opinion to the Conseil d'État, either as part of the procedure of the 5<sup>th</sup> paragraph of Article 39 of the Constitution (bills) or pursuant to Article L. 112-2 of the Code of Administrative Justice (amendments).

**Proposal 15: Better prevent the risk of economic texts being ruled unconstitutional within the framework of the *a priori* control**

1) explicitly state, at least in the preparatory work for the act, the objectives that it intends to pursue for each of its significant elements by ensuring their consistency with the mechanism adopted, with a view of the constitutionality check to which it could be subject;

*Means: Positions taken by the Government during review of bills and proposals before Parliament (SGG - General secretariat of the Government) in conjunction with the ministries concerned)*

2) conduct a thorough review of the constitutionality of the provisions relating to the economic action of public persons contained in bills or amendments; in the event of particular difficulty, seek the opinion of the Conseil d'État.

*Means: Government action; referral to the Conseil d'État (SGG and the ministers concerned, Conseil d'État)*

The main difficulties arise, however, after **the ruling of unconstitutionality**.

Even if these decisions do not cast doubt on the purpose of the measure but only the methods for attaining it, the preparation of a substitution measure more often than not proves to be tricky.

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p.1101 s. and, in response, L. Avout, "Entrepreneurial freedom on the stake? Commentary on a recent criticism of the case law of the Constitutional Council", D. 2014, p. 1287s.

This may not confine itself to reiterating the substance of the measure ruled to be unconstitutional and amending certain details or its presentation, as the legislator has sometimes been tempted to do. Such reuse then risks resulting in a new decision of unconstitutionality, this time for disregard of the authority of *res judicata*<sup>281</sup>.

To design a measure free from the defects behind the ruling of unconstitutionality, the legislator can firstly use the analysis of the decision contained in its comment in the “Notebooks of the Constitutional Council”, which generally issues valuable indications.

When it follows from this analysis that the decision only requires changes that are easy to include in the Act examined and that the promulgation of it may be postponed by a few weeks, it is possible to use a new deliberation under the framework of the second paragraph of Article 10 of the Constitution<sup>282</sup>, which can relate only to the provisions ruled contrary to the Constitution by the Constitutional Council<sup>283</sup>.

When the constitutional difficulty affects the very substance of the measure or comes about after several successive cancellations of various options, the Prime Minister may seek the opinion of the Conseil d’État on its implications, either as part of a new bill containing the provisions that have this purpose, or on the occasion of a request for an opinion on a question of law (as was done for the so-called “75%” tax)<sup>284</sup>. To usefully complement this legal expertise work and reconcile the points of view on the substance of the measure, the various substitution options can be subject to the opinion of a working group involving representatives of the State and Parliament and the professional circles concerned.

Beyond the measure directly thrown into doubt by the cancellation, its possible consequences for the other measures existing or being examined must also be analysed very quickly (in particular to prevent possible preliminary question on constitutionality (QPC), see below), since the reasoning of the constitutional judge in the economic field is often transferable from one measure to another.

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281. See in particular regarding the inclusion in the income taken into account for fortune and income tax, certain income from capitalisation bonds or contracts (Decision n° 2013-685 DC of 29 December 2013, recitals 10 s.). The repetition of such processes has led the President of the Constitutional Council to publicly denounce them (J.-L. Debré, new year wishes speech to the President of the Republic, 6 January 2014).

282. Art. 10 of the Constitution: “*The President of the Republic promulgates laws within fifteen days of the transfer to the Government of the law finally adopted. / He may, before expiry of this period, ask Parliament for a new deliberation of the law or of some of its articles. This new deliberation may not be refused*”.

283. Decision No. 85-197 DC of 23 August 1985. This procedure has been implemented only very rarely (see as an example, the Decree of 4 April 2003 submitting Article 4 of the Act regarding the election of regional councillors and representatives to the European Parliament as well as public aid for political parties to a new deliberation following the decision of the Constitutional Council No. 2003-468 DC of 3 April 2003).

284. Whose contents were made public by the press release of the Ministers of the Economy and Finance of 22 March 2013.



**Proposal 16: Better assess the consequences of rulings of the unconstitutionality of economic texts by carrying out a comprehensive analysis of the consequences of these decisions on other existing or future measures and, if necessary, seeking the opinion of the Conseil d'État.**

*Means: Government action; referral to the Conseil d'État  
(Government action; referral to the Conseil d'État)*

### **2.1.3. A control made more demanding by the preliminary question on constitutionality**

The introduction on 1 March 2010 of the preliminary question on constitutionality (QPC)<sup>285</sup> strengthened the hold of the control of constitutionality over the economic action of public persons<sup>286</sup>.

#### ***2.1.3.1. The growth of the constitutional economic law suit***

■ *A legal channel that is particularly beneficial to companies*

Until the introduction of the QPC companies only looked at the control of constitutionality from a distance, fuelling a form of “reciprocal indifference” between constitutional law and business law<sup>287</sup>. This new legal channel has markedly changed the situation.

The QPC has first changed the view of companies on the usefulness of the control of constitutionality as a way to defend their interests.

Indeed, the usefulness of a challenge is a great deal more noticeable within the framework of a QPC than in the *a priori* control. For as long as a provision is not applied in practice, it is difficult for a company to measure its consequences on its business. It is quite another matter for the *a posteriori* control, which allows provisions to be challenged when they are applied and where they are harmful or undermine an economic interest.

Companies moreover find a place in the constitutionality debate that was denied to them until then. Although the “narrow doors” (see above) were open during the *a priori* control, they were in no way official. The contrary is true of the QPC which allows companies to act against a provision which appears to them to be unconstitutional and to defend their interests directly before the Constitutional Council.

But the QPC also allows the economic world to intervene in the constitutionality debate.

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285. Article 61-1 of the Constitution, introduced by Article 29 of Constitutional Act No. 2008-724 of 23 July 2008 on modernising the institutions of the V<sup>th</sup> Republic; Organic Law No. 2009-1523 of 10 December 2009 relating to the application of Article 61-1 of the Constitution.

286. See on this theme, the contribution of Yves Gaudemet, below p. 267.

287. J.-E. Gicquel, “Constitutional law and business law, legal convergence encouraged by the QPC”, *LPA*, 20 September 2011, No. 194.

The acceptance of “interventions” is new and is the official equivalent, in the *a posteriori* control, of the “narrow doors” of the *a priori* control: “*This is what is in fact the real revolution. Civil society is involved in the constitutionality debate. The economic actors have an influence over the law, no longer according to processes of influence during its preparation or its modification but by a legal channel and a judicial process, in an organised space for discussion, in a legal relationship and no longer in a game of influence*”<sup>288</sup>.

The QPC changes the power relationship between companies and public persons: “*The position of the economic actors in the constitutionality debate has changed considerably. Excluded from the prior control mechanism, they play a considerable role in the a posteriori control. They choose the question, they prepare it, they formulate it, they decide when to raise it and they select the case through which it is asked. They use it in a pre-litigation and then litigation strategy. The fundamental rights plea has become an instrument of the law suit. The question of constitutionality may be a counter-policy weapon, in particular economic*”<sup>289</sup>.

Publicity of the QPC contributes to this: “*The debate is public. It is even visible in real time on the internet. The discussion of constitutionality becomes a forum; it may be discussed in the media beforehand – not to say prepared in the public’s mind – and developed in all its legal, economic and social implications*”<sup>290</sup>.

■ *A constitutional debate increasingly present in economic litigation*

Companies are therefore tending to favour the QPC as a legal channel which in addition has the advantage of guaranteeing a final ruling within reasonable time scales.

The QPC has thus become an essential weapon in economic law suits, which the legal services of large companies and business law firms have taken up<sup>291</sup>.

The place of questions of constitutionality in economic litigation has therefore increased. Until then, the application of the theory of “loi écran” (screen law) had had the effect of reducing to very little, the direct application of economic freedoms by the courts in disputes relating to business life. Although the administrative court had a greater opportunity to ensure the respect of these rights in its control of the regulations of economic activity, it was not a central element of its litigation activity<sup>292</sup>.

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288. G. Canivet, *op. cit.*

289. *Ibid.*

290. *Ibid.*

291. See R. Badinter, “Conclusive reflections”, proceedings of the symposium *Enterprise and constitutional law*, CREDA of 26 May 2010, p. 134s.

292. The administrative court, in particular, hears cases regarding these rights in litigation involving regulations under Article 37 of the Constitution, ordinances under Article 38 of the Constitution, and in litigation regarding other regulatory acts where the unconstitutional element lies not in the act applied, but in the contested regulatory text (theory of “the transparent screen”; see for example CE, 27 October 2011, *CFDT*, No. 343943; see also CE, Assembly 12 July 2013, *Nat. fed. of fishing in France*, No. 344522).



With the QPC, on the contrary, the two supreme courts are regularly confronted with the application of constitutional economic law. Either they refer the case to the Constitutional Council, or they decide themselves on the validity of the question, with the ordinary judge becoming the first judge of the constitutionality<sup>293</sup>.

### ***2.1.3.2. The deepening of the constitutional economic law suit***

The opening of this new legal channel has not led to a radical change in the control of economic constitutionality, but it is contributing very directly to its deepening. The QPC has led to a consolidation of economic rights and freedoms, to their application to a greater number of legal rules and a more concentrated and contextualised control than in the framework of the *a priori* control.

#### ■ *The consolidation of the legal rules of reference*

The QPC has not disrupted the organisation of the legal rules or resulted in new principles being identified, but it has led the Constitutional Council to clarify or supplement the definition of certain economic rights and freedoms, including entrepreneurial freedom.

Whereas the precise content of **entrepreneurial freedom** was still the subject of a doctrinal debate, the Constitutional Council enriched and clarified the definition in response to a preliminary question of constitutionality which was referred to it by the Conseil d'État regarding the obligation of membership of a corporation of craftsmen in Alsace-Moselle. It thus ruled that: "*Entrepreneurial freedom does not only include the freedom to have access to a profession or an economic activity but also freedom to exercise this profession or this activity; whereas, therefore, the circumstance that membership of a mandatory corporation is not a condition for exercising a profession but results from it, does not have the effect of rendering inoperative the grievance alleging infringement of entrepreneurial freedom*"<sup>294</sup>.

In the first months of the QPC, the Constitutional Council also clarified the limits of this freedom, by identifying the concept of "*public economic order*" which can justify an infringement of entrepreneurial freedom<sup>295</sup>.

The Constitutional Council has also had the opportunity, ruling on a QPC, to state for the first time, in a summarising recital, the requirements arising from the **right to property** by ruling, after having recalled the terms of Articles 2 and 17 of the Declaration of the Rights of Man: "*that in the absence of the deprivation of property rights, it nevertheless follows from Article 2 of the Declaration of 1789*

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293. In chronological terms at least. It is also, chronologically too, the final court of constitutionality, because it is always its task to examine the practical implications on the dispute of the decisions handed down by the Constitutional Council after referral, where appropriate, in the light of the clarifications that have been made by the Constitutional Council with regard to the effects over time of its decision.

294. Decision No. 2012-285 QPC of 30 November 2012.

295. Decision No. 2011-126 QPC of 13 May 2011, even if a decision of 2010 foreshadowed this development (See also for another illustration, Decision No. 2012-280 QPC of 12 October 2012). See G. Eckert, "What place for free competition", *RJEP* 718, April 2014.





that the limits made to its exercise must be justified by a general interest reason that is proportionate to the objective pursued”<sup>296</sup>.

The requirements with regard to **negative incompetence** have also been specified in the economic field in the context of the QPC. After having ruled in a tax dispute that such incompetence could be evoked as part of a QPC where a right or freedom guaranteed by the Constitution is affected<sup>297</sup>, the Constitutional Council made an important application of it by combining it with property rights, entrepreneurial freedom and the freedom of communication as regards domain names. It also, on the same occasion, clarified the scope of the “*civil and commercial obligations*” that fall within the jurisdiction of the legislator<sup>298</sup>.

■ *The extension of the legal rules subject to control*

Despite their often “divisive” nature, not all economic texts are referred to the constitutional judge as part of the *a priori* control. This is the case for the 144 articles of Act No. 2001-420 of 15 May 2001 regarding the New Economic Regulations (NRE) or 175 articles of Act No. 2008-776 of 4 August 2008 on the modernisation of the economy (LME). The possibility open to challenge these texts *a posteriori* is a widely used “**catch-up**” channel. The QPC has also allowed , texts prior to 1971 to be submitted to the constitutionality control which had been unable to be reviewed with respect to the legal rules since then integrated into the constitutionality block. This catch-up channel can also be implemented very quickly after the promulgation of an act, as the decision of the Constitutional Council on 17 July 2015 illustrates which partially annulled, on the ground of the excessive violation to entrepreneurial freedom, the provisions of the Commercial Code stemming from Article 20 of the Act of 31 July 2014 relating to the social economy and solidarity<sup>299</sup>.

The ability to challenge the act even after a first statement of compliance with the Constitution in the case of a **change in circumstances** is also an important factor in reopening the control<sup>300</sup>.

The QPC, unlike the *a priori* control, allows the act to be controlled according to **the consistent interpretation** that the courts give it. Thus, indirectly but certainly, the Constitutional Council checks compliance with the Constitution of the case

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296. Decision No. 2010-60 QPC of 12 November 2010, see in particular S. Brameret, “The right to property and the QPC,” *RJEP* No. 722, August 2014, comm. 37.

297. Decision No. 2010-5 QPC of 18 June 2010; see also. regarding the consequences of this case law, J. Arrighi de Casanova “What future for case law *Kimberly Clark* ?”, (Special feature: Incompetence in constitutional law), *Notebooks of the Constitutional Council*, No. 46, January 2015, pp. 29-40.

298. Decision No. 2010-45 QPC of 06 October 2010.

299. Decision No. 2015-476 QPC of 17 July 2015 regarding the nullity of the sale of a majority stake in a company that was made in disregard of the obligation to provide information to the employees.

300. See on the narrow interpretation of changes in circumstances, P. Collin “The Constitutional Council, tax judge in 61 and 61.1: differences and similarities,” (Special feature: the Constitutional Council and tax), *Notebook of the Constitutional Council*, No. 33, October 2011, p. 27.



law handed down by the administrative and judicial judges<sup>301</sup>. This control is of great practical importance in the economic field. It is thus, for example, that the definition given by the Court of Cassation to the concept of public undertaking has been subject to a careful control by the constitutional court which approved it on the merits, while noting that it was not such as to compensate the negative incompetence of the legislator<sup>302</sup>.

This being the case, **administrative practices** are indirectly subject to the constitutionality control.

The risks resulting from the inclusion of such practices in the control through the QPC channel are in principle examined during preparation of the implementing texts of the acts, effective scrutiny when these are subject to the opinion of the Conseil d'État (Conseil d'État decrees). Greater attention must be made from this standpoint to the other implementing texts establishing or reforming measures relating to the economic action of public persons (simple decrees, orders), as also to the texts presented as a simple interpretation of the act (circulars, in the tax field or in other areas of economic action), whose consequences may be underestimated. For the most sensitive cases, referral to the Conseil d'État on questions of law relating to a draft text not in principle falling within its jurisdiction may be appropriate.

**Proposal 17: Better forestall the use of the preliminary questions on constitutionality channel (QPC) in economic matters**

1) carry out a systematic review, when developing simple decrees and orders, of the consequences that may result from the use of a QPC against the legislative provision which they apply; if necessary seek the opinion of the Conseil d'État;

*Means: Government action; referral to the Conseil d'État*

2) carry out a review of the same type for circulars with significant scope.

*Means: Government action; referral to the Conseil d'État (SGG and the ministers concerned, Conseil d'État)*

■ *The concentration and contextualisation of the control*

Contrary to the situation for the *a priori* control, where the complexity and volume of the texts and parliamentary briefs that sometimes fall short in their technical content and very short review times, prevent the constitutional court from carrying out a very thorough control of the acts referred to it, the QPC brings together all the elements allowing for a more in-depth control.

The conclusions are first strictly circumscribed by the referral decision. The Constitutional Council focuses its attention on specifically identified provisions that have already been subject to an initial review at the filtering stage by a supreme court.

301. Not without resistance from the Court of Cassation, but the Constitutional Council adopted a different analysis (Decision No. 2010-39 QPC of 6 October 2010).

302. Decision No. 2013-336 QPC of 1 August 2013.

The grounds are also more targeted and better coordinated. Only those based on an infringement of the rights and freedoms guaranteed by the Constitution may be usefully raised, which in particular excludes procedural grounds (disregard of the rules applicable to the right to make amendments) which take a significant place in the *a priori* control. The arguments are moreover more precise than in the *a priori* control, with the parties producing very informed written submissions, assisted in this by advice that is both “specialised and imaginative”<sup>303</sup>. The “game” of the adversarial debate also contributes a great deal, by allowing for more in-depth exchanges on the most discussed issues. Although the Council can itself present pleas, this eventually is in fact very rare given, precisely, the richness of the debate which is created before it.

The control is also much more “contextualised”.

Certainly, the debate relates to the question of law and not to the law suit which elicits it, but the latter informs the constitutional court about the ins and outs of the question asked and allows it to better “embody” its analysis: the reasons themselves for its decisions reveal this<sup>304</sup>. It is also possible for it to hear experts<sup>305</sup>, which again demonstrates a form of deepening of the control.

The QPC has thus considerably increased the place of constitutional law in economic litigation. It has also contributed to the constitutionalisation of business law that its complexity limited under the *a priori* control<sup>306</sup>.

This development has not led to the shift that some commentators forecast<sup>307</sup> in the direction of the case law of the Constitutional Council, which remains and shows understanding towards the economic action of public persons. Although the intensification of the control can be felt, it has up to now resulted in more of a “refinement”<sup>308</sup> to the rules than in a change in their content.

However, it is not certain that such a change will not happen in the future<sup>309</sup>. Since the QPC places the grounds of conventionality on a procedural level that is close to that of the grounds of conventionality in economic litigation, the basis of constitutional law is tending to become increasingly closer to the conventional requirements, especially in the economic field.

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303. See P. Collin, *op. cit.*

304. G. Canivet, *op.cit.*

305. Art. 6 of the Rules of Procedure on the proceedings followed before the Constitutional Council for preliminary questions of constitutionality.

306. Confirming the prediction of R. Badinter, *op. cit.*

307. See G. Parléani, “The QPC and business law of the European Union”, QPC and business law, initial considerations, *LPA*, 29 September 2011, No. 194, p. 17-24; J.-É. Gicquel, “Constitutional Law and Business Law: Legal convergence encouraged by the QPC”, same review, p. 3-10; A. Sée, “The preliminary question of constitutionality and economic freedoms”, *Revue juridique de l'économie publique* No. 718, April 2014.

308. See in particular P. Bellanger, *ibid.*

309. e.g. for the use which could be made in the QPC, of the positions taken by the regulators, in particular the Competition Authority on the subject of legislative texts about which it gives an opinion with respect to legislative restrictions with regard to competition: M. Lombard, “For a new use of the QPC with regard to competition”, *RJEP*, March 2013.



## 2.2. Conventional legal rules that are more structuring than binding in the economic field and of which it is possible to take better advantage

The position of conventional legal rules with regard to economic action has grown steadily over the last thirty years, mainly driven by European Union law and the ever-greater movement towards integration of the single market<sup>310</sup>. Often perceived as hostile in principle to the economic action of public persons, this law does not however reject its legitimacy, even if it is based on principles and analysis frameworks that are somewhat different from those of internal law (2.2.1). Public persons need to take ownership of these rules to take best advantage of them, but also to engage in a constructive dialogue with the European institutions to preclude difficulties (2.2.2).

A growing number of international standards apply moreover to public economic action, including the European Convention for the Protection of Human Rights, increasingly invoked in economic litigation (2.2.3).

### 2.2.1. Although permeated by the idea of the market, European Union law recognises the legitimacy of the economic action of public persons

#### 2.2.1.1. *A relatively well-balanced law*

##### ■ *The “economic constitution” of the European Union and its evolution*

Although one may hesitate to speak of an “economic constitution” for France, this hesitation would not be justified for the European treaties whose provisions relating to the directions and policies of the European Union aim and have as their effect to lay down the economic constitution<sup>311</sup>, which they were criticised for when these elements were formally included in the draft Constitution for Europe.

The place of the economy in the Treaties is inseparable from the European project. Drawing its inspiration in the “de facto solidarity” evoked by the Schuman Declaration of 9 May 1950, Europe has been built on the economic integration of the Member States before and after the Treaty of Rome of 25 March 1957<sup>312</sup>.

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310. There is no real equivalent to European Union law in the other regional groupings, whether these are for example NAFTA (North America), Mercosur (South America), ASEAN (Southeast Asia), etc. The rules established by these treaties have only a limited impact on the economic action of public persons in the various countries concerned.

311. G. Farjat, “The economic constitution of Europe and the law-economy pairing”, *La constitution économique de l’Union européenne*, Editions Bruylant, September 2008. See also H. Rabault, *op. cit.* See P. Mbongo, *op. cit.*

312. This is the original idea behind the ECSC (Treaty of Paris of 18 April 1951) to which, after the failure of the more political approach of the EDC (Treaty of 27 May 1952, rejected by the National Assembly on 30 August 1954), the Europeans returned with the Treaty of Rome establishing the European “Economic” Community and the “common market”, that

The Treaty of Lisbon of 13 December 2007 did not call into question the mainly economic nature of the Union<sup>313</sup>. In this context of a gradual creation of a borderless market, itself reliant on the definition of common rules, economic action by public persons themselves could be seen as calling into question the principles of the process of European integration, both in their function of regulating the activity of the economic actors and when they act as market operators.

The texts have however **gradually** evolved, in particular in the objectives that they pursue, tempering the primacy of the market and competition which could be seen in the initial treaties. Following the debate that has arisen on “*free and undistorted*” competition to which the Treaty establishing a Constitution for Europe<sup>314</sup> referred and the rejection of this project by the referendum of 29 May 2005, the main principles have been rewritten, in particular at France’s initiative.

The economic provisions of the 8<sup>th</sup> and 9<sup>th</sup> recitals of the Treaty on European Union (TEU) stemming from the Treaty of Lisbon suggest a new balance which is reflected in its Article 3: “*3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*”.

Competition is still a goal, but less emblematic: the reference to the “*principle of an open market economy with free competition*” is confined to Articles 119 and 120 of the Treaty on the functioning of the European Union (TFEU), that to “*undistorted*” competition to Protocol No. 27 on the “*internal market and competition*”.

■ *A preponderant but not exclusive place of the market idea*

The balance sought in the founding provisions of the Treaties is also present more directly in the normative texts, in particular those on the organisation of the internal market and on the policies of the Union.

The cornerstone of European construction, the internal market is based on the “**four freedoms**” recalled in Article 26 paragraph 2 of the TFEU, which lay down direct limits on the economic action of public persons.

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the Single Act of 1986 was designed to finalise (Treaty of Luxembourg of 17 and 28 February 1986). To mark the widening of its missions beyond the economic field, the Community became “European” (dropping the “economic”) with the Treaty of Maastricht 7 February 1992 but Economic and Monetary Union were its main addition. The Treaty of Nice (26 February 2001), more institutional, did not reverse this direction, that the failure of the political initiative of the European Constitution in 2004 (Treaty of Rome of 29 October, rejected by referendum in France on 29 May 2005, and then by the Netherlands on 1 June 2005) only strengthened.

313. The observation made in 2003 by Professor L. Idot according to which the bulk of the substantive law of the Union is economic remains true, see “The impact of community law on economic law”, symposium *Community law and the metamorphoses of the law*, 2003.

314. Treaty signed in Rome on 29 October 2004, Article I-3, paragraph 3.



The free movement of goods between Member States prohibits all customs duties or taxes with an equivalent effect, quantitative restrictions and measures of an equivalent effect<sup>315</sup>. The free movement of workers requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment<sup>316</sup>.

The freedom of establishment<sup>317</sup>, the free provision of services<sup>318</sup> and the free movement of capital<sup>319</sup> affect even more clearly the freedom of action of public persons. The measures that they can adopt for the needs of their economic action may constitute restrictions prohibited by the Treaty, even if their scope of application is purely internal<sup>320</sup>. But such measures are permissible when they are justified by reasons relating, in particular, to public order or public security or to other compelling general interest reasons<sup>321</sup>: it is therefore a compatibility requirement conditional on serious justifications and not a prohibition.

**The policies** stated in the treaty relate for the most part to the internal market and also express the principle of free competition while recognising particular general interest objectives (transport, energy, regional action, etc.), whose implementation is based on economic action by States in their territory.

Derived law defines for each policy, the balance between the free play of the market and the economic action of the States. The room for manoeuvre left to the latter then depends on the substantive directions of these texts but also on the degree of harmonisation that they try to achieve.

■ *Several articles of the TFEU deal with the economic action of public persons and also confer on it an explicit form of recognition*

**State aid** is proscribed by paragraph 1 of Article 107 only *“in so far as it affects trade between Member States”* and if it *“distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods”*. Exceptions exist moreover by virtue of the treaty itself (paragraph 3), some of which automatically (paragraph 2). Sometimes described as a *“real handing over of supervision of national business aid policies”*<sup>322</sup>, this regulation

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315. Articles 28 and following of the TFEU.

316. Articles 45 and following of the TFEU.

317. Article 49 of the TFEU.

318. Articles 56 and following of the TFEU.

319. Articles 63 and following of the TFEU.

320. Freedom of movement is at issue wherever these measures, without specifically targeting the other Member States or their nationals, may have an effect on them.

321. Economic reasons are often excluded, unlike in domestic law (See in particular ECJ, 5 June 1997, *Ypourgos Ergasias*, C-398/95).

322. J.-L. Clergerie, A. Gruber, P. Rambaud, *L'Union européenne*, 2014, No. 540.



does not however prejudice, by itself, the acceptability of aid by the European Commission, after a debate with the Member State in question and under the control of the European court.

With regard to public enterprises, a calling into question of their existence is excluded both by Article 345 under which “*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*” and the mention of public undertakings in Article 106, while this same article as well as Article 37 recognise the principle of the allocation to these enterprises of exclusive or special rights, including with regard to trade.

Finally, the TFEU now attributes a large role to **services of general economic interest** (SGEI), which no longer appear solely among the common values of the European Union but which are recognised, since the Treaty of Lisbon, by provisions that form a coherent whole with the TFEU. Indeed its Article 14 lays down that these services should operate on the basis of principles and conditions, in particular economic and financial ones, that will enable them to fulfil their missions. Article 106 confirms that the competition rules apply to the SGEIS, but only provided they do not obstruct the performance, in law or in practice, of the particular tasks assigned to them. Finally, Protocol No. 26 specifically devoted to the SGEIS asserts the freedom of the national regional and local authorities to create and organise these services.

### ***2.2.1.2. Room for interpretation depends mostly on the way the treaties are applied***

■ *An interpretation of the treaties which varies according to the themes and the times*

The **doctrine** of the European Commission and the **case law** of the Court of Justice of the European Union, which are closely linked, can significantly change the reading of the Treaties.

This is especially the case of provisions regarding exclusive rights, that they have interpreted in a very restrictive way beginning in the 1990s<sup>323</sup>, admitting however justifications connected to the existence of SGEIS, to other rules of the Treaties or compelling general interest reasons<sup>324</sup>.

Equally decisive as regards the SGEIS, European case law has been mainly codified by Article 14 of the TFEU and Protocol No. 26. The Commission has taken it into account in applying rules for which it has responsibility,

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323. See in particular ECJ, 19 March 1991, *France v. Commission*, C-202/88.

324. The calling into question of these exclusive rights in the context of opening up monopoly sectors was not a direct consequence of this case law but of policies opening up markets in the secondary legislation. See M. Voisset, “Public Enterprises in Europe”, symposium *What future for public enterprises?* ASMP, 2000.



in particular with regard to State aid (see below) and to ensure that these services can be implemented according to financial conditions that are acceptable to the Member States<sup>325</sup>.

Finally, the role of European Union law in economic action is dependent on the existence of **secondary legislation**. This harmonisation is still weak in certain areas, for example, commercial law (the status of trader and commercial transactions; collective procedures and even contract law). The choice of the European Union to legislate or otherwise therefore has a strong impact on the States' room for manoeuvre, as reflected in the current debate on the common bases of corporate tax.

Even the content of secondary legislation is susceptible to changes, as recently in the field of public procurement. The TFEU does not include any general provision on public procurement<sup>326</sup>. Although the rules in this field have long been dominated by the idea of competition between operators and the best use of public funds, concerns for sustainable development, innovation, facilitated access by SMEs to public procurement and social and environmental responsibility are now taken into account.

#### ■ *The particular case of State aid*

The legislation on State aid is structural for the economic action of public persons, because it governs the financial flows from public authorities and any other form of public aid (provision of specific property or rights<sup>327</sup>). It has contributed to a calling into question of national monopolies and even national enterprises, making the continuation of State support impossible, and has obliged the State shareholder to behave as a prudent shareholder. It thus contributes to the "ordinariness" of public operators as compared to private operators.

The law on State aid is however less a matter of interpretation of the treaties than an assessment by the Commission on various types of aid, whose control and regulation are assigned to it by Article 108 of the Treaty. It has a very large amount of discretion to define a real "*policy of State aid*"<sup>328</sup>, which it uses widely.

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325. This approach has also helped shape secondary legislation taking account of the SGEIS, recognising missions of general interest or universal services in regulated sectors (post, electronic communications, etc.).

326. Only the provisions on research refer to it. Public contracts are governed by the four freedoms and especially by the harmonization texts implemented on the basis of the general references regarding the free provision of services and freedom of establishment as well as Article 95 TFEU on the approximation of the laws of the Member States that have an impact on the internal market.

327. See for example the authorisation given to London taxis to drive in bus lanes although this is forbidden for hire cars with a driver which finally was not regarded as involving State aid: ECJ, 14 January 2015, *Eventech Ltd/Parking Adjudicator*, No. C 518/13.

328. J-L. Clergerie, A. Gruber, P. Rambaud, *op. cit.*





It has thus opted in the past twenty years for a significant tightening of this policy, without a change in this direction to the provisions of the treaties. This trend recently shifted toward a refocusing of controls on the most significant aid.

The obligations for notifying aid to the Commission have been relaxed, without a change to the EUR 200,000 threshold but thanks to an overhaul and simplification of the *de minimis* exemptions regime<sup>329</sup>. The exemption by category regulation revised in 2014 in line with the communication of the Commission on the modernisation of the State aid policy<sup>330</sup> very significantly increases the volume of exempted aid, which now accounts for three-quarters of the measures and two thirds of their total amount<sup>331</sup>. There therefore remains only a quarter of aid subject to control of compliance with the guidelines and the existing framework accounting for a third of the total amount granted.

Under the case law of the Court of Justice, the amounts paid by the Member States to enterprises subject to public service obligations in return for these obligations, subject to a number of conditions, do not constitute State aid<sup>332</sup>. Favourable rules have been defined as regards this compensation, by the package of three texts, by the so-called “Alumnia package” (framework, decision, communication), to which is added a *de minimis* regulation specific to the SGEIS of 25 April 2012<sup>333</sup>.

Finally, a draft communication of the European Commission of January 2014 proposes to objectify its control by making public its doctrine on State aid, and in particular the constituent elements of aid as regards the existence of an economic activity (concept of “enterprise”), the imputability of the measure to the State, the financing through State resources, the existence of an economic advantage for the beneficiary, the selectivity and the effect on trade and competition<sup>334</sup>.

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329. Regulation No. 1407/2013 of 18 December 2013 relating to the application of Articles 107 and 108 TFEU to *de minimis* aid.

330. Regulation No. 651/2014 of the Commission of 17 June 2014 stating certain categories of aid compatible with the internal market pursuant to Articles 107 and 108 TFEU.

331. The regulation of 2008 exempted approximately 60% of aid measures and a little more than 30% of the total amount of aid granted.

332. ECJ, 24 July 2003, *Altmark Trans.*, case C-280/00

333. See Communications 2012/C8/02 of 20 December 2011; 2012/C 8/03 of 20 December 2011 as well as Decision 2012/21/EU of 20 December 2011 of the European Commission and Regulation (EU) No. 360/2012 “*de minimis – SGEI*” of the European Commission of 25 April 2012 relating to the application of Articles 107 and 108 of the TFEU to *de minimis* aid granted to enterprises providing general economic interest services. The “Almunia” package has replaced the “Monti-Kroes” package.

334. This document was submitted for consultation in January 2014. The French authorities have made their comments: SGAE memo of 31 March 2014.



## **2.2.2. It is useful to take an active part in preparing EU law and to better take it into account when carrying out economic action**

The indispensable dialogue with the institutions responsible for Union law must be accompanied by taking greater account of European law in the economic action projects of public persons.

### ***2.2.2.1. Dialogue with the European institutions enables the economic action of public persons to be secured***

■ *Promoting a European framework that is favourable to the economic action of the Member States*

Given both its weight in the internal market and the euro zone and its legal expertise, France is able to exert significant influence on the production of the legal rules of secondary legislation in the economic field. In fact, several economic mechanisms “invented” by France have been used at the European Union level, including value added tax and, very recently, the model of public service delegation, taken up in the “concession” directive.

It may first usefully act prior to the formal initiative which is the European Commission’s role, by encouraging it to make proposals in an area of priority in France’s view, as illustrated recently in the field of taxation. Likewise, contributions documented and quantified in white papers, green papers and impact studies can be used to influence the direction of the Commission’s proposals.

When the text is submitted to the Council and where appropriate to the European Parliament, the promotion of the French positions in the field of the economic action of public persons must rely on a strategy of influence getting other Member States and MPs from other countries on board.

This strategy must be extended to the delegated acts<sup>335</sup> to which the directives may refer, and for whose preparation the association of the Member States is not overseen by the treaties<sup>336</sup>. In this regard, support should be given to the initiative of the European Commission, which proposes a better association of the Member States in its communication *Better Lawmaking* of May 2015 (see 2.2.2.2. below), and taking a more active part in the consultation procedure that it proposes.

Finally, when the European Commission announces its intention to lay down or to reconsider its doctrine, in particular in the context of communication projects or guidelines, France must contribute to the process through its analyses and recommendations.

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335. Art. 290 TFEU: “1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act [...]”.

336. See Study of the Conseil d’État, *European Directives: anticipate to better transpose*, La documentation Française, 2015.



In short, it is a *lobbying* culture, somewhat foreign to the French tradition that needs to be adopted or strengthened, in order to preserve the influence on European law of French ideas with regard to public economic action.

**Proposal 18: Strengthen the capacity of central administrative authorities to bring priority issues and draft texts (including delegated acts) before the European Commission for France with regard to economic action:**

- 1) by contributing systematically to the consultations or the work carried out by the European Commission on these subjects;
- 2) in the absence of an initiative by the European Commission, by encouraging it to make proposals.

*Means: Government action  
(SGAE and the ministers concerned)*

In litigation, the use by France of its faculty to make observations on the occasion of a question for a preliminary ruling, referring to the Court of Justice a problem of interpretation of the law of the Union raised by a dispute brought before a national court, allows it to present a reasoned position that can be taken into account by the court, including when the question is put by a court of another Member State<sup>337</sup>.

The already active intervention policy of France could focus on a more important number of cases while remaining selective and directed towards the detection of **“bridges with French legislation”**<sup>338</sup>. It should foster strategies of “solidarity” and common fronts with other Member States which have developed similar mechanisms to those challenged or which simply share the same views on the economic law of the Union (as was the case recently, with regard to the “OMT” dispute<sup>339</sup>).

■ *Convincing the Commission that national measures comply with European Union law*

Dialogue with the institutions of the Union must be established as soon as projects for national measures are developed.

Although one must not present the Commission incomplete projects or too many options, it may be useful, if the **initial reflection** on the design of the measures reveals a doubt on the acceptability of a seriously considered provision and that is of a certain importance, to informally consult the services of the European Commission to obtain their initial reaction.

337. Article 23 of the Statute of the ECJ.

338. D. Colas, Deputy Director of EU law and international economic law, Cl. Dellangnol “Behind the scenes of... the Directorate of Legal Affairs of the Ministry of Foreign Affairs”, *Les Échos*, 6 May 2015.

339. It thus for example intervened in the case of the OMT regarding the ECB (Case C-62/14 Case *Gauweiler e.a. / Deutscher Bundestag*) above see 1.1.1.1.



The **prior notification** procedure must be carried out before the project is made public and *a fortiori* legally adopted. Often perceived as red tape, these notifications on the contrary prevent an *a posteriori* calling into question of national measures and thus contribute to legal security. As regards economic action, they mainly concern the right to State aid and technical regulations regarding products<sup>340</sup> as well as measures restricting access to or the performance of service activities<sup>341</sup>. Vigilance is needed on compliance with these procedures for measures which are not exemptions, because a simple failure to notify can result in the illegality of the measure even though it would be compatible in its substance.

**Proposal 19: Cooperate more with the European Commission during the development of national systems of economic action:**

- 1) by consulting it as far ahead as possible in the event of doubt as to their compatibility with European Union law or on the need to notify them;
- 2) by carrying out the required notifications as soon as they are finalised, before making them public and starting the adoption procedures.

*Means: Government action  
(SGAE and the ministers concerned)*

When the Commission expresses doubts as to the compatibility with European Union law of a measure proposed by France, a response made as quickly as possible and which is well documented helps convince it of the substance of the French position, whereas preparing prompt corrective action allows costs to be limited in the event of an unfavourable outcome.

Questions referred for a preliminary ruling directly affecting the economic action of French public persons call for special vigilance. Although the domestic court keeps control in any event of the question it raises, it may usefully be clarified by the parties, in particular through communication of technical elements arguing in the direction of the compatibility of a practice or a national measure with Union law. The public persons who are parties to the dispute therefore have an interest in following these questions closely, including in the choice of terms in which they are written<sup>342</sup>.

Given the very short time available to the national authorities to make their comments for questions referred for a preliminary ruling (2 months in principle), the questions referred in litigation involving public persons should be systematically reported to the SGAE allowing them to undergo an inter-ministerial review without waiting for the information of the Member States made by the Registry of the Court of Justice.

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340. Directive 98/34/EC of 22 June 1998.

341. Directive 2006/123/EC of 12 December 2006.

342. These efforts can be made without prejudice to the interventions of the State, directly to the Court of Justice, both on the wording of the question as it will be dealt with by the Court and on the response that it will give to it.

**Proposal 20: Make better use of the procedure for questions referred for a preliminary ruling**

1) when a public person is a party to a dispute which may give rise to a question for a preliminary ruling, communicate to the court the technical elements arguing in the direction of compatibility with Union law and, in the alternative, propose a drafting of the question taking into account elements of analysis justifying the position defended;

*Means : briefs produced before the national court  
(SGAE and the ministers concerned)*

2) ask the administrative authorities of the State and its public institutions to report systematically to SGAE the questions that the national courts have decided to refer to the ECJ so that they can undergo inter-ministerial review; request that the independent administrative authorities, the territorial authorities and their public establishments to do likewise;

*Means: Government action  
(SGG, SGAE and ministers and authorities concerned)*

3) elicit comments from other countries in support of the French authorities in the questions referred for a preliminary ruling transmitted by the French courts;

*Means: Government action  
(RP, SGAE and the ministers concerned)*

4) formulate comments on the preliminary questions put by other countries which are interested in the positions defended by the French authorities in regard to their own economic action.

*Means : comments in questions referred for a preliminary ruling*

■ *Organising to have greater influence in the dialogue with the European Union*

The **institutional mechanism for coordinating European questions** includes the permanent representation for dialogue with the institutions of the Union and with the other Member States<sup>343</sup>, the SGAE for the definition of inter-ministerial positions and the application of European law in France and the Ministry of Foreign Affairs, in conjunction with the Ministry of the Economy where the latter is leading the cases at issue, for representation of France in the litigation proceedings of the Union. For dealing with the economic issues, the permanent representation to the European Union (RPUE) has a large dedicated service. The SGAE maintains close relations with the Ministry of the Economy, including for its management and receives a large number of officials from this ministry. At the Ministry of Foreign Affairs, the same sub-directorate deals with European Union and international economic law<sup>344</sup>.

343. The dialogue is based mainly on the network of permanent representations in Brussels but also relies on the classic diplomatic network, both bilateral with the other Member States and multilateral (OECD).

344. Art. 14 of the Decree of 28 December 2012 relating to the organisation of the central administration of the Ministry of Foreign Affairs.



Although this system works efficiently, it is governed by a scattering of texts that should be revised in order to improve the flow of information at all stages of the procedure, as well as follow-up of the cases.

It could especially be strengthened by associating **other important actors** in the field of economic action<sup>345</sup>. The European Commission and the European Parliament's working methods, largely open to consultation and direct contacts with actors who have no official role in European negotiations, mean that our administration must adapt by using comparable "relays" to reinforce the French positions.

Moreover, the French actors of the business world, large companies or professional federations, already have a representation in Brussels whose contribution it may be appropriate to request. The same is true of "experts", specialised agencies in an economic sector, "think tanks", personalities from the academic world, who need to be convinced about the validity of the French positions to be able to strengthen their weight in the negotiations. The involvement of the regulatory authorities, particularly important in the economic field, is also part of a strategy of influence, given their credibility and their growing inclusion in the European networks consulted by the European Commission. Finally, the local authorities or their groupings are increasingly represented in the European bodies and must be associated with the definition and the defence of the French positions.

This opening up to other actors is now well-established in the working methods of the permanent representation. It is newer for the SGAE, which traditionally put its trust in the ministries to build useful relationships prior to laying down the inter-ministerial position. Its recent evolution, at least informally, towards making external contacts must be made of an objective of complementarity with the action of the ministries and the permanent representation.

**Proposal 21: Make the coordination and negotiation of economic affairs in Europe more efficient**

1) develop a procedures and coordination of European affairs guide within the administrative authorities; put it online on the SGAE website;

*Means: Government action;*

2) diversify the working methods of the administrative authorities to associate companies, local authorities and the regulatory authorities with them more closely in developing and defending French positions in the institutions of the European Union, in particular within the context of informal exchanges with these institutions.

*Means: Government action;*

*(SGAE, Permanent representation to the EU, the ministers concerned)*

Although the French public officials working in the European institutions are no longer there to serve French interests, their knowledge of the mechanisms, their

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345. In the particular context of EU law, a form of the recommendations on economic diplomacy are found here (see 1.2.2 above).

legal culture and their way of dealing with questions facilitate the understanding of French initiatives by the institutions of the Union.

However, the **French presence** in the institutions of the Union is declining, despite the positive initiatives already taken in this field<sup>346</sup> and without this decline being attributable in full to the enlargement of the European Union, which has a mechanical effect of decreasing the number of positions available. One of the causes may be fewer number of French candidates to seconded national expert positions, no doubt due to the still insufficient recognition given to this type of mobility. An increased French presence thus requires an awareness of and an effort for attributing greater recognition to this type of experience in a person's career. Many reports have already concluded as much, without them really being followed by effects at this stage<sup>347</sup>.

**Proposal 22: Promote the mobility of French officials within the European institutions, in particular by giving greater value to the experience of Seconded National Experts (SNE) in careers through the use of appropriate measures in managing human resources:**

- 1) before the officials leave, evoke the prospects and positions that they would be eligible to occupy on their return to their administrative authority of origin;
- 2) before their return, make several proposals of positions that take account of the actual experience acquired and the new responsibilities that they may take on.

*Means: Government action.*

*(SGAE, General Directorate of Public Service, Secretaries-general and directors of human resources of the ministries)*

#### ***2.2.2.2. Taking better account of Union law in designing the economic action of public persons***

■ *Union law is taken into account too late in economic action*

Whereas countries such as Belgium and Germany take advantage of the opportunities opened up by the mechanisms and the freedoms established by European law by taking them into account to design their economic policy, this is not the case in France where this law is taken into account much too far downstream.

This deficiency has harmful **consequences** in the economic field. When dialogue comes about too late, it can only be at the unofficial stage of a confrontation which will quickly become official and will give credit to the idea of a general problem of compatibility of the economic action of public persons in France with European Union law. It may also have serious financial consequences, such as the problems

346. e.g., the creation of a "FP" sector for "French presence" in the SGAE.

347. See for example the Mr J. Floch's information report of 12 May 2004, issued in the name of the delegation of the National Assembly for the European Union, no. 1594.



encountered in recovering the aid awarded to the SNCM currently illustrate<sup>348</sup> or in the area of the feed-in tariff of electricity of wind turbine origin<sup>349</sup>.

As in constitutional matters, ways must be found for making a prior examination of the conventional risk weighing on all provisions that have an economic impact and as early as possible in preparing measures.

**Proposal 23: Conduct a thorough review of the conventional risk that provisions having an economic impact may hide, in particular those contained in bills or the amendments to bills and proposals for acts; in the event of a particular difficulty, refer to the Conseil d'État.**

*Means: Government action; referral to the Conseil d'État (SGG, SGAE, the ministers concerned, Conseil d'État)*

Going beyond this, Union law must stop being considered as an external element, a foreign “constraint” on the design of projects. The ownership of European law starting with the initial reflection stage on the design of economic action is a question of reflexes, culture and mentality, all of which are difficult to change without substantial organisational measures.

■ *Rethinking the organisation of administrative authorities and the training of officials*

One of the main sources of the feeling of exteriority that Union law inspires is that it is dealt with by dedicated **structures**, which in some ministries have the status of a department or unit<sup>350</sup>. Often of high quality, they nevertheless have the perverse effect of fuelling a lack of interest in advance by administrative authorities that no longer feel responsible for European questions in their field of competence. Revising whenever possible this type of organisation would allow the question of European law to be perceived as an integral part of the missions of each official, in particular those developing economic action mechanisms. Only lightweight centres of expertise would be maintained to deal with new or difficult cross-cutting European questions. Composed of “Union” correspondents, they could be organised in a network, similar to what is practised in the United Kingdom with regard to State aid.

At the inter-ministerial level, the separation and absence of an organic link between the SGAE (responsible for European Coordination) and the SGG (responsible for general coordination) can be justified by very different professions, working

348. ECJ, 4 September 2014, *SNCM / Corsica Ferries France*, C-533/12 P, C-536/12 P.

349. They raise difficult issues of recovery following the decision of 28 May 2014 by which the Conseil d'État quashed the orders of 17 November 2008 and of 23 December 2008 laying down the conditions for the feed-in tariff of electricity produced by wind turbine installations (EC, 28 May 2014, *Association Vent de Colère*, No. 324852).

350. See for example, the Directorate of European and International Affairs of the Ministry of Ecology, Sustainable Development and Energy or the European and International Affairs unit of the Ministry of Justice.



methods and networks. It would be desirable for the SGAE to be able to support the SGG in running this network of “Union correspondents”.

The **training of officials** in European law must also be strengthened.

Initial training in this field has made clear progress in public administration schools but it remains focused on the institutional law of the Union. Teaching remains weak on substantive economic law and especially the right to State aid which should be in the curriculum of the non-specialised schools (ENA, INET, IRA, CNFPT).

In order to achieve a rapid increase in officials’ knowledge, an effort in continuing training is probably desirable. Highly operational “modules” in the law on State aid and more generally in substantive law would be valuable. Officials of the SGAE and of the legal departments of the ministries could be used to organise training within a ministerial or inter-ministerial framework, as has been done in recent years in the field of legislative drafting.

Already mentioned, exchanges of officials between the administrative authorities of French public persons and the European institutions, in addition to the interest that this would represent in terms of the influence of the French model in Brussels, would have the advantage of allowing European culture to permeate through administrative authorities.

**Proposal 24: Facilitate dissemination of European expertise in the administrative authorities and its operation in a network:**

1) within the ministries, establish mini-centres of expertise made up of “Union” correspondents rather than large units specialised in European issues in order to promote awareness of European issues by the officials within the administrative authorities; organise them into a network coordinated by the SGG with the support of the SGAE;

*Means: decrees and organisational orders by the ministries  
(the measure could be usefully be extended, on a voluntary basis,  
to independent quangos, public enterprises and local authorities);*

*Circular of the Prime Minister*

*(Prime Minister, Ministers concerned, SGG in conjunction with the SGAE);*

2) within a ministerial and inter-ministerial framework, organise operational training in the law of State aid, in initial training in the civil service schools and in continuing training for the benefit of the administrative authorities themselves.

*Means: Government action;  
(DGAFP, network of civil service schools, ministers)*

■ *Making Union law clearer and more accessible*

Although the spread of a “European reflex” in the departments and among the officials is a precondition for the necessary ownership for consideration of Union law from the design stage of the economic actions of public persons, the concrete requirements resulting from this must also be understood by the public persons.



The problem stems first from the **particularism** of European Law, characterised by the diversity of sources (treaties, directives, regulations, implementing acts), the place taken up in it by soft law (guidelines, interpretative communications) and the burgeoning of European and national case law, which do not make understanding of this law easy. The measures adopted by the European Commission as part of its “Better Lawmaking” initiative, whose strengthening it announced on 19 May 2015<sup>351</sup>, indispensable as they are, will not fundamentally reduce this complexity inherent in European law.

It remains possible to improve **accessibility** to Union law for the administrative authorities, using resources to identify and consult the relevant information on all the rules applicable to a sector or a given question. They are currently scattered over several sites including on the internet (EUR-Lex and Légifrance)<sup>352</sup> such that a unification of the website portals and European databases would not be sufficient. As a minimum, thematic portals under the aegis of the departments concerned should be created, including a portal dedicated to State aid (moreover included in the European Regulation on exemptions by category). Handbooks would usefully complement this resource, in the same way as that developed on State aid by the Directorate of Legal Affairs of the economic and finance ministries.

**Proposal 25: Improve accessibility to European Union law by creating thematic web portals dealing with Union law and internal law questions at the same time in the main fields of economic action.**

*Means: Government action  
(ministers concerned)*

### 2.2.3. The rise of other international standards

#### *2.2.3.1. The growing influence of the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to the economic field*

Ratified in 1974 and regarding which direct appeals can be made since 1981, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) is not an economic declaration<sup>353</sup>. It has nonetheless imposed itself on the economic action of public persons through the new requirements that the European Court of Human Rights (hereinafter the ECtHR) has identified.

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351. Communication (2015) 215 *Better regulation for better results - An EU agenda* and Communication (2015) 216 *Proposal for an Inter-institutional Agreement on Better Regulation*. See also on this subject, the contribution of F. Timmermans, p. 275. below.

352. The use of links on Légifrance is not sufficient in this regard.

353. The term is included in it only once, in the expression “*economic well-being of the country*”, about cases in which interference by a public authority in private and family life may be allowed (Art. 8).

## ■ *The conventional protection of property rights*

There are few international conventions which address property rights. Even in the case of the ECHR, this right for a long time remained fairly discreet. For diplomatic reasons, it was not included in the initial text of 4 November 1950 and only appeared, moreover in a fairly roundabout way, in the 1<sup>st</sup> additional protocol to the Convention adopted on 20 March 1952.

The Court itself only stated in 1979 that this protocol “*in substance guarantees the right of property*”<sup>354</sup> and stated only in 1982 the resulting requirements<sup>355</sup> and which give it a concrete scope for economic operators<sup>356</sup>: it thus “*managed to make from this vague text of little force, a major economic provision which the Member States must necessarily take into account within a framework that is increasingly constrained by the interpretation of case law*”<sup>357</sup>.

The conventional protection of the right to property is close to that laid down by French law, particularly with regard to the distinction made between restrictions (regulations regarding the use of property) and deprivation of it. The Court however increasingly focuses less of this distinction, especially when dealing with violations which are difficult to classify in one or other category and that it then describes as a violation of the substance of the right of property within the meaning of the first paragraph of Article 1 of the First Protocol.

The case law of the ECtHR on the right of property gives it a wide scope of application, in particular through its independent and extensive approach to the concept of property within the meaning of the Convention, in which it includes all types of assets, including intangible ones, and equally “*existing possessions*” or *assets, including claims, in respect of which the applicant can argue that he has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right*”<sup>358</sup>, protection particularly valuable for companies, especially as Article 1 of the First Protocol is the only stipulation of the ECHR to expressly mention legal persons among its beneficiaries<sup>359</sup>.

This extension has practical implications for the economic action of public persons, whose freedom to overturn authorisations is affected for exercising a profession<sup>360</sup>, a tax advantage<sup>361</sup> or occupation of the public domain<sup>362</sup>, for delaying VAT repayment<sup>363</sup> or not anticipating the consequences of granting an audio-

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354. ECtHR, 13 June 1979, *Marckx v. Belgium*, app. 6833/74.

355. ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, app. 7151/75.

356. F. Sudre “The interpretative dynamism of the European Court of Human Rights”, *JCP*, G 2001, I, 335.

357. M. Lascombe, *Constitutional code and fundamental rights*, Dalloz, 2014, p. 2446.

358. ECtHR, 12 July 2001, *Prince Adam II*, app. No.42527/98; *Kopeccky v. Slovakia* of 28 September 2004, No. 44912/98.

359. See R. DUMAS, E. Garaud, “ECtHR and business law”, *F. Lefebvre* 2008, No. 1190. Article 10 nonetheless mentions “*broadcasting, television or cinema enterprises*”.

360. ECtHR, 7 July 1989, *Tre traktörer Aktiebolag v. Sweden*, No. 10873/84 ; ECHR 18 February 1991, *Fredin v. Sweden*, No. 12033/86.

361. CE, 9 May 2012, *Min of the budget v. company EPI*, No. 308996.

362. ECtHR, 29 March 2010, *Brosset-Triboulet v. France*, No. 34078/02.

363. ECtHR, 16 April 2002, *SA Dangeville v. France*, No. 36677/97.



visual authorisation in terms of the right to broadcast<sup>364</sup>. It also restricts their right to adopt retroactive measures or those with immediate application, even irrespectively of the particular issue of legislative validations<sup>365</sup>. Finally, this case law may oblige the State to ensure protection against property violations through the prevention of industrial<sup>366</sup> or natural risks<sup>367</sup>.

This right can be combined with the principle of **non-discrimination** which is more demanding than the principle of equality applicable in internal law since, in certain cases, the former requires differences of treatment<sup>368</sup>.

Questions relating to the application of the ECHR are now subject to a comprehensive examination during consideration of the draft text submitted to the Conseil d'État in the field of the economic action of public persons. For the other texts, it is the responsibility of the public persons to undertake this study and to ask that the more sensitive questions are referred to the Conseil d'État.

**Proposal 26: Allow public persons to better take into account the case law of the ECtHR when they act in the economic field by making available to them suitable information tools; refer to the Conseil d'État on questions of law that contain a particular difficulty.**

*Means: Government action; referral to the Conseil d'État (SGAE, ministers concerned, Conseil d'État)*

■ *Procedural law has a repercussion on economic repression*

Although the case law of the ECtHR in the field of procedural law is not particular to economic action, its impact in the field of economic action is high and likely to severely restrict the amount of freedom of public persons.

Adopting a broad interpretation of the scope of application of the right to a fair trial enshrined in Article 6-1 of the Convention, the Court, diverging in this respect from the position traditionally taken by the domestic court<sup>369</sup>, has applied some of

364. ECtHR, 7 June 2012, *Centro europa 7 Srl and Di Stefano v. Italy*, No. 38433/09.

365. ECtHR, 6 October 2005, *Draon v. France*, No. 1513/03; ECtHR, 14 February 2006, *Lecarpentier and others v. France* No. 67847/01; ECtHR, 9 January 2007, *Aubert and others v. France* No. 31501/03; ECtHR, 23 July 2009 *Joubert v. France*, No. 30345/05. The Constitutional Council has since made its case law converge with that of the Court (see decision No. 2013-366 QPC of 14 February 2014 and the note of the Constitutional Council of March 2014 put on line on its website, regarding the control of legislative validation).

366. ECtHR, 18 June 2002, *Moulin v. France*, No. 48939/99.

367. ECtHR, 20 March 2008, *Budayeva v. Russia*, No. 15339/02.

368. Article 14 of the Convention. The Court states that "in certain circumstances, the absence of differential treatment to correct an inequality may in itself amount to a violation of this provision" (see recalling this position: ECtHR, 16 March 2010, *Orsus and others v. Croatia*, No. 15766/03, paragraph 149).

369. See in particular CE, Assembly, 3 December 1999, *Didier*, GAJA, Dalloz, 19<sup>th</sup> ed., 2013, No. 106.

the requirements derived from this interpretation to administrative sanctioning procedures, with implications, particularly with regard to the **impartiality of regulators** with sanctioning powers. This case law, applied by the administrative and judicial courts on which it is imposed, was then taken into account by the constitutional court, thus completing the movement for the compliance of the repressive procedures of regulators, in particular as regards the separation of the functions of prosecution and judgment<sup>370</sup>.

Another example of case law involving the sanctioning power of regulators, but this time in the field of **twofold** administrative and criminal **proceedings** (principle of *non bis in idem*), the ECtHR has adopted a broad interpretation of Article 4 of Protocol No 7 annexed to the Convention that it has regarded as prohibiting this type of twofold action in the case of the Italian stock market regulator, removing to this end the reservation made by the Italian Republic when ratifying this protocol<sup>371</sup>. This decision is of interest for France, given the similar wording of its reservation of this same protocol and the opposite solution adopted by the Court of Cassation<sup>372</sup>. The Constitutional Council was first to act on the implications of this with regard to its own standards of reference, by prohibiting this twofold action in the case of insider trading offences and breaches<sup>373</sup>.

The case law of the ECtHR has also had an impact on the power of control of the administrative authorities in the economic field, by ruling that the fact that **home visits** made for tax purposes may not be challenged before the appeal court<sup>374</sup> is contrary to the requirements of the Convention, an appeal that the law now allows.

### ***2.2.3.2. The growth of other international standards involving economic action***

■ *International rules are heterogeneous in their form and their legally binding nature*

The growing influence of international economic law on the economic action of public persons is exerted through increasingly diverse instruments.

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370. See in particular on this movement: F. Brunet, "From the procedure to the trial: the sanctioning power of the independent administrative authorities", *RFDA*, 2013, No. 113.

371. ECtHR, 4 March 2014 *Grandestevens*, No. 18640/10; See in particular regarding this judgment H. Matsoupoulo, "The combination of criminal and administrative proceedings, for the same acts, does not comply with the *ne bis in idem* rule", *Revue des sociétés*, 2014, p. 675.

372. The criminal chamber of the Court of Cassation had ruled out the same challenge on the basis of the Charter of Fundamental Rights (Crim. cass., 22 January 2014, No. 12-83.579).

373. Decision No. 2014-453/454 QPC of 18 March 2015: See in particular O. Décima, *The phantom of ne bis in idem*, D. 2015 p. 874. See L. Ayrault, "Non bis in idem, the issues regarding tax", *AJ Pénal*, 2015, p. 185. This decision has led to reconsideration of the sanctioning powers of several economic regulators with regard to existing criminal sanctions. A bill, currently in preparation, is due to be submitted to Parliament for entry into force in 2016.

374. ECtHR, 21 February 2008, *Ravon and others v. France*, No. 18497/03.



**The traditional sources** of international economic law connect the States and govern their action on the economy more or less directly.

Custom or the general principles of international law occupy only a residual place in the economic field, except as regards the nationalisation of property and businesses belonging to foreign nationals<sup>375</sup>. Most legally binding rules stem from treaties, conventions or agreements, i.e. bilateral or multilateral agreements signed, ratified and legally published which have higher authority than the laws by virtue of Article 55 of the Constitution.

The requirements which result from this for the economic action of public persons differ according to whether these rules have or do not have a “direct effect”<sup>376</sup> allowing applicants to invoke them before the national court<sup>377</sup>.

Many bilateral conventions have such an effect<sup>378</sup>, in particular in the field of taxation, but as they are the most often applicable only where a foreign element is present (taxation by two States in particular), they generally do not have an effect on the action of public persons.

In the area of international trade, an area in which the European Union has its own competence, multilateral conventions rarely have a direct effect either on the internal legal system or in European law. The case law of the Court of Justice, somewhat restrictive on this direct effect, has thus limited the ability to rely on the rules of the GATT/WTO to those cases only where the European texts refer to them expressly<sup>379</sup> or where an act of secondary legislation has intended to implement a particular obligation stemming from international trade law<sup>380</sup>.

A direct effect however has been recognised to several multilateral conventions whose purpose is not primarily economic but likely to be imposed on the economic action of public persons. This is the case with regard to protection of the environment for certain stipulations of the Aarhus Convention of 25 June 1998<sup>381</sup>,

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375. The ECtHR reflects this in the right of property, as stated in Article 1 of the First Protocol: ECtHR, 8 July 1986, *Lithgow and others v. United Kingdom*, No. 9006/80.

376. CE, Assembly, 11 April 2012, *Information and support group for immigrants and Federation of associations for the promotion and integration through housing*, No. 322326.

377. In the absence of such an effect, the disregard by public persons of these texts may not give rise to litigation before the domestic court; litigation is then purely international and can then only be resolved through the channel of the international liability of the State.

378. This is not true for all the bilateral conventions, see for example with regard to the “Russian loans”, the absence of a direct effect of Articles III and V of the agreement of 27 May 1997 between the French Republic and the Russian Federation (CE, 21 February 2003, *Uran*, No. 226489).

379. ECJ, 22 June 1989, *Federation of the vegetable oil industry of the EEC (FEDIOL) v. Commission*, C-70/87.

380. ECJ, 7 May 1991, *Nakajima v. Council*, C-69/89.

381. The direct effect of this convention on access to information, public participation in decision-making and access to justice in environmental matters signed in Aarhus on 25 June 1998 has been recognised with regard to paragraph 9 of Article 6 (CE, Assembly, 12 April 2013, *Interregional stop HV overhead lines association and others*, No. 342409), as well as paragraphs 2, 3 and 7 (CE, 6 June 2007, *Municipality of Grosly and others*, No. 292942).

or with regard to workers' rights<sup>382</sup> for the stipulations of the conventions of the International Labour Organization (ILO) invoked by example in challenges against laws organising the opening of certain shops on Sundays<sup>383</sup>.

The **new sources** of international economic law, stemming in particular from consultative bodies (see 1.2.2.2. above) apply only very indirectly to public persons acting in the internal legal system. The economic importance of the positions that are adopted in them indeed contrast with their lack of legal effect in domestic law. This is particularly true of the decisions taken by bodies of a political nature or at regular major international summits such as the "G20" and the positions taken by technical organisations, as for example the recommendations of the Financial Action Task Force on Money Laundering (FATF), an intergovernmental coordination body, whose acts do not have the force of an international convention<sup>384</sup>. A lack of knowledge of these rules affects the word and credibility of the State's action, but it has no legal scope.

It is however a different matter when these decisions or recommendations are "incorporated" into formal multilateral (such as the conventions based on the positions of the OECD) or bilateral instruments<sup>385</sup>. This incorporation also comes about frequently through the secondary legislation of the European Union which sets out international standards for all the Member States as it did recently for the IFRS standards<sup>386</sup> or the Banking Regulation (Basel III)<sup>387</sup>.

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382. See also in the social field, certain rights of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, have been recognised as having a direct effect by the Court of Cassation (see for the Art. 6-1: Cass. soc, 16 December, 2008, 05-40.876; 14 April 2010, 08-45.247). The Conseil d'État has not adopted the direct effect of Articles 2, 9 and 10 (CE, Assembly 5 March 1999, *Rouquette and others*, No. 194658; 196116) nor Article 12 (CE, 26 Sept. 2005, "*Collective against disability phobia*" association, No. 248357)

383. See on this point, the invocation of Articles 6 and 7 of Convention No. 106 of the ILO (CE, 2 December 2011, *CFTC and others*, No. 333472; CE, 13 February 2013, *Fed. of employees and executives of the CGT FO and others*, No. 335640; Ord. 10 April 2014, *Fed CGT of personnel of shops, distribution, services and others*, No. 376266, 376412.

384. CE, 23 July 2010, *M. Patrick A.*, No. 309993.

385. Like the multilateral instrument implemented at the initiative of the OECD on the automatic exchange of banking data in the course of ratification by France, or that being negotiated relating to the taxation of multinational companies. These standards can also be set out in domestic law without an international instrument acting as intermediary. States wishing to allow their companies to compete with international operators in other markets (and avoid them having to deal with several standards simultaneously) must take ownership of these standards and organise them within a strictly national context.

386. Regulation (EC) No. 1126/2008 of the Commission of 3 November 2008 concerning the adoption of certain international accounting standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and of the Council.

387. The legislative package, the so-called "CRD IV" that entered into force on 1 January 2014 includes a regulation (RRC) and a directive (CRD IV) which replace the previous "own funds" directives (2006/48 and 2006/49).





The *de facto* obligation to comply with these standards thus tends to be transformed into a legal necessity.

■ *Standards that it is very important to identify and reconcile*

**The multiplication of instruments, agreements or treaties** means that public persons must deal with a voluminous quantity of texts of different origins, whose application is often very broad and cuts across different areas, which may have an impact on their economic action.

However although the Ministry of Foreign Affairs makes a very useful database available to the public<sup>388</sup>, there is no reliable and exhaustive inventory of the stipulations regarded as having a direct effect that is accessible to the various administrative authorities.

This multiplication of sources also increases the risk of a conflict of international legal rules which makes their necessary conciliation difficult.

Where a conciliation is possible between two conventions with direct effect<sup>389</sup>, concurrent application of these texts is required. But where there is clear incompatibility that presupposes a choice by the public actor, this choice may be challenged before the court since the decision handed down in 2011 by the Conseil d'État in the case of *Kandyrine de Brito Paiva*, which lays down in this regard, a general framework for all conflicts of legal rules not related to the law of the European Union<sup>390</sup>.

Where it does not appear possible either to ensure conciliation of the stipulations between each other or to determine which of them must be disregarded in the particular case, the administrative judge applies the international legal rule in the field of which the challenged administrative decision intended to position itself and for whose application this decision was made and, therefore, rules out the ground of its incompatibility with the other international legal rule invoked<sup>391</sup>.

This solution leaves quite a large amount of freedom to public persons, but results in them demonstrating particular attention in formalising their decisions, to ensure their internal coherence. Where a decision may involve different international rules that are incompatible between each other, the public person must take care to present it as implementing the standard that it wishes to apply.

The *Kandyrine de Brito Paiva* decision rules however that the choice made by the public person is such as to involve its international liability due to the disregard of the convention that has decided not to apply.

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388. "PACTE" database: <http://basedoc.diplomatie.gouv.fr>.

389. For the others, the question can only be diplomatic, it then forms part of choices that cannot be separated from the conduct of diplomatic relations.

390. CE, Assembly, 23 December 2011, No. 303678.

391. These rules are applicable, however, only when the two conventions invoked by the applicant are in fact applicable to it (CE, 11 April 2014, *M. G.*, No. 362237).



**Proposal 27: Secure the economic action of public persons by taking better account of the international treaties**

1) by constituting under the aegis of the Ministry of Foreign Affairs, for public persons, a database identifying the stipulations of treaties and international agreements regarding by the case law as having a direct effect and stressing those which have an interest in the economic field;

*Means: Government action  
(Minister of Foreign Affairs)*

2) by recalling to the administrative authorities, in the event of several treaties applicable to the same question, that they must ensure that they place themselves clearly within the scope of the treaty that they intend to refer to, in order to secure their decisions and by inviting the other public persons (independent quangos, local authorities, etc.) to do likewise.

*Means: action by the public persons concerned  
(SGG, ministers and other authorities concerned)*

## 2.3. A block of legality favourable to economic action of public persons subject to a thorough judicial review

In its general inspiration, the block of legality is in line with the constitutional requirements by showing itself largely in favour of the principle of the economic action of public persons (2.3.1). The main subject of concern is the mushrooming of applicable texts, their coordination and their often uncertain scope (2.3.2) and especially the increasingly intense jurisdictional control over public economic action (2.3.3).

### 2.3.1. Action long considered legitimate by case law

#### 2.3.1.1. The admissibility in principle of public economic initiatives

##### ■ Oversight of private economic activities

Regulation of economic activities first finds its legal basis in the **administrative police**, i.e. the ability and even the obligation for public persons to act even without a text to ensure public order in its different forms. Besides conventional breaches of public order, the idea has gradually been affirmed of a “public economic order”.



The intrinsic legality of economic regulations at the local level as at the national level is therefore accepted by the judge even in the absence of approval by the legislator for this purpose<sup>392</sup>.

This classic case law is certainly applied increasingly **rarely**, given the very large number of texts of a legislative level having specifically as their purpose to supervise economic activity and to confer on the administrative authority the means to enforce the regulations. Most economic areas are in fact today covered by special legislation, which takes the form of either special economic policing carried out by classic administrative authorities, or economic regulations which are materially very close to them but whose implementation is entrusted to independent quangos.

The admissibility of the principle of economic regulation nevertheless retains all its scope and relevance when the national administrative authorities or local authorities wish to regulate private initiative outside the hypothetical cases envisaged by the law<sup>393</sup>.

#### ■ *The conduct of their own economic activities*

Although public persons in domestic law<sup>394</sup> have never had an acknowledgement of their entrepreneurial freedom, the freedom to become involved in trade and industry<sup>395</sup> or the freedom to compete freely with private initiative<sup>396</sup>, the courts very early on recognised that they were able themselves to carry out activities of an economic nature.

The *Order of barristers at the Paris bar* case law<sup>397</sup> however clearly distinguishes the economic activities of public persons on the one hand from public service activities on the other hand<sup>398</sup>.

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392. Moreover, on the fringe of the police power, it has been accepted that the regulatory power can regulate certain professions that are moreover subject to a legislative framework as part of the “theory of the state of previous legislation” (See in particular CE, Assembly, 7 July 2004, *Min. of the Interior v. Benkerrou*, No. 255136).

393. See O. Renaudie “What remains of the general policing power of the government in economic matters?”, symposium *The economic constitution of the State, The constitutional economic order*, 1958-2008 prev.

394. This is clearly distinguished from this point of view from European Law, which on the contrary allows such freedom but on the condition that the public persons are subject to the same rules as the private economic actors.

395. D. Truchet, “Do public persons, in French law, have entrepreneurial freedom?”, *D.aff.*, 1996, art. p. 731.

396. G. Clamour, “Regarding law applicable to the economic actions of public persons,” *Revue Lamy de la concurrence*, 2006, No. 9, p. 46.

397. CE, Assembly, 31 May 2006, *Order of barristers at the Paris bar*, No. 275531. See on this point: M. Bazex, “The distinction between economic activity and non-commercial activity before the Conseil d’État”, *Droit administratif*, No. 8, August 2006, comm. 129.; Cl. Landais, F. Lenica, “The economic intervention of public authorities: a guide”, *AJDA*, 2006, p. 1592; see M. Lombard, “80 years after the *Retailers’ Association of Nevers* judgment, pavane pour une infante défunte”, *RJEP*, February 2011, No. 683.

398. The distinction is not without precedent (see in particular Opinion No. 369315 of the Conseil d’État of 23 October 2003 regarding the Jean Moulin Foundation) and is not unconnected from the distinctions arising out of European case law: ECJ, 19 January 1994, *SAT Fluggesellschaft Mbh v. Eurocontrol*, C-364/92; see on these issues, F. Tesson, “The French concept of economic activity of public persons”, *AJDA*, 9 September 2013, p. 1675.

Public persons who carry out activities that are equivalent to those that private persons can carry out, undertake a purely private management activity<sup>399</sup>. Although the question of their legal regime and jurisdictional competence to hear cases regarding them has focused most of the attention, that of their lawfulness in principle has never been placed in doubt.

Purely public service activities are, on the contrary, in principle, extraneous to any economic logic. These are non-market activities, even though they may have an economic component<sup>400</sup>. It is in this category that the legal advice activities for public persons of the public-private partnerships support mission (*Order of barristers at the Paris bar* already cited) or the putting legal information online on the Légifrance website have been classified.

Between these two legally pure cases, public persons can carry out real economic activities even though they have the characteristics of a public service. There is not in fact any incompatibility between public services and economic activity<sup>401</sup>.

Public persons can first carry out an economic activity, building it into a real public service, as the court also accepted very early on. By theorising industrial and commercial public service (SPIC), this opened the way to carrying out economic activities, regarded as being of general interest and needing to be organised by the public person, but that could be broadly privately managed (TC, January 22, 1921, *Société commerciale de l'Ouest africain*). The court then laid down the law applicable to this management (private law personnel, ordinary law contracts with third parties). These services still have a very important place today, but their classification given the distinction recalled above is not easy.

Alongside these known categories, many economic activities are carried out by public persons under regimes that are closer to administrative management, i.e. even outside the SPIC's category, which has led some commentators to suggest the concept of "economic public service" which would, in particular, cover the activities of certain committees and professional bodies<sup>402</sup>.

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399. The existence of these activities and their difference with activities which by the nature of their missions and the specific processes of the administrative authorities has contributed to building the scope of administrative law; see GAJA comment under *Bac d'Eloka*, No. 36, *Dalloz*, 19<sup>th</sup> ed. 2013, No. 36.

400. These activities are similar to public administrative services, generally regarded as not constituting an economic activity within the meaning of Article L. 410-1 of the Commercial Code (see in particular Competition Council, Opinion, 10 July 2008, No. 08A13 BOCC 10 October 2008).

401. See N. Boulouis's conclusions under CE, 3 March 2010, *Dépt. de la Corrèze*, No. 306911, and J.-J. Israel, "Is judicial activity an economic activity?", *AJDA*, 5 May 2008, p. 911.

402. D. Linotte, R. Romi, *Public services and public economic law*, Litec, 5<sup>th</sup> ed., 2013 quoting M. de Corail, "The administrative judge and the qualification of interventions of the State in the area of the economy," *Mél. Eisenmann*, Cujas, 1975, p.314.



### 2.3.1.2. *The vigilant admission of interference made to private initiatives*

The economic action of public persons is exercised within the limits laid down by the court, resulting primarily from the freedom of commerce and industry. This freedom has no constitutional value<sup>403</sup>. It was deduced from the Allarde Decree of 2 and 17 March 1791 before becoming an autonomous principle<sup>404</sup>.

The court thus ensures the balance between public and private initiatives, on the one hand by ensuring that the economic activities of its own public persons do not interfere with private initiative and, on the other hand, checking that the regulations produced by the public person do not interfere excessively with the freedom of commerce and industry.

#### ■ *The conditional legality of the economic activities of public persons*

Case law has little by little become more **flexible** as regards the possibility for public persons to compete with private initiative<sup>405</sup>. Initially, very strict at the time of municipal socialism at the beginning of the 20<sup>th</sup> century, where public interventions were only allowed in “*exceptional*” circumstances<sup>406</sup>, it subsequently admitted interventions in “*particular*” circumstances<sup>407</sup>, relating to the existence of a local public interest and to a shortfall in private initiative.

Firstly, assessed in a purely quantitative way, the shortfall in private initiative could then be assessed qualitatively and result for example from a lack of supply at acceptable conditions (price in particular)<sup>408</sup>. This change was completed with the suppression of the condition of the shortfall of private initiative, which is now simply one of the possible indications of the existence of a public interest such as to justify the economic activities of public persons<sup>409</sup>.

At the same time, case law has enshrined several **specific cases** in which the public person was able to compete with private operators without disregarding the principle of freedom of commerce and industry.

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403. Even if an act has strangely asserted the contrary (Art. 1 of Act No. 2007-1224 of 21 August 2007 on social dialogue of the continuity of public service in terrestrial passenger transport) and although the principle appeared once in a decision of the Constitutional Council (Decision No. 2003-474 DC of 17 July 2003).

404. CE, Assembly, 22 June 1951, *Daudignac*, GAJA, No. 64, D. 19<sup>th</sup> ed., 2013. It is a public freedom within the meaning of Article 34 of the Constitution: CE, Sect., 28 October 1960, *Martial de Laboulaye*, rec. 570. It must not to be confused with freedom of competition, which coexists with it (See case law *Order of barristers at the Paris bar*, already cited).

405. J.-Ph. Kovar, “What is the situation of the freedom of commerce and industry?”, *Droit administratif*, No. 12, December 2007.

406. CE, Assembly, 29 March 1901, *Casanova*, GAJA, No. 8, D. 19<sup>th</sup> ed., 2013.

407. CE, sect., 30 May 1930, *Retailers’ Association of Nevers*, GAJA No. 42, D. 19<sup>th</sup> ed. 2013.

408. CE, Sect., 20 November 1964, *City of Nanterre*, No. 57435; see on this point, the “potestative” nature of this condition (i.e. that it is held by the party on whom the obligation falls), the comment by J.-Y. Chérot, *Droit public économique*, 2007, No. 628.

409. CE, Assembly, 31 May 2006, *Order of barristers at the Paris bar*, No. 275531, already cited.

This is firstly the case when the activity is organised to serve the needs of the public community itself<sup>410</sup>, the public person thus remaining “master of the scope of the market”<sup>411</sup>. It has also been admitted that public persons could extend an existing service<sup>412</sup>.

These issues are still highly topical, as shown in the *Armor SNC* decision which admitted that a public authority is allowed to tender for a contract put out to tender by another one, even if the Conseil d’État placed itself within the strict scope of the jurisdiction of the local authority and not within that of the freedom of commerce and industry<sup>413</sup>.

■ *The conditional legality of the restrictions imposed by the public power on private economic activities*

The administrative judge also applies the principle of **freedom of commerce and industry** to limit the interference made by the public person to private initiative, not by competing with it, but by overseeing its exercise, in particular by economic policing regulations<sup>414</sup>.

It is in particular for this purpose that it outlaws general and absolute prohibitions, as well as subordinating the exercise of a profession to prior authorisation. The freedom of commerce and industry here is an extension of entrepreneurial freedom.

Any restrictions must to be lawful, moreover, observe all the **other general principles** of law.

This is true in particular for the principle of equality. As in constitutional matters, this principle is often invoked regarding the economic action of public persons, but with a less marked success for the applicants, in particular due to the fact that the issues of the scope of application of the measures are more rarely dealt with at the regulatory level. If there is a problem, its source is generally found in the law.

Finally, the principle of non-retroactivity of regulatory acts<sup>415</sup> and equally the principle of legal security<sup>416</sup> play an important role in the field of economic action<sup>417</sup>.

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410. CE, Assembly, 26 October 2011, *Association for the promotion of the image*, No. 317827 extending the CE case law, 20 November 1970, *Company Unipain*, No. 77935.

411. See A. See, comm. under the decision *Association for the promotion of the image* already cited. *Concurrences*, No. 01-2012, p. 222-223.

412. Likewise when it involves an addition to an existing public service, see in particular CE, 4 July 1973, *Association of broadcasting companies*, No.82456; see however, with regard to the extensions of the SPIC, CE, 23 May 2003, *Community of Municipalities Artois-Lys*, No. 249995.

413. CE, Assembly, 30 December 2014, *Company Armor SNC*, No. 355563.

414. CE, Assembly, 22 June 1951, *Daudignac*, already cited. See M. Lombard, “To what extent is it still useful to refer to the freedom of commerce and industry?”, *RJEP*, No. 690, October 2011.

415. CE, 25 June 1948, *Aurore Newspaper*, GAJA, No. 60, 11<sup>th</sup> ed. 2011.

416. CE, 24 March 2006, *Company KPMG*, No. 288460, GAJA, Dalloz, 19<sup>th</sup> ed. 2013, No. 111.

417. See J.-M. Sauvé, “The company and legal security”, contribution at the symposium organised by the Society of Comparative Legislation at the Conseil d’État, 21 November 2014.



Although all these rules are clearly set out in the case law, public persons may find it difficult to precisely measure their implications in conducting their economic action. Documentary resources could be developed for this purpose. It is one of the purposes of the guide, prepared within the context of this report. For the most difficult questions, a consultation of the Conseil d'État is also possible.

**Proposal 28: Allow public persons to take better account of administrative case law, particularly with regard to respect for the freedom of commerce and industry when they act in the economic field:**

- 1) by making available to them suitable information tools (see in particular the guide referred to in proposal 50);
- 2) by referring to the Conseil d'État questions which present a particular difficulty.

*Means: Government action; referral to the Conseil d'État (ministers concerned, Conseil d'État)*

### **2.3.2. Action overseen by a profusion of texts of a highly diverse nature, scope and linkage**

#### ***2.3.2.1. A scattering of texts specifically applicable to the economic action of public persons***

■ *A large and fragmented body of general texts*

Some of the general texts that govern the economic action of public persons have been codified: the Public Contracts Code (destined to become a Public Procurement Code incorporating other forms of contracts), the General Code of the Property of Public Persons, the Urban Planning Code, the Public Financial Accounts Code, the Penal Code (the criminalisation of certain behaviour of public officials in economic matters, such as the illegal taking of an interest or favouritism), the General Code of Local Authorities (overseeing of aid to enterprises).

None of these codes deals specifically with the economic action of public persons. This issue is addressed from the angle, either of public persons (General Code of Local Authorities), or types of action (General Code of the Property of Public Persons), or jurisdictions (Penal Code, Public Financial Accounts Code). The structure of these codes does not clearly identify the link with economic action<sup>418</sup>.

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418. Although the General Code of Local Authorities contains provisions organised under "economic interventions" or "economic development" headings, they do not include all the rules relating to this action, in particular those relating to the policing of the markets. As regards the other codes, the link with economic action is not taken into account either. It is either diffuse in the body of the texts (Public Contracts Code), or it constitutes only a possible use of mechanisms of a more general scope (General Code of the Property of Public Persons).

These provisions are not uniform and they include highly variable requirements for the action of public persons. The Public Contracts Code lays down many basic rules and especially of procedures, which moreover give rise to many disputes. Overseeing the economic interventions of the territorial authorities is much more limited, with them remaining in charge of the actual arrangements by which they carry out their economic action.

These codes however do not contain not all the material and **other general provisions** applicable to the economic action of public persons are not codified.

This is for example the case for the granting of subsidies (Art. 9-1 and following of Act No. 2000-321 of 12 April 2000), for the governance of Public Industrial and Commercial Establishments (Act of No. 83-675 of 26 July 1983) or for partnership contracts (Order No. 2004-559 of 17 June 2004).

This scattering may lead to problems. Although a Code of the Economic Action of Public Persons would not have any significant added value as compared to the existing codes<sup>419</sup>, a minimum grouping of the autonomous provisions would be appropriate, in the same way as the approach adopted for the rules of corporate governance and public equity holdings, which in a single text, Order No. 2014-948 of 20 August 2014, has consolidated very many provisions up to then scattered around. Making a collection of these texts would moreover strengthen their accessibility.

■ *Many sectoral texts that are poorly coordinated*

The largely **sectoral** approach to economic regulation has led to the adoption of a large number of “silo” texts stemming from the law of the Union, so that it is not possible to effectively address this fragmentation through a purely national initiative. But this approach and its consequences also affect other policies not covered by economic regulation of European origin, such as housing for example.

This situation encourages **duplication between sectors** and contributes to the lack of clarity of *corpora* designed independently of each other and which are poorly coordinated. This is particularly the case of “neighbouring” sectors such as banking and stock markets or those relating to the audio-visual and electronic communications sectors.

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419. None of the foreign countries studied has developed a code of the economic action of public persons. The texts governing these questions remain, as in France, highly fragmented. In some countries, some texts, although not constituting real codes, are references of a fairly general scope for the economic action of public persons, as for example, in Poland, the Act on the Freedom of Economic Activities of 2 July 2004 (last amended in January 2015) or, in Argentina, the so-called Financial Administration a System of Control of the Public Sector (*Ley* 24.156) and the General Law of the National Budget (*Ley* 28.411).



In addition, **intersectoral** regulation, especially in the area of competition and consumption, interferes with sectoral regulations, as illustrated in the example of the division of the roles between the DGCCRF (General Directorate of Competition, Consumption and Fraud Control) and the ARCEP (Regulatory Authority of Electronic and Postal Communications) regarding consumer protection<sup>420</sup>.

### ***2.3.2.2. The recurring question of the application of ordinary economic law to the action of public persons***

#### ■ *The application of competition law to public persons*

The subject of abundant case law<sup>421</sup>, the application of competition law to public persons cannot be challenged in principle: Article 53 of **Ordinance of 1 December 1986** relating to the freedom of prices and competition stated that it was applicable to “*all activities of production, distribution and services, including those which are the result of public persons*”.

Competition law applies to public persons acting as real **operators** as was ruled in 1996<sup>422</sup>, as well as in the context of public procurement since the *Millon and Marais* judgment of 1997<sup>423</sup>. This solution also applies in the area of policing regulations<sup>424</sup>.

The *Order of barristers at the Paris bar* decision confirms that the freedom of commerce and industry and free competition are complementary. The first relates to the principle of intervention and the second to its terms<sup>425</sup>. Since then, the court has **empowered** the foundations of the application of these rules by forming a principle of “free competition” independent of its textual sources<sup>426</sup>.

#### ■ *The application of the other provisions of ordinary economic law*

More generally, the economic activities carried out by public persons that are akin to those of private operators are most often governed by ordinary law. It is also more and more widely recognised that when they regulate an activity or intervene through unilateral acts, it is their responsibility to comply with the rules which govern the activities in question<sup>427</sup>.

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420. For example, regarding the interpretation of Article L. 3233-1 of the Postal and Electronic Communications Code.

421. See in particular on this *Public authorities and competition*, EDCE, 2002, No. 53, p. 253s.

422. CE, Sect., 8 November 1996, *FFSA*, No. 122644; CJEG, 1997, p. 232, Concl. Bonichot; *AJDA*, 1997, p. 142, Chr. D. Chauvaux and T.-X. Girardot.

423. Sect., 3 November 1997, No. 01169907.

424. CE, Sect., appeal opinion, 22 November 2000, *Company L. et P. publicité*, No.223645; CE, 15 May 2009, *Company Cie des bateaux mouches*, No. 311082.

425. See the D. Casas conclusions, under the decision *Order of barristers at the Paris bar*, already cited.

426. CE, 21 May 2008, *Société Nouvelle de Remorquage du Havre (SNRH) and Société de Remorquage Maritime de Rouen*, No. 291115.

427. In line with the *Company Lambda* case law: CE, 6 December 1996, GAJA, Dalloz, 19<sup>th</sup> ed., 2013, No. 97.



Some cases are **explicitly governed** by the texts<sup>428</sup>. In company law, the aforementioned Ordinance of 20 August 2014 explicitly settles most of the issues of the coordination between the provisions of the Commercial Code and the specific situation of the equity holding State. In banking law, loans and repayable advances as well as sureties are credit operations that are part of the bank monopoly but the Monetary and Financial Code explicitly provides that it does not apply to certain public persons<sup>429</sup>.

In other cases, **case law** has clarified the cases of applicability of the ordinary law to the public persons. Thus the application of consumer law to public persons has been recognised when they act as professionals<sup>430</sup> but not when they act, like consumers, in the context of a public procurement contract<sup>431</sup>. More generally, consumer law imposes on public persons all the acts that they enact<sup>432</sup>. In stock market law, the fate of the public shareholder in the event of a mandatory repurchase must follow ordinary law<sup>433</sup>.

A more systematic adoption of express provisions regarding the conditions under which the law or the regulation applies to public persons would help strengthen legal security, including for the benefit of private operators which are linked to public persons carrying out an economic activity.

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428. A study of the experience in other countries confirms the broad application of ordinary business law and in particular, competition law to public persons, with more or less significant accommodations. In the United States, in 1943, in a *Parker v. Brown* ruling, the Supreme Court created the *State-action exemption*, a principle according to which a state law may contravene federal competition laws, provided the law in question is adopted as part of a clear state policy, and that the State actively controls the anti-competitive regime. In Poland, the principle consists of the application of ordinary law to public persons, in particular with regard to its public enterprises. In Israel, the principle consists of the application of competition law to public enterprises if they act as economic operators (legislation of 1988). In Singapore, the public person may only intervene in the economic sphere if there is a marked public interest presence (resulting in particular from the absence of private initiative) and within the framework of the rules laid down by the *Competition Act* signed in 2006.

429. Art. L. 511-6 and L. 518-1 of the Monetary and Financial Code.

430. CE, 11 July 2001, *Société des eaux du nord*, No. 221458.

431. CE, 23 February 2005, *Association pour la transparence et la moralité des marchés publics*, No. 264712.

432. See for example, for an application following a decision of the telecommunications regulatory authority, rules applicable regarding unsolicited sales: CE, 15 October 2003, *ADEIC et a.*, No. 240645.

433. CE, 4 July 2012, *Département de Saône et Loire*, No. 356168; Cass. Com., 21 January 2014, No. 12-29475; see A. Delion, *The powers of the AMF, public repurchase offers and public holdings*, 1 April, 2014, p. 229.



**Proposal 29: Clarify and make more accessible, laws and regulations in the field of the economic action of public persons:**

1) by consolidating the applicable non-codified legislation and regulations relating to the economic action of public persons in a limited number of texts;

*Means: law and regulations concerned  
(SGG, High Commission of Codification, ministers concerned)*

2) by monitoring cases of overlapping jurisdiction between economic regulations in order that the legislative or regulatory provisions necessary to rectify them are prepared by the services concerned;

*Means: activity reports of the regulators; five-year evaluation of the regulated sectors (see below Part 3, proposal 47)  
(SGG, regulators, ministers concerned)*

3) by specifying in the ordinary law texts that may concern public persons, the provisions which actually apply to them, particularly in the area of competition law.

*Means: law and regulations concerned  
(SGG, Ministers of the Economy, Finance and Justice)*

### **2.3.3. A situation increasingly open to judicial review**

#### ***2.3.3.1. Economic action increasingly challenged in the courts***

■ *Varied and scattered litigation*

The economic action of public persons generates substantial number of challenges which are now growing. They are highly varied and affect all the areas in which this action is carried out.

Challenges to the economic action of public persons relate first to the legality of decisions taken in this context: economic regulations and the decisions taken on their basis as well as the penalties to which they may give rise, whether they are taken by the conventional administrative authorities, the regulatory authorities or the organisations formed to “carry out” their action (private or public groupings); the financial assistance that they grant, in whatever form (grants, sureties, loans and advances); the contracts that they award, in particular in the context of public service contracts or public service delegations, the management of their field, etc.

Cases involving liability resulting from this action are no less abundant and can be initiated in the absence of any question of legality (liability resulting from laws and legal administrative decisions in particular for unequal treatment before public burdens).

Because of the place of private law in the rules applicable to public persons acting in economic matters, this action is not reserved to the administrative court. The



legislator has moreover entrusted certain actions, in particular in the regulated sectors, to the judicial court and in particular to the Court of Appeal of Paris, by endeavouring to form blocks of competence, whose relevance should be periodically reviewed. Over the course of the litigation proceedings, particular situations may indeed arise that were not considered by the legislator when it defined these blocks of competence<sup>434</sup>.

Within each branch of law, contentious jurisdiction is not unified either, due to the diversity of public persons involved and their different types of actions: actions regarding the acts of the sectoral regulatory authorities are the responsibility of the Conseil d'État in the first and last instance, except as regards their indemnity component which falls in the first instance to the administrative courts, as well as for example contracts and contracted-out services and local authority aid.

■ *Litigation that is increasingly attractive for companies*

The reasons for the strong momentum of litigation with respect to public economic action are in part subjective: the impact of the successes obtained against the administrative authorities in a few symbolic affairs; the role of the economic crisis in the lower acceptability of public decisions that affect the interests of companies or which do not grant them a contract or an advantage; the strategic use of court appeals against competitors.

But one must see in this especially the effects of the increasing efficiency of the economic action judge.

Legal channels providing fast responses have long since been available before the judicial court in relation to the economic action of public persons (such as the referral to the Court of Appeal of Paris). The Administrative Courts have in turn developed this type of procedure with the reform effected by Act No. 2000-597 of 30 June 2000 relating to the procedures for administrative referrals. Companies have widely used the new interim suspension procedures<sup>435</sup>, the useful measures referral and even the freedom referral, since the freedom of commerce and industry has been recognised as a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice<sup>436</sup>. This is also true for specific emergency procedures such as the pre-contractual referral with regard to public procurement and the contracting-out of public services.

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434. For example, direct appeals exercised against the decisions of the general rapporteur of the Competition Authority refusing the protection of business secrecy or granting the lifting of this secret have been considered "*in the absence of an express legislative provision assigning the challenge to the judicial court*" as falling within the remit of the administrative court (CE, 10 October 2014, *Syndicat national des fabricants d'isolants en laines minérales manufacturées*, No. 367807).

435. See for example, for a case where the condition of urgency has been regarded as having been satisfied given the particularities of the sector in question, due in particular to its rapid growth and its highly competitive nature (So-called "Mini Cab" Decree) Ordinance of 5 February 2014, *SAS Allocab*, Nos. 374524, 374554.

436. CE, JR, 8 June 2005, *Municipality of Houilles*, No. 281084.



The judge also has more effective weapons. The texts have recognized in particular that the administrative court has a new power of injunction and penalty that allows it to exercise real pressure on public persons (L. 911-1, L. 911-2 and L. 911-4 of the Code of Administrative Justice). Case law has opened the way to a change in the effects of judicial decisions which allows for a more targeted and suitable response to the specificities of economic requests (including the need for legal stability of the actors): deferred cancellation over time and other original mechanisms, such as the “*if the court prefers*”<sup>437</sup>; the growth of full jurisdiction which allows the decision to be reversed, in particular in relation to the action of regulatory authorities (penalties, but also the settlement of disputes between operators, etc.); admissibility of the principle, in the context of excess of power, of the severability of authorisation subject to conditions<sup>438</sup>...

Finally the judge, despite the technical nature of these proceedings, no longer hesitates to exercise full control over the technical choices of the administrative authority, as regards competition or in the audio-visual sector for example. In these disputes, the court no longer only has to assess the legality of a decision according to its immediate effects, but to take account of its potential economic effects, thereby including in its assessments of these cases an increasingly important place to economic analysis<sup>439</sup>.

■ *Proceedings which lead to a rethinking of the role and the resources of the judge*

Increasingly an actor in the process, the judge must ultimately decide on the relevance of economic action, becoming in some way a kind of final regulator. The profession of judge of the economic action of public persons is thus constantly evolving, forcing him to review his investigatory and decision-making methods.

The various instruments at his disposal to carry out his investigations in complex cases are widely used in economic matters, such as the use of expert reports<sup>440</sup> and more original procedures such as “the investigation at the bar” or on the spot<sup>441</sup>, “*Amicus curiae*”, a method introduced in 2010<sup>442</sup>, or “the technical opinion”<sup>443</sup>, introduced at the same time, and of which one of the first

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437. A mechanism whereby the public person can either repair in kind by rectifying the disruption that it has caused, or provide compensation in money.

438. CE, Assembly, 23 December 2013, *Company Métropole Télévision*, No. 363978.

439. See in particular, on these two aspects, regarding the control of injunctions ordered by the Competition Authority in the context of a concentration authorisation, CE, Assembly, 21 December 2012, *Company Groupe Canal Plus and others*, No. 362347.

440. Art. R. 621-1 and following of the Code of Administrative Justice.

441. Art. R. 623-1 of the Code of Administrative Justice; a procedure which has been notably used in the telephone enquiries market: CE, Sect., 25 June 2004, *Company Scoot France; Company Fonecta*, Nos. 249300, 249722.

442. Art. R. 625-3 of the Code of Administrative Justice stemming from Article 46 of Decree No. 2010-164 of 22 February 2010.

443. Art. R. 625-2 of the Code of Administrative Justice:

implemented concerned the electricity market<sup>444</sup>. The texts organise moreover the possibility for the courts to consult the economic regulation authorities in certain areas<sup>445</sup>.

The technicality of the economic questions may impede investigation of the case by the judge, in particular in excess of power litigation where the public persons are reluctant to communicate to him their technical arguments. Business secrecy is an even greater barrier for the public economic action judge, when he must compare the merits of various projects or different situations of companies in dispute without having information which, covered by business secrecy, cannot be disclosed to the other party, unlike what is authorised by the law, within the limit of the respect of the rights of the defence, for the regulators themselves<sup>446</sup>.

The place of competitive analysis (definition of the relevant market, identification of a dominant position, the anti-competitive effects of a measure or distortions that can arise from a status or benefits given to a public operator) and that of accounting, budgetary or financial techniques in the cases that are submitted to him, finally results in the judge ruling in areas where he has not necessarily benefited from *ad hoc* training. Since not all the judges are faced with these questions and since these subjects moreover are evolving all the time, a strengthening of initial training would probably be less relevant than a targeted effort for the continuous training of those judges who have to deal with them.

The very technicality of these questions and the breadth of what is at stake would even be a good argument for a specialisation of the judges, which has already started within the judicial courts: thus the Court of Appeal of Paris is mainly competent with regard to economic regulation cases. Specialisation<sup>447</sup> within the administrative courts is more limited<sup>448</sup>, although some of them have special competencies in economic matters: the Conseil d'État with regard to the control of concentrations<sup>449</sup>, such as the Administrative Court of Appeal of Paris to hear decisions of the CSA (Audiovisual Council) regarding the broadcasting of local radio and television services<sup>450</sup>. The existing mechanism could be supplemented by the creation within some jurisdictions of "specialised centres" for the more technical cases accompanied, if need be, by specific training for the judges who are assigned to them.

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444. CE, 28 March 2012, *Company Direct Énergie and others*, No. 330548.

445. See in particular Art. L. 462-3 of the Commercial Code relating to the referral for an opinion of the Competition authority by the courts.

446. See about the Competition council and then the Competition authority, CE, 13 February 2006, *Company Fiducial informatique and Company Fiducial expertisee*, No. 279180; CE, Assembly 21 December 2012, *Company groupe Canal plus and others*, No. 362347.

447. Conversely, non-specialisation may be used for economic cases that do not raise specific technical issues, as is the case of appeals against the decisions of the National commission of commercial development: Art. R. 311-3 of the Code of Administrative Justice stemming from Decree No. 2013-730 of 13 August 2013.

448. See nevertheless, at the Conseil d'État, the specialisation of certain sub-sections of the litigation section of the Conseil d'État with regard to tax matters.

449. 7 of Article R. 772-1 of the Code of Administrative Justice.

450. 2 of Article R. 772-2 of the Code of Administrative Justice stemming from the Decree of 13 August 2013.



**Proposal 30: Make litigation more efficient with regard to the economic action of public persons by reassessing:**

- 1) the relevance of the existing blocks of jurisdictional competence in the field of litigation regarding the economic action of public persons;
- 2) The consequences of the development of economic litigation on the office of the judges and, in particular, investigatory powers, the handling of urgencies, the possible accommodations for protecting business secrecy and the constitution of specialised centres.

*Means: study requested by the Government*

### ***2.3.3.2. The force of attraction of other types of dispute resolution***

#### ■ *The increasing importance of the disciplinary or criminal courts*

The economic action of public persons imposes on the public officials who exercise it, a non-negligible risk of disciplinary or criminal proceedings.

A specific and original law enforcement mechanism was established in 1948, with the creation of the **Court of Budgetary and Financial Discipline** (CDBF), competent to judge breaches committed by authorising officers<sup>451</sup> and whose procedure has recently been found to comply with the Constitution<sup>452</sup>.

Its particularly broad domain covers all officials of public persons but also the representatives of the organisations audited by the Court of Auditors and the regional chambers of accounts, i.e. in particular public enterprises and organisations benefiting from public financial assistance. The major part of the economic action of public persons<sup>453</sup> may give rise to prosecution before the CDBF with regard to the implementation of revenue and expenditure or the management of property<sup>454</sup>, undue benefits provided to others<sup>455</sup> or to actions that have caused serious harm to a public undertaking<sup>456</sup>. Any breach of a “rule” regardless of its nature (budgetary rule, but also public procurement law or even company law) may also constitute an offence.

The wide-ranging nature of the offences contrasted with the low number of prosecutions for many years. The number of referrals however experienced a jump in 2014 due in particular to “*the greater awareness of the Chambers of the Court of Auditors and the regional chambers of the accounts of the referral to the CDBF*”<sup>457</sup>.

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451. Act No. 48-1484 of 25 September 1948, codified in Articles L. 311-1 and following of the Public Financial Accounts Code. Implementation of expenditure is undertaken by accountants who are under the jurisdiction of the Court of Auditors and the regional chambers of the accounts.

452. Decision No. 2014-423 QPC of 24 October 2014.

453. With the exception of those with no financial impact such as normative work, public statements or certain accompanying measures.

454. Article L. 313-1 to L. 313-4 of the Public Financial Accounts Code.

455. Article L. 313-6 of the Public Financial Accounts Code.

456. Article L. 313-7-1 of the Public Financial Accounts Code.

457. Activity report of the CDBF for 2014 (February 2015), p. 6.

With a narrower field but of greater symbolic and practical importance, the economic action of public persons may also give rise to **criminal proceedings**, either against legal persons governed by public law (with the exception of the State<sup>458</sup>) or, more frequently, against the officials at the origin of the offence.

Several offences set out in the Penal Code relate specifically to the economic action of public persons or included as a major part of it. This is particularly the case of breaches of the duty of probity such as illegally taking an interest<sup>459</sup> or of the so-called offence of “favouritism” in public procurement or public service delegation<sup>460</sup>.

Other offences may be committed by public persons and their officials when they act as economic operators (for example, in the field of misappropriation of corporate assets<sup>461</sup>) or otherwise (for example, with regard to the disclosure of false information on the financial markets<sup>462</sup>).

The main attraction of the law enforcement channel for complainant companies is to alleviate them of the burden of proof of the offences committed by the public persons or officials, which is the responsibility of the prosecuting authority<sup>463</sup>. In addition, the success of the proceedings has the symbolic attractiveness of a real “conviction”. It may thus, given these different advantages compared to the other legal channels open to operators, become part of a litigation strategy through “the filing of a complaint” or a denunciation.

But as regards criminal matters even more than in disciplinary matters, the use of these legal channels must remain exceptional. The criminal court is also not always best placed to decide on the economic action of public persons, whose traps and technical difficulties have already been discussed.

However, the decriminalisation route, already explored with mixed success as regards business life<sup>464</sup>, would no doubt be even more difficult for people to accept with respect to public officials, given the exemplarity they must demonstrate. The recent case law of the Constitutional Council applying the principle of “*non bis in idem*” to the application of both administrative and criminal sanctions could also lead to a review of cases for which the maintenance of a charge is justified<sup>465</sup>.

One must in any case trust the prosecuting authorities to seek the best balance through measured use of these punitive proceedings, it being specified that in criminal matters, the constitution of civil parties limits the amount of discretion on the appropriateness of prosecution.

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458. Article 121-2 of the French Penal Code.

459. Articles 432-12 and 432-13 of the Criminal Code.

460. Article 432-14 of the French Penal Code.

461. Articles 241-3 and L. 242-6 of the Commercial Code.

462. Article L. 465-2 of the Monetary and Financial Code.

463. See in particular, B. Warusfel, “Economic law and its judges”, *Rue St-Guillaume*, No. 152, 2008.

464. See the report of 20 February 2008 of the working group chaired by Jean-Marie COULON.

465. Decisions No. 2014-453 QPC and 2015-462 QPC of 18 March 2015.





### ■ *The attractiveness of alternative methods for resolving disputes*

The use of **arbitration** presupposes allowing public persons to use private judges, which is not necessarily easy, even with regard to economic action.

At the present time, the rule remains the prohibition of the use of arbitration by public persons<sup>466</sup>, even if an increasing number of exceptions have been provided for in domestic law to allow it for certain entities or for certain subjects<sup>467</sup>. International conventions increasingly lay down the use of arbitration for the needs of a particular operation<sup>468</sup>. It must be stressed that the transformation of public enterprises into limited liability companies established in the form of a public establishment accordingly means that they are no longer subject to the principle of prohibition of the use of arbitration, as has been the case for La Poste<sup>469</sup>.

Some studies on these issues have concluded that it would be of interest to further broaden the use of arbitration for public persons both in relation to international contracts and for purely domestic operations<sup>470</sup>. It happens that occasional widenings of the scope are decided<sup>471</sup>. However, given the interests at stake and the serious disappointments of certain procedures, the Conseil d'État recommends the most extreme caution with regard to the extension of the field of application of arbitration in disputes that directly or indirectly involve public interests. In any event, arbitration cannot be used to allow the application of the laws of public order to be side stepped<sup>472</sup>.

466. CE, Opinion No. 339710 of 6 March 1986: *"It follows from the general principles of French public law, confirmed by the provisions of the first paragraph of Article 2060 of the Civil Code that, subject to the derogations arising from express legislative provisions or, where relevant, the provisions of international conventions incorporated into the domestic legal order, legal persons governed by public law cannot evade the rules which determine the jurisdiction of the national courts by referring the solution of disputes to which they are parties to the decision of an arbitrator and which relate to relations falling within the internal legal order"* (EDCE 1987, No. 38, p. 178).

467. These exceptions are recalled in Article L. 311-6 of the Code of Administrative Justice. Other exceptions have also been laid down for partnership contracts (Art. 11 of the Ordinance of No. 2004-559 of 17 June 2004) or the construction or renovation of sports arenas as well as for the related equipment for hosting the UEFA Euro 2016 (Art. 3 of the Act No. 2011-617 of 1 June 2011).

468. Such as the Mont Blanc Tunnel (Franco-Italian Convention of 14 March 1953); the Channel Tunnel (Treaty of Canterbury of 12 February 1986) or the Universal museum of Abu Dhabi (Agreement of 6 March 2007).

469. Point 6 of Article L. 311-6 of the Code of Administrative Justice is now devoid of useful effect from this point of view.

470. See in particular the study of the Conseil d'État, *Resolving conflicts otherwise: conciliation, transaction, arbitration in administrative matters*, 4 February 1993; working group chaired by D. Labetoulle on arbitration, 13 March 2007; report prepared by M. Prada on *Certain factors for strengthening the legal competitiveness of the Paris stock exchange*, March 2011.

471. See in particular legislative proposal No. 2887 of 19 October 2010 of P. Clément on the arbitration of disputes involving public persons, which never reached the committee stage. Provisions extending the use of arbitration to partnership contracts concluded by public persons, under the condition of the application of French law, are instituted by Article 90 of Ordinance No. 2015-899 of 23 July 2015 relating to public procurement.

472. See also the decision of the Court of Conflicts of 17 May 2010, *INSERM v. Sausgstad Foundation*, No. C 3754 which ruled that the administrative court had jurisdiction to hear appeals against arbitral awards involving the control of compliance with certain mandatory rules of French public law (in particular occupancy of the public domain, public procurement, etc.).



The development of **non-judicial** methods for settling disputes, including before the administrative court, would appear to be able to secure economic action<sup>473</sup>.

Conciliation, provided for in Article L. 211-4 of the Code of Administrative Justice, has been extended to the administrative courts of appeal, whereas provisions specific to mediation in cross-border disputes were introduced in Articles L. 771-3 and following of the same code. The use of these processes, particularly as regards economic action, could be usefully developed<sup>474</sup>. Clarification of the particular purpose and scope of these two measures and the definition of more specific rules, in particular with regard to their effects on appeal deadlines, could contribute to this<sup>475</sup>.

The use of transactional settlements should also be encouraged, either resulting from mediation or successful conciliation, or directly after exchanges between the parties themselves, without the intervention of a third party. Several circulars of the Prime Minister recall the interest of this procedure<sup>476</sup>, in particular in the field of the economic action of public persons, as demonstrated again recently by the settlement of the *Ecomouv* case.

**Proposal 31: Develop alternative methods for settling economic disputes, in particular before the administrative courts** by clarifying the purpose and the field of the two mechanisms currently in force in the Code of Administrative Justice regarding mediation and conciliation and by specifying the rules which apply to it, in particular with regard to their effects on the time limits of appeals.

*Means: a law  
(SGG, Minister of Justice, Conseil d'État)*

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473. The prior mandatory administrative appeal falls within the same logic by imposing a prior dialogue between the administrative authority and the applicant. It has the interest of being able to be implemented in matters relating to public order and to the prerogatives of public power to which recourse to alternative modes of dispute resolution is not possible. See, regarding the issues surrounding prior mandatory administrative appeals (RAPO), the report by the Conseil d'État, *Prior administrative appeals*, La documentation Française, 2008; an ordinary law framework for RAPOs has since been introduced by Article 14 of Act No. 2011-525 of 17 May 2011 regarding the simplification and improvement of the quality of the law and procedures in Article 1 of Act No. 79-587 of 11 July 1979 and Articles 19-2 and 20-1 of Act No. 2000-321 of 12 April 2000.

474. See to this effect, the proceedings of the symposium of 17 June 2015 organised in Paris on mediation and conciliation before the Administrative Court, Ed. L'Harmattan, to be published.

475. Provisions to this effect are provided for in the bill on 21<sup>st</sup> century justice. The problems of the inter-relation of these two corpora of rules can probably be explained by the fact that amendments were introduced in 2011 by two texts worked on in parallel. The amendment of Article L. 211-4 on conciliation was introduced by Act No. 2011-1862 of 13 December 2011 whereas the provisions of Article L. 771-3 and following of the Code of Administrative Justice on mediation in cross-border disputes stem from Ordinance No. 2011-1540 of 16 November 2011 taken on the basis of the authorisation contained in Article 198 of the Act No. 2011-525 of 17 May 2011 to transpose Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (See moreover, on these issues, the report of the Conseil d'État, *Developing mediation within the framework of the European Union*, 29 November 2010).

476. See finally, the circular of 6 April 2011 relating to the development of the use of transactions to settle conflicts non-judicially (Official Gazette of 8 April 2011).





# What conditions for effective economic action?

Three precepts determine the effectiveness of the economic action of public persons:

- involving a limited number of closely coordinated actors (3.1);
- taking account in the decision-making process of the specific complexity and temporality of the economic issues (3.2);
- choosing the relevant tools to achieve the objectives pursued (3.3).

## 3.1. The action must be conducted by a limited number of closely coordinated actors

Although many entities are present in the field of public economic action, not all are “actors”, given the power to act by themselves, directly<sup>477</sup>.

Even thus defined, the number of actors is still very high at the national level (3.1.1) but also, despite a consolidation effort, at the decentralised level (3.1.3). Between these two levels, the most efficient inter-relation has yet to be found (3.1.2).

### 3.1.1. A centrifugal movement affecting the national authorities whose breadth and effects must be contained

Among the national authorities, Parliament occupies a growing place in the economic field. Although the electorate rejected the idea of an “*economic bicameralism*”<sup>478</sup>

477. This is particularly true of agencies that have a role of advice, expertise, assessment (CESE, France Stratégie) or control (inspectories and supervisory bodies). Other stakeholders, although they have true decision-making power in the economic field, do not use for a particular purpose, for example the economic jurisdictions of the judicial or administrative courts. The Court of Auditors, which simultaneously exercises assessment and auditing functions alongside jurisdictional functions, is not regarded as an economic actor either from the standpoint of this report. These institutions and agencies nonetheless play an essential role in the decision-making process (see 3.2.1. below)

478. According to the expression of Ph. Colson and P. Idoux, *Droit public économique*, LGDJ, 7<sup>th</sup> ed. No. 1248.



in the referendum of 27 April 1969, the prerogatives of Parliament in the field of public finance<sup>479</sup> allow it to exercise its control over the economic action of the executive authorities, due to its impact on the main budgetary balances<sup>480</sup>.

Parliament has thus been able to use the strengthened powers that it holds from the reforms that have come about since 1995,<sup>481</sup> and especially the constitutional revision of 2008<sup>482</sup>, to extend its influence over economic texts. The parliamentary initiative in the economic field, whether this concern bills or amendments, remains highly dynamic<sup>483</sup>. Economic action is an issue that is more shared today than in the past with Parliament even if, in the last resort, the Government retains the ability to have its reforms adopted<sup>484</sup>.

National economic action however remains to a large extent in the hands of the executive authorities<sup>485</sup>. However, their number and diversity require them to continuously ensure the coherence of this action.

### ***3.1.1.1. The fragmentation of economic questions in the central administrative authority***

#### **■ *The reporting of certain economic competencies to the Prime Minister***

The importance of the finance laws for the conduct of government action and the cross-cutting nature of economic issues have sometimes justified combining the economic portfolio with that of head of the Government, including under the V<sup>th</sup> Republic<sup>486</sup>.

Although this accumulation now appears dated, fairly frequently certain members of the government with competency in economic matters (secretary

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479. See in particular the controlling power it has with the support of the Court of Auditors, in particular with respect to regulatory laws (Article 47-2 of the Constitution).

480. The impact is direct when the action involves revenue or expenditure. It is also indirect through the effect of economic action on the level of activity and therefore the resulting tax revenues.

481. In particular the introduction of the single nine-month session. There is also the strengthening of the role of the parliamentary committees and assessment boards, as well as the introduction of the LOLF - organic law on the finance laws in 2001 (or the institution of the finance laws of the social security in 2005, which most often include a large economic component, for example regarding the price or tax on drugs).

482. Such as the discussion in a public session of the text voted for by the commission, the impact studies accompanying the bills, the requirement for an explicit ratification of ordinances, etc. Other rights recognised to Parliament have also partially divested the executive of its traditional prerogatives, such as the procedure put in place with respect to the appointment of the main senior directors of public enterprises (Art. 13 paragraph 5.)

483. The number of amendments moreover creates particular difficulties (see 3.2. below)

484. See for example the use of Article 49-3 of the Constitution for consideration of the bill for growth, activity and equality of economic opportunities, adopted at final reading by the National Assembly on 9 July 2015.

485. In addition to the control that the government retains over the legislative procedure, national economic action is largely due to regulatory and individual acts of the administrative authorities.

486. See in particular during the government of R. Barre between 1976 and 1978.

of state responsible for the digital economy<sup>487</sup>, the minister responsible for the implementation of the recovery plan<sup>488</sup>) and, more frequently, certain economic services (General commission for investment<sup>489</sup>) report to the Prime Minister.

This type of organisation, that often comes about due to the cross-cutting nature of the competencies or by their link with forward planning, has the disadvantage of increasing the administrative burden of the services of the Prime Minister at the expense of their coordination tasks. Moreover, it does not always provide the expected benefits in terms of visibility, authority or decision-making ability. Provided they are real actors<sup>490</sup> and that their primary competence is economic, the grouping of these services and ministers under the responsibility of the Minister responsible for the economy would seem to be preferable.

■ *The hesitations over the division of economic competencies between ministries*

Economic action as applied in the various public policies necessarily leads, in France as in most other countries<sup>491</sup>, to it being conducted by ministries other than that or those for which it is the main mission. Areas such as transport or agriculture have thus always been in specific so-called “**sectoral**” ministries. This dispersion is now recognised and accepted and even promoted, with the economic aspect of these ministries being highlighted in their titles (emphasis placed on the agri-food aspect in the Ministry of Agriculture, on sustainable development in the Ministry of Ecology, etc.) and their organisation itself is developing along these lines<sup>492</sup>.

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487. E. Besson, from 18 March 2008 to 15 January 2009, then N. Kosciusko-Morizet, from 15 January 2009 to 13 November 2010.

488. P. Devedjian, from December 2008 to November 2010.

489. To the Prime Minister, then the Minister of Productive Recovery (Decree No. 2014-404 of 16 May 2014 relating to the powers of this minister, whose publication led A. Juppé and M. Rocard to withdraw from their co-chairmanship of the Council overseeing the future investments programme), and then again to the Prime Minister, for legitimate reasons moreover, relating to the strategic nature of this mission, to the breadth of the resources involved and to the very long term commitments that they represent.

490. In accordance with the definition given above, the advisory agencies are not actors within the meaning of these developments.

491. This dispersion of economic competence between different ministries is not particular to France however. Several countries have thus felt the need to implement collegial coordination structures for economic questions such as the Liaison Secretariat for Macroeconomic Policy in Canada, the Cabinet Council in Italy, the National Economic Council in Israel and the Economic Coordination Council in Turkey. This coordination of economic issues within the Government is sometimes provided by individual ministries, such as the “Ministry of Economic Revitalisation” in Japan, in addition to the Prime Minister’s own action.

492. The ministries responsible for these sectors have also become aware of the economic importance of their activity, by creating services dedicated to these issues. E.g. the “economy, assessment and integration of sustainable development unit” of the General Commission on sustainable development of the Ministry of Ecology, Sustainable Development and Energy.



The division of the roles between the economic and financial ministries and the sectoral ministries is a question of appropriateness in a given economic context. The constituent power itself in 2008 refused to impose a specific governmental organisation<sup>493</sup>.

It is important nevertheless, in the economic field more than elsewhere, to ensure a certain stability in defining the scopes of the various ministries in order to ensure the continuity and coherence of action over time and not to forget the lessons learned.

In this regard, the to-ing and fro-ing between the Ministry of the Economy and that of Work regarding employment<sup>494</sup> or with that of Sustainable Development regarding energy<sup>495</sup> may have been harmful for conducting economic action.

The experimentation of innovative groupings serving priority economic policy objectives may have a sense, provided, however, that it does not result in permanent instability of the governmental organisation. The emphasis should be put on defining uniform scopes for the various ministries so that they have responsibility for the whole of a given area, with the Prime Minister of course retaining his deciding power to avoid an overlapping of competencies.

**Proposal 32: Clarify government organisation in the economic field**

1) prefer the attachment of administrative authorities contributing directly to economic action to the Minister responsible for the economy rather than to the Prime Minister's services;

*Means: texts organising the services  
of the Prime Minister and the services of the Minister responsible for the  
economy*

2) promote the stability of government organisation in the economic field by forming uniform blocks of competence for the Ministry of the economy and the sectoral ministries.

*Means: Decree of composition of the Government; Decrees conferring powers.  
(SGG, Ministry of the economy and sectoral ministries)*

Certain competencies that are crucial for economic action are out of the control of the minister responsible for the economy even though they are of a **cross-cutting** nature.

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493. It had been planned in particular to lay down a maximum number of ministerial departments which would be imposed on the President of the Republic and the Prime Minister when forming the Government.

494. Between May 2007 and November 2010.

495. Traditionally attached to the Ministry of Industry, itself grouped with that responsible for the economy, energy was then attached to the Ministry of Sustainable Development (2007-2010) and then to the Ministry of the Economy (2010-2012), before returning to the ministry responsible for sustainable development (since 2012).

This circumstance is sometimes explained by the level at which these competencies are exercised: thus local economic action is the responsibility of the Minister of the Interior, responsible for local authorities<sup>496</sup>. This is also true for the organisation chosen since 2014 for international economic action, now attached to the Minister of Foreign Affairs to strengthen synergies with general diplomatic activities.

The competency of the Minister of Justice with regard to business law, exercised in particular by the sub-directorate of economic law within the Directorate of Civil Affairs and the Seal, is justified by the historic responsibilities of the Chancery with respect of certain regulated professions and the support it can provide to the other ministries in the field of economic law. However, one may well ask questions about the extent of its own competencies to develop “*legislative and regulatory texts relating to commercial law and that of private law companies and economic groupings*”<sup>497</sup>. Just as it is natural that criminal business law, given the very specificity of the criminal field, remains a competence of the Directorate of Criminal Affairs and Pardons (DACG) and, accordingly, of the Minister of Justice, in the same way, it would be appropriate to formalise, in the field of commercial law and particularly the law of commercial companies, the coordination of the work of its services with those of the Minister responsible for the economy.

**Proposal 33: Better coordinate the competencies of the central administrative authorities in business law by formalising the conditions of closer coordination between the Minister of Justice and the Minister of the Economy in preparing draft texts regarding business law and company law.**

*Vector: Decree conferring power on the Minister of the Economy*

■ *The search for an optimal configuration of the economic and financial ministries*

The definition of the responsibilities of the Minister or Ministers of the Economy and Finance fluctuates according to the governments and begs the recurring question of the unification or dissociation of the “economic” and “financial” spheres<sup>498</sup>. After trying out various configurations<sup>499</sup> the current set-up, not previously used in France but inspired by German practices, distinguishes between the public finances and the private financial sphere (markets, banks and insurance) on the one hand and the other economic questions on the other hand.

496. Competent both for the organisation of the deconcentrated departments of the State and relations with the local authorities, through the general secretariat (DMAT) and the general directorate of local authorities (DGCL); the latter is now placed under the joint authority of the Minister responsible for decentralisation, the reform of the State and the civil service, with regard to its decentralisation competences.

497. Art. 3 of the decree of 1 December 2014 laying down the organisation into sub-branches of the Directorate of Civil Affairs and the Seal.

498. The current meaning of ministerial competence designated by the word “finance” is both indeterminate and ambiguous and refers according to the case, either to the public finances or to the historical missions of the General Directorate of the Treasury.

499. Either by making the minister of the budget a delegated minister or by merging all of these functions into a large ministry, or by making the minister of the budget, responsible also for public accounts, a full minister, of the same rank as that of the economy. More recently, the “Bercy” sphere has been divided up between four fully-functioning ministers.



The internal organisation of the ministry has moreover considerably changed over recent years, especially with the creation in 2006 of a new general directorate, since renamed “Directorate General of Enterprises” (DGE)<sup>500</sup>. Although this restructuring has resulted in a strengthening of the visibility of these services, they remain fairly heterogeneous and mainly directed at certain sectors of activity or types of enterprises (SMEs, artisanal enterprises, etc.)<sup>501</sup>. The “enterprises” competence remains divided between the DGE and the Directorate General of the Treasury (sub-directorate of the financing of enterprises and financial markets), which both deal with issues relating to the environment and the governance of companies<sup>502</sup> as well as industrial restructuring<sup>503</sup>.

Although the DGE is already of significant size<sup>504</sup>, it could be useful to strengthen it on cross-cutting issues of interest to those companies that have, within the economic and financial ministries, a reference official handling all of their issues.

### ***3.1.1.2. The growth of independent or autonomous agencies***

#### ■ *The meeting of three types of segmentation logic*

**Large historical institutions** intervene independently in public economic action. The Bank of France, from its inception given managerial autonomy in relation to the State, has been really independent since 1993. Responsible for monetary policy, it also carries out different missions by virtue of the law or under agreements with the State<sup>505</sup>. The Caisse des dépôts et consignations, whose independence was intended from its inception to preserve the funds entrusted to it, also plays an important role in the conduct of economic action, particularly with respect to the funding of general interest activities.

The **independent regulators have emerged more recently**, and in the first place in the economic field, with the creation in 1967 of the Commission of stock exchange transactions<sup>506</sup>. Independent authorities have the role of ensuring the impartiality

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500. Decree No. 2014-1048 of 15 September 2014 amending Decree No. 2009-37 of 12 January 2009 relating to the directorate general of competitiveness, industry and services.

501. In particular, the DGE has cross-cutting services (such as its business law office), but their main mission is not responsibility for dealing with the rules applicable to commercial companies. Its business law sub-directorate only has its own regulatory competence in the field of artisanal enterprises.

502. See in particular the office for the funding and development of businesses of the Directorate General of the Treasury and its financial stability, accounting and governance of enterprises office (Art. 4 of the Decree of 21 April 2009 on the organisation of the Directorate General of the Treasury).

503. The secretariat of the inter-ministerial committee on industrial restructuring is organised by the funding of enterprises sub-directorate of the Directorate General of the Treasury while a sub-directorate of the DGE is responsible for “*reindustrialisation and company restructuring*”.

504. 1,300 officials (Source: DGE website). See the similar questions regarding the scope the new “*DG Grow*” created within the European Commission.

505. They maintain a more or less close link with its monetary missions. This is true for its economic cycle studies. The Bank of France is moreover a stakeholder of the banking supervision implemented at the European level (see part 1 above).

506. Ordinance No. 67-833 of 28 September 1967.





of the oversight function of an economic sector where the State remains bound to historical operators or where the political authority might be tempted by other forms of interference. Various economic sectors now have their own economic regulators: banks, insurance, audio-visual, transport, energy, etc.

The current period is seeing the rise of **agencies**, which are organisations carrying out a non-commercial activity and enjoying a certain autonomy without being independent of the Government. Sometimes the heirs of former “offices”<sup>507</sup>, there are many of them in the economic field (Business France, INPI, PACE, IAB France, etc.). They carry out specialised management tasks with the central administrative authorities concentrating on the strategic functions.

■ *A momentum that affects the balances within the actors and between them*

After having been very strong, the pace of creation and the growth of the powers of these independent or autonomous entities have recently slowed in France, as in a number of countries having pushed this movement inspired by the model of the American agencies very far<sup>508</sup>. The trend today is somewhat more to their grouping and consolidation<sup>509</sup>, as these institutions are asked to make budgetary efforts and to control their workforce<sup>510</sup>.

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507. Offices which are distinct from professional associations, which perform functions of oversight of professions that are closer to those of some of the regulatory authorities.

508. In a large number of countries, their multiplication has created demarcation or effectiveness problems. This is notably the case in Brazil for example, where the number, the role and legitimacy of these agencies are frequently called into question. In Italy, the profusion of these agencies is part of the political debate and conflicts of competence have recently been decided by the administrative court (Decision of the Italian Council of State of May 2012). In Spain, a movement of consolidation has begun in the competition field with the merger in 2013 of 8 sectoral agencies.

509. The trend towards the consolidation of independent quangos is going in the energy, electronic and postal communications, financial markets, banking and insurance sectors. Similarly, a streamlining effort has been started in respect of the agencies, resulting in a streamlined use of this model and by the consolidation of some of them, pursuant to a circular of the Prime Minister of 9 April 2013 acting on the recommendations of several reports, including the Conseil d’État study on *Agencies, a new kind of public management?* (2012 Annual Study) and the report of the General inspectorate of finance on *The state and its agencies* (March-Sept 2012). A new circular on overseeing operators was announced by the communication in the Council of Ministers by the Secretary of state for simplification of 27 May 2015 on the streamlining of operators and agencies.

510. Normalisation has begun at the Caisse des Depots et Consignations and the Bank of France and at the same time the regulators were asked to ensure budgetary and financial moderation. As regards the agencies, they have been subject to budgetary and accounting rules, transparency and a workforce ceilings similar to those of the State.



## The consolidation of the agencies in the economic field

### *The example of the BPI*

The creation of the Public Investment Bank -BPI (Act No. 2012-1559 of 31 December 2012) is the culmination of a long process of consolidation of several entities, stemming from the Caisse des Depots et Consignations, the ANVAR (1967), the CEPME (1980) and SOFARIS (1982).

The grouping of the CEPME and SOFARIS resulted in the creation of the BDPME (1996), which itself was grouped with the ANVAR to constitute OSEO (2005). The merger of CDC Entreprises, the FSI and OSEO, marked the official creation of Bpifrance (2013). The last step in the process was marked by the consolidation of the various structures within a single management company, Bpifrance investissement (2014). The BPI today has 42 local offshoots, organised into 22 regional branches, which make up the core of its operation.

A consequence of these successive groupings, the missions of the BPI are structured around six occupations, which are the product of the successive integration of the various structures: guarantees (ex SOFARIS), credit activities (ex BDPME), support for innovation (ex ANVAR), contribution of funds (ex CDC entreprises), financing of SMEs (ex Avenir entreprises) and capital development (ex FSI).

### *The example of Expertise France*

The creation of Expertise France, on 1 January 2015, was the result of the merger of six public operators of international technical cooperation: Adecri, Adetef, FEI, GIP Esther, GIP international and GIP SPSI. Placed under the joint supervision of the ministries responsible for the economy and foreign affairs, the new agency with international technical expertise intervenes in over 80 countries.

The Expertise France's mission is to accompany the partner countries of France *"in implementing reforms in the areas of public finance, economic development, health, sustainable development, social protection and employment, stability, safety and security, governance and human rights"*.

But the **attractive power** of these agencies remains strong, as evidenced by the continuing assignment of additional functions, created by the legislator or resulting from transfers of services, sometimes without any obvious connection to their initial missions. These assignments may jeopardise the internal balance of these entities by making the performance of their missions harder and complicate their governance<sup>511</sup>.

To be relevant, these increases in competence must meet several cumulative conditions: firstly, be justified by the added value that the basic specificity of the beneficiary body contributes compared to other methods of exercising this

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511. Besides the harm done to the effectiveness of the structure in its field of initial competence, their governance bodies are frequently made more cumbersome (see in particular the structure that has become very complex of the Caisse des Depots et Consignations group or the different collegial bodies of the Prudential control and resolution authority).

competence<sup>512</sup>; secondly, the internal consistency of the functions of these structures must be preserved by defining fields redefining the natural boundaries of the sector or a clearly defined “business competence”<sup>513</sup>; thirdly, the entity itself must be previously consulted on the sustainability and the feasibility of the missions that it is envisaged to entrust it with<sup>514</sup>; fourthly, the new functions should be isolated from the previous ones when they are of a different kind, using proven methods in this area<sup>515</sup>; fifthly, the relevance of these transfers should be checked regularly, and in the case of negative or disappointing results they must be abandoned, reassigning these functions back to the original bodies as needed<sup>516</sup>; finally, a periodic review of the coherence of the mission and of the organisation of each of these entities is required.

The growth of these entities must not moreover compromise the State’s ability to **maintain sufficient expertise** within its central administrative authorities.

Indeed, they concentrate significant material and human resources and develop a technical competence which is not found or is no longer found in the central administrative authorities<sup>517</sup>. Moreover, they also have an advantage over the latter due to their proximity with the professional and international forums, as well as with the European authorities, which play a significant role in defining the regulatory framework<sup>518</sup>. The traditional central administrative authorities are no longer able to exercise their strategic role, including sometimes even for preparing normative texts.

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512. In particular, one must use the independent quango model only when it is useful, for exercising a competence, ensuring the independence of the entity in relation to the central administrative authority or its collegial operation (the model of management through a single authority, a minister or director of central administration depending on the subject, prevailing within the ministries).

513. The positioning of the ARAF raised some questions in this regard. However, the difference in the nature of audio-visual and electronic communication regulations means that one must proceed with caution as to a possible merging of the Regulatory authority of electronic devices and communications (ARCEP) and of the Higher audio-visual council (CSA).

514. The texts only rarely provide for consultations of this type and the rules on consultation of technical committees do not include them either. The case of road transport regulations which it was planned to entrust to the ARAF without prior consultation, illustrates this phenomenon.

515. Signature of an agreement (in return for remuneration as for the BDF or the CDC), assignment by a unilateral act, use of analytical accounting to ensure at least an accounting separation of functions where interferences between them would create problems.

516. See in particular the case of the National agency of the services to the person absorbed into the DGE (Decree No. 2014-753 of 2 July 2014).

517. Thus for example relations between the General Directorate of the Treasury (of around 8 officials at the “Finent 1” savings and financial markets office) and the AMF (457 full-time equivalent staff in 2014), or between this directorate and the CDC. The creation of the ADLC, to the extent that it attracts some members of the teams of the DGCCRF, raises the same type of questions, particularly in the control of concentrations.

518. Since the entities in question have relays at the European level, they develop expertise and influence with which it is difficult to compete. The weight of technical regulations of European origin only strengthens this movement.



### ■ *The coherence of the economic action of public persons*

The regulators were designed “in silos”, in a mainly sectoral way and this is also true of the law that they must apply (see 2.3.2 above). The development of regulatory bodies at the European level reinforces the difficulty, which is no longer only horizontal but vertical, as in the banking field<sup>519</sup>. This field, well identified in the doctrine, is that of “interregulation” which requires particular vigilance<sup>520</sup>.

Questions of boundaries and scope also arise with regard to traditional institutions and agencies. Thus, the coexistence within the State of two “*holding*” entities, the BPI and the EPAS, although generally harmonious, does not prevent problems of the coherence of joint portfolios and ownership<sup>521</sup>.

Since the prevention or resolution of these problems is not sufficiently guaranteed by conventional coordination methods, more formalised solutions have sometimes been used: consultations, mandatory or otherwise<sup>522</sup>, collegial structures bringing together several bodies, cross-participation in the governance bodies (for example in the field of banking and finance). These different ways of working in a network should be developed.

Coordination of the action of these entities **with the action of the government** is an even thornier problem.

There is no objection in principle for the non-independent agencies, where it can be carried out by strengthening checks and by a true steering of their performance objectives contracts<sup>523</sup>. These contracts, usually triennial, give rise to a review, at least once a year of the performance of the current contract. These annual meetings would have greater value for the future by dealing with what will be included in the next three-year contract.

Coordination with the independent entities must not be excluded in principle, based first and foremost on a relationship of mutual trust and continuous dialogue. The presence of a representative of the Government within these authorities is not, in itself, a violation of their independence. Provided his role is well delimited, the representative of the Government can encourage more transparent exchanges with the regulator, which, otherwise, could use other, more informal, channels.

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519. The division of competences between the Bank of France and the European Central Bank in the field of macro-prudential analysis is still uncertain on some specific points.

520. See coll. under the direction of G. Eckert and J.-Ph. Kovar (under dir), “Interregulation”, *Droit, Justice et économie*, L’Harmattan, 2015.

521. This situation results in a twofold appraisal of projects, requires constant coordination and is accompanied by a certain loss of energy.

522. Organised by certain texts, as in the case of consultation of the Competition authority (ADLC).

523. A new circular will deal with this issue shortly (see the announcement which was made in the above-mentioned communication of the Council of Ministers of 27 May 2015).

Coordination is also needed in some individual cases, especially where the law has imposed a precise division of competences between the independent entity and the central administrative authority, as is the case between the Competition authority and the DGCCRF<sup>524</sup>. The development of work programmes or *a minima* strengthened information on the planned programmes would be one way of encouraging their coordination.

However, it would be desirable to limit the to-ing and fro-ing between the independent entities and the central administrative authorities, that is involved, in particular, in the procedures for gas prices<sup>525</sup> or setting the rate of regulated savings<sup>526</sup> which tend, through their complexity, to take responsibility away from the various protagonists.

**Proposal 34: Maintain the necessary balance and coordination between economic administrative authorities, agencies and independent regulators**

1) carry out a systematic review of the expertise of the administrative authorities in relation to that of the economic regulators and maintain or restore it at the level necessary to enable them to ensure the strategic functions and design the policies for which they are responsible; if necessary, carry out rebalancing processes;

**Means:** Action by the SGG and the Government  
(Ministers responsible for the Economy and Finance and sectoral ministers concerned, in conjunction with Parliament for the independent quangos)

2) provide transparent coordination between the central administrative authorities and the operators, agencies or independent administrative authorities acting in the same economic field by using:

- for the agencies, three-year performance objectives contracts updated every year, for preparation of the next multi-annual contract;

**Means:** Action by the Government and operators, three-year contracts

- for the independent entities, formalised and transparent collaborations as a minimum in the form of a reciprocal information process.

**Means:** Action by the Government and independent quangos.  
(ministers responsible for the economy and finance, independent quangos concerned)

524. In the field of anti-competitive practices, the DGCCRF has its own control power and may also be requested by the competition authority to use it. It is important for the audit campaigns to be coordinated.

525. Art. L. 445-3 of the Energy Code; Art. 3 and 5 of Decree No. 2009-1603 of 18 December 2009 relating to regulated prices for the sale of natural gas.

526. Regulation of the Banking and Financial Regulations No. 86-13 of 14 May 1986 relating to the remuneration of funds received by credit institutions.



### 3.1.2. For better coordination between national action and local action

#### 3.1.2.1. *The State must encourage and accompany local economic action*

■ *Avoiding obstructing local action by defining too strict a general framework*

The State and local authorities are not placed on an equal footing. Certainly, the Republic has been “*decentralised*” since the revision of the Constitution in 2003 and the principle of “*free administration of local authorities*”, enshrined in 1979 by the Constitutional Council<sup>527</sup> protects their freedom of action, especially in the economic field. But unlike what applies in federal or even regionalised states<sup>528</sup>, economic policy remains the responsibility of the Government under Article 20 of the Constitution and the law itself has recalled since 1982 that “*the State has responsibility for economic and social policy*”<sup>529</sup>.

For the most part, the local authorities implement measures designed by the State<sup>530</sup>. Especially, the choices of the State can significantly reduce their room for manoeuvre by affecting their financial equilibrium<sup>531</sup>, by amending their own resources, by increasing their compulsory expenditure or reducing their allocations<sup>532</sup>. The agencies representing the local authorities (national committee

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527. Under the terms of paragraph 2 of Article 72 of the Constitution in the wording adopted in 1958, local authorities “*are freely governed by elected councils and under the conditions laid down by the law*”. The constitutional value of the principle of the free administration of local authorities communities was recognised by the Constitutional Council by Decision No. 79-104 DC of 23 May 1979.

528. Local authorities do not have prerogatives comparable to those of Federated states such as the United States, Canada, or Germany, or even powers as extended as their counterparts in regionalised countries such as Spain (Art. 148 to 150 of the Constitution), Italy (Art. 117 of the Constitution), but also to a certain extent, the United Kingdom (trend further strengthened since the adoption of the *Localism Act* of 2011). These different systems have their own specific features but have in common that they define the economic competences, generally shared between the State and local structures (States or regions).

529. Art. 5 of Act No.82-213 of 2 March 1982 on the rights and freedoms of municipalities, departments and regions, included in particular in Articles L. 2251-1 and L. 3231-1 of the Local Authorities General Code.

530. The rules at issue nevertheless leave them a fairly large amount of room. The local authorities cannot define the conditions under which they award a public contract, but the choices they make in applying the general framework have a decisive impact. Similarly, they cannot create a new tax, but can change certain elements of it.

531. A study of foreign experiences confirms that the question of the resources of local authorities is the crucial element in their ability to carry out genuine economic action. Although Canada is one of the federations which gives the most room to local initiatives, it is also because the provinces collect 50% of the tax revenues of the country. The same is true in the emerging countries. Indonesia, which is engaged in an ambitious movement towards decentralisation, has allocated 30% of revenue to the budgets of local authorities. Conversely, the absence of significant local resources is the sign of more centralised States, as is the case in Chile where the 345 municipalities do not have the necessary resources to effectively exercise all of the powers attributed to them.

532. The financial balance of the local authorities is itself quite broadly defined by the finance acts prepared by the services of the State (Directorate of the budget and DGCL in particular). The definition of compulsory expenditure as well as transfers (fully

for evaluation of standards, local finance committee), which must be consulted prior to the adoption of any standard or financial constraint having an impact on these authorities is mandatory, have only a consultative role. And the constitutional court, although it verifies that the legislator does not deprive local authorities from all autonomy, leaves a large amount of discretion to the State in managing public finances<sup>533</sup>.

Aware of the risk of depriving the local authorities of any economic initiative, the Government has, in recent times, made several commitments in this area<sup>534</sup>. It is to be hoped that they will be respected over time.

■ *Applying the principle of subsidiarity to local economic action*

The State does not confine itself to defining a general framework of action for the local authorities, but also has its own economic action for local areas, which must be better coordinated with that of these authorities. “The State at the local level” must in fact avoid competing with local economic action. The Constitution itself lays down that the division of roles must be designed using a logic of subsidiarity<sup>535</sup>.

The very multiplication of the structures and agencies of the State or over which it more or less directly has control is the source of excessive complexity. The grouping of deconcentrated services under the reform of the local administration of the State (REATE) has not resolved everything<sup>536</sup>. The State is in fact also present through representative bodies, in particular chambers of commerce and industry<sup>537</sup>, and through agencies which in recent years have tended to develop a large local network in the economic area<sup>538</sup>. Finally, the territorial action of the State coexists with the very active local networks of the Bank of France and the Caisse des dépôts et consignations.

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compensated, but only at the transfer date) or creations of charges (not specifically compensated) are also decisive factors.

533. Note however that the vigilance of the Senate on laws which can result in constraints for local authorities.

534. See in particular, the circular of 9 October 2014 on the reduction of the restrictions applicable to local authorities.

535. Under the terms of 2 of Article 72 of the Constitution: “*The local authorities shall take decisions for all the competencies that can best be implemented at their level*”.

536. At the regional level, there are several important directorates in the economic field, beginning with the DIRECCTEs, which play the role of a one-stop-shop for businesses for the State in the regions, subject to specific competencies of the DRFiP. Other sectoral directorates also play a role such as the DRAAFs with regard to agri-food and the DREALs with regard to industry in particular.

537. Although managed by business leaders, the chambers of commerce are public institutions of the State placed under the aegis of the Minister of the Economy (DGE) and which, in addition to some specific management functions of some economic schools and infrastructure, have important public service activities with regard to support for companies (See Art. L. 710-1 of the Commercial Code).

538. In particular with regard to financing, innovation or support for international activities.





This scattering complicates the task of the prefects, who are responsible for coordinating the efforts of these various bodies, in particular for businesses experiencing problems<sup>539</sup>. Their mission should be made easier by the decree of 7 May 2015 relating to a deconcentration charter, which gives them greater authority over the local network of agencies<sup>540</sup>.

Beyond this, budgetary constraints and especially the need to avoid duplication of tasks lead to new measures to pool action being considered. The illegibility of the system and the dilution of responsibilities are an inducement to avoiding situations where the same types of activities are provided by the services of the State, the chambers of commerce, particular institutions (Bank of France, Caisse des Depots et Consignations), and sometimes the local authorities themselves.

However, it is not desirable to reduce drastically the local presence of the State<sup>541</sup>, essential for ensuring contact with businesses and for relaying the national policies in the field. However, organising delegations of management or role splitting could be envisaged allowing local authorities to carry out tasks on behalf of the State or to entrust the chambers of commerce with management tasks on behalf of these local authorities or for that of deconcentrated services of the State.

Simplification also requires a **clearer division of competences** in the field of economic action to determine which entity must act, operating in the same way as the territorial reform act (NOTRe) between the different levels of local authorities (see 3.1.3 below).

Many actions overlay each other at the present time, for example in the area of local trade<sup>542</sup>, businesses in difficulty<sup>543</sup>, international support<sup>544</sup>, or competitiveness clusters<sup>545</sup>. Most of these actions, which have little or no coordination will then compete with each other. There is no clear and uniform criterion that can be used to distinguish what should be the responsibility of the State from that of the local authorities<sup>546</sup>.

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539. In the context of different committees, such as the Departmental committee for aid for companies in difficulty (CODEFI), the Regional industrial restructuring committee, etc.

540. Decree No. 2015-510 of 7 May 2015 relating to the deconcentration charter.

541. Going even further, the report of 13 April 2015 of France Stratégie, *What public action for tomorrow? 5 objectives, 5 levers*, evokes the hypothesis, discussed in its workshops, of the disappearance by 2025 of the deconcentrated non-sovereign services, p.51.

542. The Government tries to ensure the balanced development of the different forms of business by contributing to encouraging local business pursuant to Article L. 750-1-1 of the Commercial Code relating to the FISAC, but without prejudice to the action of local authorities and in particular municipalities in the same area.

543. The division of roles is not always very clear, with the State and the local authorities acting concurrently in relation to these issues (CIRI, but also CODEFI). Overlapping also exists with regard to the systems of aid (see report of the IGF on public aid to companies, *For simple and effective aid for improved competitiveness*, 18 June 2013).

544. See inset below.

545. Between the national clusters and the clusters of a regional dimension, such as the PRIDES in PACA. See *Competitiveness clusters: Outcome of and prospects for an industrial policy and for the development of the territory*, Senate Report No. 40 (2009-2010) of 14 October 2009.

546. The size of companies and sectoral and development logics are criteria used from time to time. The local level can also be preferred for actions that involve a certain inventiveness





This situation favours a fragmentation of efforts, dilution of responsibility and sometimes even bargaining (cross-financing) and problems of consistency (overlapping, interference or contradictions). It is therefore preferable to limit an interweaving of competencies and constitute blocks of competence in order to increase the responsibility of the actors, while ensuring close collaboration between them.

***Streamlining the action of several actors in the same area: the example of international support for companies***

The gradual merger of the various entities involved in the area of internationalisation of companies on behalf of the State led to the creation of “*Business France*”. A national public industrial and commercial establishment, placed under the aegis of the Ministries of Foreign Affairs and of the Economy, “*Business France*” is the result of the merger on 1 January 2015 of UBIFRANCE and the French agency for international investment (AFII).

“*Business France*” enhances and promotes the attractiveness of French products, its businesses and its territories. In the export, investment or international partnerships field, its mission is to provide support to French and international companies from the start until the completion of their projects. The missions of “*Business France*” include the international development of SMEs and mid-caps and their exports, canvassing and receiving foreign investors in France; the promotion of attractiveness and the economic image of France, its businesses and its territories as well as the management and development of international volunteering in companies (VIE).

The coordination of its action with those of the regions and of the chambers of commerce is assured in particular by the representation of the latter on its board of directors. Moreover, a strategic partnership was concluded in March 2015 between this agency and the international network of chambers of commerce to mobilise the resources of their respective networks more efficiently, focusing on six main priority export sectors identified by the Ministry of Foreign Affairs: agri-food, sustainable city, health, information technology and communication, culture and creation, tourism.

■ *Extending the necessary control of local authorities through support for their action*

**The traditional controls** are of course still present. The first is the control of legality, which is put to the test in the economic field, given the increase in power of the local authorities in this area, the increasing sophistication of the tools used although the prefectures have limited resources, and the complexity of the law that needs to be applied (with regard to State aid in particular).

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(such as the management of energy networks).



In exercising its control, the State increasingly strives to be a partner of the local authority. **It is a question less of compelling than encouraging and guiding.**

Besides strict compliance with legality, control of the deconcentrated services<sup>547</sup> is shown through the concern to guard local authorities against the temptation of destructive competition, by relaying the more general action of the State in favour of equality between local areas (in particular in terms of an equalisation of the resources of the local authorities)<sup>548</sup>.

In the economic and financial field, the deconcentrated services advise local authorities by raising their awareness about the risks they take in their economic action, in particular with regard to public investment. This is the role in particular of the DGFIP network, in permanent contact with the local authorities whose accounts it keeps.

These support functions moreover go beyond the daily action of the State with regard to the decentralised local authorities, with for example the creation of the risky borrowing support fund<sup>549</sup> and the France locale funding agency<sup>550</sup> or again, in a different area, “the Agency for economic development in the territories”<sup>551</sup>.

### ***3.1.2.2. Relying on the State-region relationship to ensure the coherence of interventions***

The region is the main level for economic deconcentration<sup>552</sup> and decentralisation<sup>553</sup>. It is therefore at the regional level that the economic action of the State must be coordinated with that of local authorities, in a partnership approach.

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547. Deconcentration is the delegation of powers to local entities which have no legal personality of their own. Decentralisation is the transfer of powers to local authorities.

548. Competition between local authorities, particularly at the economic level, is a phenomenon which affects most countries. Addressing these problems can be carried out directly at the level of the State, including in federal structures (it was in this way notably that in the United States, in the 1970s, that competition between Kansas and Missouri was dealt with). Some countries have set up local ways of dealing with these issues, such as in South Africa, where the provincial governments can intervene in the event of competition between municipalities.

549. Art. 92 of Finance Act No. 2013-1278 of 29 December 2013 for 2014.

550. Local authority funding agency: Article L. 1611-3-2 of the Local Authorities General Code stemming from Act No. 2013-672 of 26 July 2013. This act more generally deals with so-called “toxic” funding, lays down the legal framework for the use of borrowing for local authorities, their groupings and their public establishments and limits the type of borrowing options, in particular in foreign currencies.

551. Announced by the President of the Republic in February 2015 and whose principle was confirmed in May 2015 (partnership between the State and the regions for development and employment in the territories, 12 May 2015).

552. The texts no longer explicitly confer the economic role to the prefect of the region, unlike the situation of 1982 (Art. 63 and 65 of Decree No 2004-374 of 29 April 2004) but the prefecture of region remains the essential link of deconcentrated services in the economic field. The reform of the territorial administration of the State, which took place in 2009 and 2010, strengthened this situation. These directorates work under the authority of the prefect of the region and SGARs whose role in the field of economic coordination is essential.

553. See below 3.1.3.



The creation as of 1 January 2016, or large regions in application of the Act of 16 January 2015<sup>554</sup> can only strengthen this pivotal relationship, since the regional authorities are now more able than in the past to conduct new economic actions. The State has begun to reflect on the evolution of the organisation of deconcentrated services within the framework of the territorial reform, especially with regard to the regions<sup>555</sup>.

■ *A partnership to be forged in actions*

The dialogue between the State and the regions has for many years relied on **contracts** and, in particular, on the State-region planning contracts<sup>556</sup> whose planning logic has become weaker. The lever of the future investment plan can help restore a strategic and foresight dimension to these contracts, which could also ensure coordination of the action of the State and the region in the area of aid to businesses<sup>557</sup>. The same approach could be implemented with regard to the competitiveness clusters, which are co-financed by the State and the regions.

But this more partnership-based approach may also be extended to defining, between the State and the local authorities, an economic action plan within the jurisdiction of the region. It is one of the ambitions of the territorial reform act (NOTRe) when it entrusts the region with preparing an economic innovation and internationalisation development framework (SRDREII), involving the State, in advance, with developing it, and then with approving it<sup>558</sup>. Discussion of this plan could become the central element of coordination between the economic action of the State and the regions.

A procedure favouring transmission to the Government of proposals by the regions relating to **changes to legislative and regulatory texts** or to experiments to implement at the level of their local area, in the economic field, would also stimulate this partnership-based approach<sup>559</sup>.

■ *A partnership based on accountability of the means*

As a result of an experiment in this area, it has been decided to entrust the regions with **the management of the European Structural Funds**<sup>560</sup>. But this would not

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554. Act No. 2015-29 of 16 January 2015 relating to the demarcation of the regions, the regional and departmental elections and amending the electoral calendar.

555. See *The evolution of the regional organisation of the State following the new demarcation of the regions*, Report by the IGF, April 2015.

556. See 1.3.1.1 above

557. This avenue was put forward by the president of the ARF, at his press conference of 27 May 2015.

558. See for the last known status of this text, that stemming from the review of it by the Joint committee of 9 July 2015.

559. The Territorial Reform Act contains a provision of this type (Article L. 4221-1 of the Local Authorities General Code stemming from Article 1 of the Act).

560. The State entrusts to those regions which so request it, the management of all or part of the European programmes for the 2014-2020 period in a capacity as managing authority; I of Article 78 of Act No. 2014-58 of 27 January 2014 relating to the modernisation of public territorial action and the affirmation of the cities organises a temporary transfer of skills that takes effect on the date on which this capacity is acquired pursuant to the procedure for the designation of managing authorities.



be a pure and simple transfer since the State remains responsible, with regard to the European institutions, of possible failings by the regions. In the event of a ruling against it, the State can take remedial action against the region, but this may, in practice, appear difficult to implement. In order to ensure that this prospect remains credible and that the regions are encouraged to manage these funds responsibly where considerable amounts are at stake, the practical provisions and a doctrine for the use of these remedial actions could be quickly specified.

With regard to local authorities' own resources, it is essential, in line with the territorial reform, to complete it quickly by texts giving the local authorities **tax and financial resources** relating to their organisation and the competences attributed to them. This review of the level of resources of the local authorities would be the opportunity to change their nature and composition by ensuring that they have a larger share of "economic taxation"<sup>561</sup>. The regions could thus be directly interested, from a financial point of view, in the results of the economic action that they carry out on their territory<sup>562</sup>.

**Proposal 35: Clarify the respective roles of the State and local authorities in the economic field**

1) give priority to blocks of competence at the level of the State or local authorities by defining clear allocation criteria; base the State's own territorial economic action on the principle of subsidiarity;

*Means: a law*

2) seize the opportunity of the reform of territorial administration of the State to strengthen, by means of redeployments:

- the services of the State responsible for controlling the legality of economic decisions of local authorities;
- the State advice and support structures for the benefit of local authorities which wish to carry out economic action in their territory.

*Means: regulation; circular  
(Prime Minister, Minister of the Interior, Minister of the Economy)*

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561. The reform of business tax in 2010 led according to some analyses to a loss of fiscal and financial autonomy of the local authorities, in particular of the regions and departments (see in particular the Information Report of the Senate No. 611 (2011-2012) by Ch. Guené, issued on behalf of the Joint information mission on the business tax, of 26 June 2012).

562. This avenue was adopted by the ARF and restated in the document it signed on 12 May 2015 with the State, entitled *Partnership between the State and the Regions for development and employment in the territories*.

**Proposal 36: Organise a real economic partnership between the State and the Regions**

1) by greater use of State/Region plan contracts (CPEP), as well as the future economic development frameworks (SRDEII);

*Means: regional economic development, innovation and internationalisation frameworks, State-Region plan contracts*

2) by facilitating the transmission by the regions of proposals to change laws and regulations or proposals for experiments that are useful for carrying out their economic action;

*Means: action by the public persons concerned*

3) by assisting the regions in carrying out their economic action:

- by reviewing the resources which are available to them with regard to their new competences after implementation of the territorial reform;
- by increasing the share of economic taxation in their resources.

*Means: a law*

*(Minister of Finance and Public Accounts; Minister of the Interior; Parliament)*

**3.1.3. A centripetal movement in the division of economic competences between local authorities which will not settle all the issues.**

**3.1.3.1. Successfully polarising action around the region/city pair**

- *The gradual affirmation of the regions with respect to the other local authorities*

Since their creation, the regions have exercised specific competences in the economic field. These prerogatives have been strengthened, going as far as making the region the “leader” of the local authorities in the area of economic development<sup>563</sup>, a role enshrined in Article L.1511-1 of the General Code of Local Authorities: “The region coordinates on its territory the economic development actions of the

563. The Act of 5 July 1972 that established them as public establishments explicitly mentions their role in the economic field (Art. 4 of Act No.72-619 of 5 July 1972), which remained after their transformation into local authorities by the Act of 2 March 1982 (art. 59 of the Act No. 82-213 of 2 March 1982), which gave them special competences in particular in relation to aid to businesses, whereas they were given a central planning role by the Act of 29 July 1982 (Act No. 82-653 of 29 July 1982 on planning reform). The region plan is provided for by Act No. 83-8 of 7 January 1983 (see Art. L. 4251-1 of the Local Authorities General Code; Art. 103 of Act No. 2002-276 of 27 February 2002; Art. 1 of Act No. 2004-809 of 13 August 2004 on local freedoms and responsibilities).



*local authorities and their groupings*". The region also plays a primary role in distributing direct aid to businesses, but this primacy up to now remained relative, since each local authority could invoke its general clause of competence to promote economic development<sup>564</sup>.

The economic role of the regions has been considerably strengthened by two recent territorial reforms. Firstly, their economic effectiveness is increased by the revision of the map of the regions stemming from the Act of 16 January 2015 which, by reducing their number from 22 to 13 has led to an increase in their size<sup>565</sup>.

Secondly, the Territorial Reform Act reaffirms their supremacy with respect to economic competence in the territories, while depriving the department of legal support, by the concomitant removal of its general clause of competence<sup>566</sup>. Most economic aid will now be awarded by the region. In addition, extending an experimental measure established by the 2004 Act<sup>567</sup>, the Act establishes a regional economic innovation and internationalisation development framework with which the actions of the other public persons must be compatible and which it is envisaged will constitute the main tool for the region in the field of economic action<sup>568</sup>.

#### ■ *The emergence of the big cities and the search for new balances*

This movement in favour of the regions has been accompanied by an awareness of the strategic importance of the major urban centres in the economic development field with the phenomenon of the "*metropolisation of growth*"<sup>569</sup>. In order to promote a ripple effect and to avoid these urban centres from becoming isolated business centres that absorb the bulk of the wealth at the expense of the other surrounding areas, better coordination has been sought with the regions.

The economic component of the territorial reform implements these principles. The legislator thus established a framework suited to the emergence of big cities by giving them a specific status and by entrusting them with important competences in the economic development field<sup>570</sup>. Care was taken in reforming the regional map to include big cities in each region, in order to promote ripple effects. But the last stage of the reform, which focuses on the division of competences between the region and the big city, is also the trickiest.

564. All local authorities as well as their groupings are able to intervene with regard to economic development, including by granting aid to businesses under certain conditions. As indicated by the Court of Auditors in its report on *Aid from local authorities for economic development* of 2007, economic development aid was "*considered* [by the legislator of 1982] *more than any other, as a competence inherent to the legitimacy of each local authority to control the development of its territory*".

565. Act No. 2015-29 of 16 January 2015 relating to the demarcation of the regions, the regional and departmental elections and amending the electoral calendar. On the economic dimension of these new boundaries, see in particular the statements of B. Cazeneuve, Minister of the Interior, at final reading, 8 December 2014.

566. Which should lead to the disappearance of most of the economic development agencies set up by the latter.

567. Planned for a period of 5 years by the Act of 13 August 2004 (Art. 1 prev.).

568. Art. L.4251-16 the Local Authorities General Code created by the Territorial Reform Act.

569. B. Lajudie, *Regional reform: an important factor for growth?*, France Strategy, July 2014.

570. See Act No. 2010-1563 of 16 December 2010 on the reform of the local authorities and the so-called "MAPTAM" Act No. 2014-58 of 27 January 2014.

The debates on the Territorial Reform bill concentrated in particular on the prerogatives of the big cities in preparing<sup>571</sup> and especially in implementing the regional economic framework in the event of a disagreement between the city and the region<sup>572</sup>. The solution of allowing the city in this case to develop a strategic directions document that takes into account the regional framework without necessarily being compatible with it, seems to be established<sup>573</sup>.

### ***3.1.3.2. Containing the risk of a scattering of the action of the local authorities***

■ *Local economic action will necessarily remain scattered*

**As regards economic development**, the concentration of power in the hands of the region will remain partial, even after the Territorial Reform Act. For most aid to businesses, the municipalities, inter-municipal groupings and the big cities will always be able to intervene in addition to the region, subject to its agreement<sup>574</sup>. The big cities, alongside the regions, have competence for supporting and participating in the competitiveness clusters<sup>575</sup>, for the agencies working to encourage business start-ups<sup>576</sup> or for the payment of aid that may contribute to maintaining activity<sup>577</sup>. The municipalities, the inter-municipal groupings and the city of Lyon should remain competent for aid for business property<sup>578</sup>.

The economic development framework ensures the coherence of this set of entities for granting aid to businesses only<sup>579</sup>.

Beyond this, economic action in the broad sense remains scattered among all the local policies. This is particularly true of public investment, industrial and commercial public services, town planning, road building and tourism<sup>580</sup>. The result is that a number of specific competencies of the municipalities, inter-municipal groupings and cities but also of the departments themselves have an economic dimension that the framework cannot take into account.

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571. The city is already automatically associated with the preparation of frameworks and planning documents in the economic field (VI of Article L. 5217-2 of the Local Authorities General Code). But this mechanism could be adapted by the Territorial Reform Act which would introduce a specific procedure in this area.

572. There are no problems with collaborations or voluntary transfers: the Act provides for the possibility for the region to delegate competences to the city in the area of economic development (Art. L. 4221-1-1 of the Local Authorities General Code).

573. The Senate joined the position of the National Assembly on this point on 28 May 2015: see Art. L.4251-14.

574. Art. L. 1511-2 of the Local Authorities General Code.

575. Articles 3641-1 and L. 5217-2 of the Local Authorities General Code.

576. Art. L. 1511-7 of the Local Authorities General Code.

577. The local authorities and their groupings in particular can allocate aid for health professionals to establish or stay in the authority. L. 1511-8 of the Local Authorities General Code.

578. Art. L. 1511-3 of the Local Authorities General Code.

579. Art. L. 4251-16 the Local Authorities General Code created by the Territorial Reform Act.

580. See on this point the above-mentioned report of the Court of Auditors of 2007.



Although some of these aspects can be covered by other frameworks (such as the development frameworks), these do not have an strictly economic purpose and will not be able to ensure the overall coherence of this action.

■ *A scattering whose effects must be controlled*

The spread of economic competence between local authorities has the characteristic disadvantages of action undertaken by several actors<sup>581</sup>. Moreover, some local authorities do not have the ability to undertake economic action by themselves or to take on the risks, especially when their territory is of a size that is too small for relevant economic action.

This spread does however have some advantages, especially in terms of territorial coverage. The multiple interventions, despite their defects, limit the risk of “blind spots” of the economic action of public persons, by increasing the chances that issues which deserve to be, are supported by at least one local authority. Moreover, the spread of economic action over very many local authorities allows experiments to be multiplied and thus contributes to a “laboratory of ideas” effect<sup>582</sup>.

These advantages could be strengthened by developing pooling<sup>583</sup> between a grouping of local authorities to organise a project of joint interest or to “twin” projects with strong similarities that can be prepared and funded together<sup>584</sup>. Another avenue is to promote successful experiments by creating, for example, information banks to enable exchanges and encourage good practices.

To facilitate sharing projects or experiments, it is possible to get support from different actors for which it is not their primary mission but for which this pooling could be a natural extension, such as the associations of elected representatives (AMF - Mayors of France association, ADCF - French municipal authorities association, ARF - Regions of France association)<sup>585</sup>. It would also be possible to involve the regions themselves which could, on their territory, promote the innovative measures of local authorities in the region. The regional development agencies could also take over this role that the departmental development agencies had gradually developed. Some specialised agencies (such as the CDC, BPI or Agence France Locale) could also be used for this purpose, in particular with regard to the financial aspects.

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581. A loss of energy and resources, lack of clarity for the recipients of the action, in particular businesses, or on the contrary “bounty hunter” attitudes, a dilution of responsibility and problems with assessing results...

582. Local authorities facing difficulties locally do in fact create varied and ingenious mechanisms which probably would not have been developed if the action had been supported by a single structure. It is a highly attenuated manifestation, in the unitary State that France is, of the theory of the “laboratory of democracy” particular to the federal states identified in the United States since the beginning of the 20<sup>th</sup> century, see 3.2.3.1 below).

583. See on the issue of pooling, but more in a logic of management: the IGA-IGF report, stemming from the *Pooling within the municipal block* report, December 2014.

584. Such as the “*Project bonds*” promoted by the Caisse des dépôts et consignations.

585. These practices already exist in an embryonic way at the ARF; the ADCF also gives advice and disseminates good practices through a review and an observatory.





**Proposal 37: Ensure the coherence of the economic action of the various local authorities and foster collaboration between them**

1) seek the right degree of detail for the regional strategy for economic innovation and international development to ensure the coherence of the action of the local economy without excessively restricting local initiatives;

*Means: regional economic development, innovation and internationalisation frameworks (regions, regional prefect)*

2) develop the pooling of projects in the economic field by including for this purpose agencies such as the CDC, BPI, "Agence France Locale" for which this activity would be a natural extension of their missions.

*Means: texts organising the organisations concerned, agreements with these organisations (funding organisations, associations of elected representatives)*

## 3.2. Decisions better prepared and verified in order to adapt them to the complexity and the temporality of economic issues

Despite its political dimension and sometimes its media impact, economic decision-making is first and foremost technical and implies meticulous preparation in advance (3.2.1). The decision-making process must be adapted to the recipient, in particular to businesses (3.2.2). Finally, once the decision is implemented, it is important that its effects are precisely assessed (3.2.3).

### 3.2.1. Better appraisal of economic decisions

#### 3.2.1.1. Economic decisions remain insufficiently appraised

■ *Better knowledge of the available resources and those shortly due to be*

Expertise is **abundant** on economic issues and more particularly on the measures that the public authorities could take. Besides the analyses of the assessment authorities, many are available from public expert organisations or observatories. The assessment and auditing institutions<sup>586</sup>, the parliamentary assemblies<sup>587</sup>,

586. This is one of the essential tasks of the Court of Auditors. The Economic and Social Council has a foresight and assessment structure.

587. These are developing this same function as part of their mission for assessing public policies, in particular *through* the Committee for the assessment and control of public policies (CEC). But the work of the commissions also contributes to it with their information reports.



agencies, the Bank of France, the Caisse des dépôts<sup>588</sup> and the regulators also produce studies. International agencies conduct their own work, sometimes specifically dedicated to France such as those of the OECD. Finally, the local authorities, develop their own, with the associations of elected representatives.

Besides these institutional sources, public persons and especially the Government use external contributions, from working groups or well-known persons<sup>589</sup>. In addition there are unsolicited contributions from academics, researchers, “*think tanks*” and professional organisations.

These resources could be enriched further by promoting economic research work on the French situation. Making data collected available to the public would allow researchers around the world to work on French data and thus produce useful analyses on the economic situation and on the way to act with regard to it in a relevant way.

However, these sources are **not fully exploited**. Some remain unpublished<sup>590</sup>. In particular, their abundance is even a barrier to their proper dissemination: fairly frequently the same issue is dealt with in parallel studies whose authors are unaware of the other until they are made public, despite the creation of a library of public reports intended, in particular, to identify reports in progress<sup>591</sup>.

Access by the assessment authorities and decision makers to this work, including when it is not public, should be facilitated by the creation of an inter-ministerial platform dedicated to the administrative authorities, which would also usefully identify reports in progress, the themes they address and their schedules<sup>592</sup>. Restrictions would be possible when this work is confidential, blocking distribution even within the administrative authority on the express decision of the authority that is the source of this work.

**Proposal 38: Identify the analysis and research work in progress and publish that which is completed in an inter-ministerial database accessible to the administrative authorities only and regularly updated, with multiple entry thematic categories.**

*Means: extranet website for use by administrative authorities (services of the Prime Minister; Minister of the Economy)*

588. Either by itself or within the context of the Public investment bank.

589. Many reports are ordered in the economic field and have given rise according to the case to very wide reviews (So-called “Attali”, “Gallois”, “Pébereau”, “Pisani-Ferry” reports, etc.) or on the contrary to more targeted contributions.

590. The reports ordered from an inspection body are not disseminated unless their commissioning entity agrees, thus preventing a shared analysis.

591. Circular of 28 January 1999 relating to the free dissemination of official reports on the Internet.

592. It would also facilitate the identification of resource services.

### ■ *Better analysing the resources available for public decision-makers*

Besides the problem of access to resources, most often the public decision-maker does not have a **critical summary** of the elements, arguments, numbers and positions of the services or organisations that are proposing the measure to it.

The abundance of available studies in most cases discourages their analysis prior to decision-making within a time frame compatible with the pace of public action in the economic field. The notes submitted to the decision-makers address a great number of questions of uneven scope and to which priorities are attributed enough. The decision-making meetings do not concentrate enough on questions that justify their “escalation” to the political level.

The preparatory work for the decision-making must therefore correct these defects and focus on a sorted and prioritised presentation of all the studies and relevant elements needed to make the decisions.

#### ***3.2.1.2. The prior assessment mechanism could be systematised***

##### ■ *Improving the mechanism stemming from the revision of 2008 for legislative measures*

France, like other European countries at the same time<sup>593</sup>, instituted a prior assessment procedure resulting from the constitutional revision of 2008<sup>594</sup>. This procedure applies to most bills that the Government submits to Parliament. It requires the Government to explain the reasons for the reform and its main predictable consequences.

This procedure has turned out to be disappointing. Designed in particular to clarify *ex ante* the choices proposed by the bill, the studies are too often prepared after the decision is taken and are used to justify its basis *a posteriori*. The data contained in it are often of little use and not easily verifiable; they do not allow

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593. In Spain, a systematic prior assessment was instituted by a decree-law in 2009 and a guide to assist its preparation has been published. As in France, it is submitted to the Council of State, which issues an opinion made public on its content. In Italy, the Act of 28 November 2005 lays down an assessment before review of the texts in the Council of Ministers and then by the Legislation Committee; the Act of 11 November 2011 strengthens the prior assessment of texts having an impact on businesses. The field of prior assessments varies in other countries. In the United States, bills are assessed by the *Congressional Budget Office* and the *Joint Committee on Taxation*, using several economic models. The assessment is not systematic but, in fact, all the major bills undergo it. Since 2011, the presidency has made the assessment of the economic impact of the regulations of agencies and federal departments mandatory and guidelines have been published for this purpose (quantification and monetisation of costs and non-quantifiable benefits, identification of uncertainties). South Africa has established prior assessment (*Regulatory Impact Assessment*) since 2007 for legislation (laws, orders, decrees) or quasi-regulations (guides and codes of good practice), but very few of the studies are made public. In Canada, only the assessment of environmental impacts is mandatory but, in reality, a major assessment of all aspects of the bill is carried out.

594. Articles 8 to 12 of Organic Law No.2009-403 of 15 April 2009, used for the application of the third paragraph of Article 39 of the Constitution, introduced by the Constitutional Act No. 2008-724 of 23 July 2008.



for a real assessment of the relevance of the options adopted (in particular as compared with possible alternatives) or to assess their effects. In particular, the scope of these studies is very patchy. These defects are particularly notable with regard to the economic impact of the projects.

**The scope** of the prior assessment would benefit from being extended to bills which represent an increasingly important proportion of the texts adopted<sup>595</sup>, subject however to applying only to bills actually on the agenda of the assemblies, which are few in number. An alternative solution, less cumbersome, would be to establish a power of review, in the same what as that existing for requests for opinions from the Conseil d'État<sup>596</sup>. The assemblies could thus undertake to carry out prior assessments for the most significant, in particular, economic provisions<sup>597</sup>. The question of the human and material resources needed to carry out such evaluations remains delicate, since the assemblies do not have all the necessary information. Help, as necessary, should be given from the competent administrative authorities according to arrangements to be defined jointly by the Government and Parliament.

Neither has the prior assessment of amendments been established, even though some of them may profoundly change the initial text and generally make the analysis contained in the prior assessment obsolete. An obligation of a simplified prior assessment could usefully be laid down for amendments of government origin that substantially alter the economic impact of a bill. Although the prior assessment of the amendments of parliamentary origin could constitute an obstacle to the right to make amendments, nothing however prevents the Government from carrying out such an evaluation to clarify the position it will adopt in the session with regard to the said amendments<sup>598</sup>.

A review of the **content** itself of the assessments is required, focusing on the essential aspects. In its current version, the Organic Law of 15 April 2009 provides that in particular these studies must set out in a precise manner *“an assessment of the economic and financial consequences”*. The legislative drafting guide lays down an analysis of the impacts, in particular the macroeconomic ones, as well as the impacts by sector or the types of companies that are the most affected. However, experience shows that the developments that are devoted to

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595. 23.5% of the texts adopted by the National Assembly under the 14<sup>th</sup> Parliament (see information report of 9 October 2014 by L. La Raudière and R. Juanico, on legislative simplification No. 2268).

596. Under the terms of last sub-paragraph 1 of Article 39 of the Constitution: *“Under the conditions provided for by the law, the president of an assembly may submit for opinion to the Conseil d'État, before its review in committee, a legislative proposal filed by one of the members of this assembly, unless the latter objects to it”*.

597. A motion for resolution, filed by B. Accoyer (No. 739 of 21 February 2013) and seeking to amend the regulations of the National Assembly in order to associate an impact study to the bills discussed in public session, has not been examined.

598. The assemblies may in any event decide to carry out a prior assessment themselves of some of the amendments in the conditions laid down by their regulation (Article 15 of the Organic Law No. 2009-403 of 15 April 2009 on the application of Articles 34-1, 39 and 44 of the Constitution).

them are too brief and do not analyse the economic effects enough, the emphasis being put somewhat more on the budgetary consequences of the measures<sup>599</sup>. These shortcomings would justify the introduction of stricter prescriptions in the legislative drafting guide and their reiteration in the methodological indications made to the assessment authorities by the General Secretariat of the Government (SGG).

The prior assessment, which is an integral part of the process for developing bills, must remain the responsibility of the services that put forward this bill. An **external audit** of its quality would nevertheless strengthen its credibility. A counter-analysis of the measures of the bill having a significant economic impact for the growth and activity asked for by the Government from France Stratégie confirms the relevance of such an approach.

Without going as far as creating a new body independent of the Government as exists in several neighbouring States<sup>600</sup>, a control of the relevance and quality of the impact studies of the bills of significant economic scope could be entrusted to a body that is external to the administrative authorities which has proposed the measure<sup>601</sup>. Its outcome should be made public.

■ *Extending the approach, in an adapted way, to certain administrative decisions*

Regulations and administrative decisions do not all currently undergo a real prior assessment of general scope, even when they have a significant economic impact<sup>602</sup>. A circular of the Prime Minister dated 17 February 2011 lays down for any draft text comprising measures regarding businesses, that a detailed impact analysis should be made. Although useful when it was decided, this requirement is no longer sufficient today given the importance of non-legislative texts in economic life<sup>603</sup>.

This is firstly the case with **ordinances**, which are regulatory acts at the stage that they are adopted, even though they act in the area of the law. However, a growing

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599. The instruments at the disposal of administrative authorities to assess the administrative burden on businesses, particularly the Oscar tool, and the “simplification and evaluation” analytical mission of the CGEFI remain moreover under-used.

600. These are in particular the *Regulatory Policy Committee* (RPC) in the UK, established in 2009 and the *Normenkontrollrat* (Nkr) German, established in 2006. See for a thorough study of these two models, the information report of the National Assembly on the above-mentioned legislative simplification of 9 October 2014.

601. The second expert assessment could be total or limited to an audit of the methodology and the trustworthiness and whether the resource administrative authorities, especially when they have a cross-cutting role, have been involved and consulted.

602. See in particular for particular prior assessment obligations: the case of declarations of public utility (Art. R. 122-2 and following of the Environment Code); the use of public-private partnerships (Ord. No. 2004-559 of 17 June 2004), the establishment of commissions of an advisory nature (Decree No. 2006-762 of 8 June 2006); the standards regarding local authorities (circular of 7 July 2011); agency creations (circular of 9 April 2013) etc.

603. The creation announced by the Government on 3 December 2014 of an “Enterprise Impact Committee” made up of business leaders that will work with France Stratégie, whose specific functions and organisation are not yet known, does not make up for the current shortcomings of the prior assessment mechanism for regulatory texts having an impact on businesses.



number of economic reforms are made using ordinances for reasons of speed<sup>604</sup>. The obligations that frame the enabling text are minimal and the ratification text is in principle exempted from a prior assessment. The legislative drafting guide already recommends that a prior assessment as complete as that which would have been required for a bill should be carried out. This recommendation is not always followed, probably because of a lack of genuine commitment by the Government in implementing it. A reminder must be made of it.

Regulatory **decrees and orders** could in the same way undergo a prior assessment, even if it could be briefer than for the ordinances. The current mechanism imposed by the circular of the Prime Minister of 2011 for texts having an impact on businesses could be strengthened and systematised<sup>605</sup>.

Beyond this, it is legitimate to question the regulatory decisions of the independent administrative authorities, agencies, local authorities and individual decisions that may have a significant economic impact, which should in some cases be assessed and made public<sup>606</sup>.

The main difficulty here is to demarcate the scope of the obligation for studying the impact given the basically extensive nature of the subject and the legal risks associated with too imprecise a definition.

Among these decisions, those relating to costly investments deserve particular attention. The main investment decisions of the State must since 2013 undergo an economic assessment<sup>607</sup>. The measure regarding investment by local authorities submitted to Parliament within the framework of the Territorial Reform Act does not relate to an assessment of the basis of the investment decision but only on its multi-year impact on operating costs<sup>608</sup>. It would be desirable to go further and to extend to all public persons, according to provisions that need to be defined, a framework inspired by the regime established for State investment.

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604. Act No. 2014-1545 of 20 December 2014 relating to the simplification of business life and relating to various provisions of simplification and clarification of the law and administrative procedures was thus chiefly an enabling text.

605. The advertising set out in the circular of 17 July 2013 on implementing the freeze of the regulations could, in particular be made more accessible and more visible.

606. The legislative provisions such as those laid down by Article 42-3 of the Act No. 86-1067 of 30 September 1986 requiring the CSA to undertake a prior assessment before giving its approval to a modification of the financing provisions when it relates to the use or non-use of remuneration from users (so-called "switch to free or paid-for service") of certain television channels could be extended to other individual decisions having a significant economic impact.

607. See on the assessment of investment, the regime, which concerns only the State and its public establishments, Article 17 of Act No. 2012-1558 of 31 December 2012 of the public finance framework laws for 2012 to 2017 laid down by Decree No. 2013-1211 of 23 December 2013.

608. Art. L. 1611-9 of the Local Authorities General Code: *"For any exceptional investment operation whose amount is greater than a threshold laid down by decree depending on the category and the population of the local authority or of the establishment, the executive of a local authority or a group of local authorities presents to its deliberative assembly a study relating to the multi-annual impact of this operation on operating costs (...)"*.

**Proposal 39: Extend the scope of the prior assessment of texts falling within the domain of the law and improve its quality**

1) make an undertaking to carry out a prior assessment of amendments of government origin that substantially alter the economic impact of a bill or a legislative proposal;

*Means: Circular of the Prime Minister*

2) recommend the prior assessment of the legislative proposals listed in the agenda of the parliamentary assemblies, with the assistance of the ministries;

*Means: Deliberation of the Senate select committee and of the Conference of the Presidents of the National Assembly*

3) strengthen the prior assessment of ordinances;

*Means: Circular of the Prime Minister*

4) organise an audit of the quality of prior assessments of bills having a significant economic impact, entrusted to a body that is external to the administrative authority which has prepared the project; make its results public;

*Means: Circular of the Prime Minister*

5) enforce the obligation to analyse the economic impacts in the prior assessments, by strengthening the relevant requirements of the legislative drafting guide and methodological indications made to the authorities assessing bills.

*Means: Legislative drafting guide, other methodological tools*

**Proposal 40: Develop assessments beyond the legislative field for decisions having a significant economic impact**

1) establish, for each public person, a doctrine regarding the prior assessment of its decisions that may have a significant economic impact; make this doctrine public and specify in particular those cases for which the results of the assessments will be made public but in compliance with secrets protected by law;

*Means: public doctrine of the public persons concerned*

2) extend the assessment mechanism for investments planned for the State to other public persons, by adapting the system to the situation of each of them.

*Means: a law  
(Minister of the Economy; Minister of the Interior)*



## 3.2.2. Associating businesses with decisions to enable them to anticipate them

### 3.2.2.1. *Improving the conditions of dialogue with companies*

#### ■ *Making the relationship with interest groups more transparent*

Interest groups' "lobbying" activity<sup>609</sup>, for a long time ignored<sup>610</sup>, is taking on a new importance in France, especially in the economic field<sup>611</sup>.

In response, the ethical obligations of public officials have been clarified and strengthened in particular by the act relating to the transparency of public life<sup>612</sup> and should be for all public officials<sup>613</sup>. But beyond the ethical obligations and prevention measures applicable to public decision-makers<sup>614</sup>, the activity of interest groups has up to now had little oversight.

It is true that a framework has been defined for Parliament: the Senate adopted three texts in this sense in October 2009<sup>615</sup>; the National Assembly followed with a similar approach<sup>616</sup>. These measures which lay down prior registration of the groups, advertising regarding their participation in parliamentary work (a listing of their hearings) and in return, ease of access to the work of the Assemblies, are optional and incentive, and few organisations are currently listed. Nothing however is laid down for the Government and the central administrative authorities, although a major part of the activity of the interest groups is directed at the executive (cabinets and sometimes administrative authorities).

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609. See on this questions in particular G. Houillon, *Lobbying in public law*, Bruylant, 2012; see the report of the working group of the National Assembly on *The lobbies in the National Assembly*, Ch. Sirugue, 27 February 2013.

610. Foreign to the French conception of general interest and public decision making, inspired by the ideas of Rousseau and which is not regarded as the result of a confrontation of particular interests, the way in which these interests should be taken into account has therefore only become the subject of a particular reflection very recently.

611. Because of professional federations, consulting firms, large companies that create "public relations", "strategy" or "future" managers when these are not essential functions of "secretaries general". This activity is thus becoming increasingly professionalised. See criticising this situation: *Transparency International France* report, *Transparency and integrity of lobbying, an issue of democracy, overview from a good-citizenship viewpoint of lobbying in France*, October 2014; see also, on the comparative study of the oversight of lobbying in Europe, its report of March 2015 *Lobbying in Europe: hidden influence, privileged access* (in English).

612. Act No. 2013-907 of 11 October 2013 relating to the transparency of public life.

613. Amending letter of 17 June 2015 to the bill (No. 1278) on ethics and the rights and obligations of public officials.

614. The law enforcement framework itself is analysed in a critical way in the report of J.-L. Nadal of 7 January 2015 on the exemplary behaviour of public officials, *Renew public trust*.

615. The select committee of the Senate adopted on 7 October 2009 a new chapter for its general instructions (Chapter 22 *bis*), a code of conduct applicable to representatives of interest groups and a Quaestors Order No. 2010-1258 of 1 December 2010 laying down the rights of access to the Luxembourg Palace by representatives of interest groups.

616. A new mechanism was decided by the Select Committee of the National Assembly on 26 June 2013, which adopted a code of conduct for representatives of interests.



It would be preferable to define a **single framework applicable to interest groups**<sup>617</sup>, without making a distinction on whether they conduct their activities with Parliament, the Government, the local authorities, independent administrative authorities or operators. It could as a minimum consist of an obligation on any actor, prior to exercising its activity, to register its areas of activity in a public directory listing and if applicable, its representations to public officials.

When these groups have participated in a process that has resulted in a decision that will undergo an impact study, mention of their contribution could be made.

**Proposal 41: Define a legislative framework for all the activities of interest groups**

- 1) provide for the registration of these groups in a public register identifying in particular their areas of activity and their contacts with public officials;
- 2) mention the contributions of these groups in the impact studies.

*Means: a law  
(Prime Minister; Minister of the Economy)*

■ *Ensuring the economic representativeness of the actors dialoguing with the public powers*

The Chambers of Commerce and Industry are described by the Commercial Code as “*intermediate bodies of the State*” performing “*the function of representing the interests of industry, trade and services with public authorities or foreign authorities*” and “*providing the interface between the different actors concerned*”<sup>618</sup>. But their status as public institutions of the State prevents them from fully fulfilling this representative role, the chambers having primarily the utility of making known to the public authorities, independently of any specific request that they might have, the opinion of business leaders and information about their situation.

Other forums promote this dialogue, such as the CESE<sup>619</sup> and various specialised committees (National conference of industry, a permanent commission of consultation for services, National consultation commission of liberal professions)<sup>620</sup>.

The existence of such structures or “intermediate bodies” does not however exhaust the question of the representation of economic interests and businesses in relation to the public powers. It is distinguished from the **representativeness** of employers’ organisations governed by the Act of 5 March 2014, which only explicitly

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617. See the communication of the Minister of Finance and Public Accounts to the Council of Ministers of 22 July 2015, which announces a bill for the transparency of economic life including provisions in this field.

618. Art. L. 710-1 of the Commercial Code.

619. Given its current organisation, which does not allow it to work easily with the central administrative authorities or parliamentarians in preparing bills or legislative proposals, the CESE seems more usable for *ex post* assessment than *ex ante* assessment of reforms.

620. Of certainly a different profile, the “Business Impact Committee” announced by the Government on 3 December 2014, already mentioned, could contribute to this representation.



deals with that of the social field<sup>621</sup>. Although the social representativeness regime provides useful lessons, a specific reflection on economic representativeness is necessary<sup>622</sup>, since the economic action of public persons must be able to rely on a transparent dialogue with representatives of the business world.

■ *Strengthening consultation prior to the adoption of new mechanisms*

Taking into account the point of view of companies and economic actors in general is an essential part of the quality and acceptability and therefore effectiveness of the standard to which they will then be subjected<sup>623</sup>.

**Economic regulation has innovated** in this area, through the collection of observations from actors about projects even though there is no text that requires this. Thus “financial market consultations”<sup>624</sup> have developed in the financial field and, more generally, open consultations with regulatory projects being put on line. Most regulators and even ministries now follow such an approach, for example in the field of commercial law<sup>625</sup> or public procurement<sup>626</sup>.

These consultations nevertheless are carried out on an ad hoc basis and subject to the whim of the public persons.

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621. Act No. 2014-288 of 5 March 2014 relating to vocational training, employment and social democracy.

622. See in particular regarding the reform of employers’ representativeness, the report of J.-D. Combrexelle, Director General of Labour, of 23 October 2013: *“Indeed not without perplexity, the author of this report has been able to observe to what extent this issue of representativeness and therefore the legitimacy of the actors was little present in certain forums that have an economic purpose – including community or national forums with decision-making powers...”*.

623. A review of foreign experiences shows different models of organising dialogue between the public authorities and the business world, in particular through the consultation procedures that they have put in place. Since 2005, Switzerland has established a specific framework implementing Article 147 of its Constitution with regard to consultation on significant texts. A fairly systematic consultation mechanism also exists in Norway. In Canada, dialogue is carried out through the Chamber of Commerce and the Canadian Council of Chief Executives. Similarly, in Saudi Arabia, dialogue is primarily provided through the 28 chambers of commerce. In Brazil, dialogue takes place informally through the National Confederation of Industry and through the Council of Economic and Social Development, as well as by the Federation of Industries of Sao Paulo (which represents a very significant share of Brazilian GDP). The Japanese system is more original. The culture of consensus there is very strong and dialogue between the administrative authorities and the business world is continuous and structured at the highest level by advisory committees or through relations forged directly with the offices of the technical ministries.

624. Supported by a dedicated committee, the Committee “Paris financial market 2020” was set up by the Minister of Finance in June 2014 (press release of the Minister of the Economy of 16 June 2014)

625. The Ministry of Justice has established a specific page on its website on these public consultations, which it carried out recently on the reform of contract law (until 30 April 2015) or in the past on the simplification of company law, the effectiveness of the commercial justice system or the social and environmental transparency of businesses.

626. The Directorate of Legal Affairs of the Economic and Financial Ministries has launched a public consultation on the draft decree relating to the measure for the simplification of public procurement markets and contracts in March 2014, and then on a draft order transposing the legislative component of the “public procurement” directives in December 2014.



Compulsory strengthening of prior consultations is not the most suitable channel. Often cumbersome and formalistic, their field of application would be very difficult to define given the difficulty even of demarcating the scope of the economic questions. It would not seem desirable for economic texts therefore to adopt a measure similar to that of Article L. 1 of the Labour Code<sup>627</sup>.

The Prime Minister could however ask members of the Government to submit **systematically for open consultation** any draft text of significant scope. The independent administrative authorities and the local authorities that adopt regulation or decision-making proposals that have an economic impact could do the same.

It would be possible in this regard to be guided, for these voluntary “open consultations”, by the reference framework established by Article 16 of the Act of 17 May 2011 for mandatory consultations<sup>628</sup>.

**Proposal 42: Carry out a public consultation on all draft texts and decisions having a significant economic impact in line with the framework laid down for the mandatory open consultations by the Act of 17 May 2011.**

*Means: Circular of the Prime Minister;  
commitments of the competent authorities  
(public persons concerned)*

### 3.2.2.2. *Allowing companies to better anticipate*

#### ■ *Limiting the number of interventions within the same economic field*

Fluctuations in the economic cycle, the desire to react immediately to economic difficulties and media and political pressure lead to public persons intervening very frequently, sometimes revisiting measures that have only just been applied. The phenomenon is highly pronounced in the tax field, where a very significant part of the General Tax Code is amended every year, and sometimes several times within the year.

627. Pursuant to Article L. 1 of the Labour Code: “Any reform project planned by the Government which relates to individual and collective relations regarding work, employment and vocational training and which falls within the field of national and inter-professional negotiations, is subject to a prior consultation with the trade union organisations of employees and representative employers at the national and inter-professional level for the purpose of starting such negotiations;

628. Art. 16 of Act No. 2011-525 of 17 May 2011 for simplifying and improving the quality of the law, specified by Decree No. 2011-1832 of 8 December 2011 relating to open consultations on the Internet.



The instability of the legal norms and the resulting legal insecurity constitute one of the major criticisms made by businesses to the public authorities. They prevent companies from planning for the future and from reasonably anticipating the consequences of their management choices or the profitability of their investments.

The first solution is to refrain from frequently adjusting the economic mechanisms. Very often the disruption resulting from a change to a mechanism may cancel out the expected benefit. An imperfect mechanism, but one that is well-known is thus often preferable to a change with unpredictable effects. The “zero option” must therefore be appraised in the prior assessment, as well as all the alternatives to changing the standard.

Public persons must also be able to commit themselves not to change a mechanism for a set period of time, as was decided with regard to the five “*main tax mechanisms*” for investment and the life of enterprises frozen as part of the competitiveness pact<sup>629</sup>. Similarly, the Government has undertaken not to change the regulatory framework of time limits for payments<sup>630</sup>. The development of this type of “moratoria” contributes substantially to strengthening the predictability and efficiency of the standard.

**Proposal 43: Study the benefits of not intervening in the economic field**

1) strengthen the “zero option” analysis in the prior assessments by measuring in a precise and quantified way the costs induced by any normative change;

*Means: prior assessments required by the texts*

2) develop “moratoria” on essential economic mechanisms , especially as regards taxation and standards.

*Means: public commitment by the competent authorities;  
texts establishing the mechanisms in question*

*(SGG, Minister of the economy and sectoral ministers concerned)*

■ *Using the available procedures to control the implementation time*

Given the volatility of the economic situation and the instability of the business environment, the efficiency of an economic measure depends very largely on when it is implemented. It can even produce effects that are the opposite to those expected when it is applied too late. This is particularly true in the field of starting companies and aid to companies in difficulty.

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629. Research tax credit (CIR); mechanisms favouring holding and passing on businesses (“shareholder pacts”); exemptions for Young innovative enterprises (JEI); incentive for investments in SMEs; territorial economic contribution (CET).

630. “Payment times: The State commits to regulatory stability”, press release of the Ministry of the Economy of 13 February 2014.

The economic action of public persons must therefore be able to follow **fast decision-making procedures** when urgency so requires<sup>631</sup>. Like other countries, France has rules that take this necessity into account<sup>632</sup>.

The accelerated legislative procedure has precisely this purpose<sup>633</sup>. Although the regulatory procedure does not include formalised emergency mechanisms applying to the whole of the process, it is possible to shorten the mandatory prior consultation times that use up a lot of time<sup>634</sup>. Agencies, independent quangos and local authorities for the most part control the time limits applicable to their procedures.

Therefore, delays in implementing decisions made are due more to **managing priorities**, in particular in the parliamentary calendar, and to contradictory instructions made to the administrative authorities, which must simultaneously prepare the implementing texts of laws that have already been voted, interact extensively with all of the stakeholders, prepare new legislative provisions and assess increasingly specifically the consequences of the envisaged measures.

The use of the accelerated procedures fails to compensate for these delays because all too often it is made without a genuine reason of urgency. It would be futile to try to restrict its use using criteria defined in advance: by their nature, it is difficult to

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631. Case law has long recognised that an urgency can, even without a text, empower the competent authorities to adopt the measures required by the circumstances with legal constraints that are less strong than in ordinary law (see in particular the case law developed in line with the CE decision, 28 June 1918, *Heyriès*, GAJA No. 31, D, 2013).

632. Most of the countries studied have emergency procedures available in the field of economic action. In the United States, the *International Emergency Economic Powers Act* is a federal law authorising the President to regulate trade after having declared a situation of national emergency in response to an unusual and extraordinary threat. In Italy, urgency in economic matters is taken into account by the use of the decree-law (provided for by Article 77 of the Constitution); the government has recently made use of it for urgent measures to revive the economy (2013) or again the “*Sblocca Italia*” decree of September 2014 containing measures to support investment and administrative simplification. In Spain, royal decrees allow the government to legislate rapidly (Article 86 of the Constitution) and have often been used in recent years in the context of economic crisis, in particular for the establishment of a fund for restructuring the banking sector (2009), a deposit guarantee fund (2011), a hiving-off bank (2012) and for the reform of the labour market (2012). In Argentina, Article 9 of the Constitution allows emergency decrees for economic and budgetary matters to be issued, with the exception of the tax field.

633. Amending texts about which discussions are already quite advanced in Parliament is also sometimes used to save time. This expedient creates risks with respect to constitutional case law regarding the right to amendment and it is made dangerous because of the current lack of real technical and legal expertise for amendments, even of government origin, see 2.2.1.2 above (on legal expertise) and 3.2.1.2 (on technical expertise).

634. See in particular Decree No. 2006-672 of 8 June 2006 relating to the creation, composition and operation of administrative commissions of a consultative nature. Certain emergency consultation procedures are also organised by specific texts, such as that regarding the CNEN which even provides for a decision within 72 hours under VI of Article L. 1212-2 of the CGCT.



define urgent situations abstractly and a strengthened framework could result in procedures becoming slower and less secure<sup>635</sup>.

Besides controlling the flow of new provisions (see above) it is therefore the agenda<sup>636</sup> and the control of schedules that must be improved, as the experience gained in the area of “guiding the normative work” for implementing the laws and the transposition of European directives<sup>637</sup>.

The schedule is also influenced by **contentious proceedings**, since purely dilatory appeals may delay the action and its implementation. Certain fields of the economic action of public persons are very well suited to these, such as public procurement.

Although the right of appeal must be preserved<sup>638</sup>, mechanisms to limit its negative effects have been tried out<sup>639</sup>.

With regard to urban planning, the ordinance of 18 July 2013<sup>640</sup> thus adopted a number of mechanisms, including the possibility of suspending contentious proceedings when the act or the contested decision may be subject to a modification<sup>641</sup>. Subject to a positive outcome of the initial applications of these mechanisms, provisions of this kind could be applied to other economic areas able to mitigate the negative effects of appeals on the time aspect of the economic action. The Government could ask the Conseil d'État to study the conditions and means for an extension of this kind.

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635. Currently, the possibility open following the revision of 2008 by the second subparagraph of Article 45 of the Constitution, of the Conference of the Presidents of both assemblies, jointly opposing the use of the accelerated procedure, has never allowed it to be prevented.

636. A large number of countries practice a form of annual timetabling of the main measures that need taking, in particular in the economic field. This is the case in the United States with the state of the Union address or in the United Kingdom with the Queen's Speech. In Canada, in addition to the Queen's Speech, an economic action plan sets out the main decisions to come, sometimes over several years, that can provide security to operators.

637. Circular on the quality of the law of 7 July 2011.

638. It has even been renewed in some cases, see e.g., for contracts: CE, Assembly, 4 April 2014, *Department of Tarn-et-Garonne*, No. 358994.

639. Most countries are faced with the proliferation of appeals in the field of the economic action of public persons. The methods adopted to limit the use of these legal channels for dilatory purposes are quite varied. Certain systems place on the losing party, as in Argentina, the bulk of the costs that it has generated. Italy has developed non-contentious proceedings to limit appeals regarding public procurement. More extreme solutions are sometimes also used, such as in Egypt, where appeals against privatisations have been closed to third parties to the operation.

640. Ordinance No. 2013-638 of 18 July 2013 relating to urban planning appeals implementing certain urban planning recommendations of the report of D. Labetoulle, 25 April 2013 *Construction and Appeal Rights: Striking a Better Balance*.

641. The text also adopts a strict definition of the interest of acting, the possibility of ordering the applicant to pay damages if the appeal exceeds its legitimate interests, the obligation to register the transactions with the tax authorities by which the applicants can withdraw in return for a sum of money...

**Proposal 44: Acquire means for controlling the timetable for implementing reforms in the economic field**

1) make a public commitment to timetabling economic measures and on the deadlines for their implementation; ensure compliance except in exceptional circumstances;

*Means: Government action  
(SGG, Ministry of the economy and sectoral ministries concerned)*

2) study the conditions under which the effects of dilatory appeals on the mechanisms of public economic action could be prevented in the light of an initial assessment of the application of the provisions adopted, in the field of urban planning, by the Ordinance of 18 July 2013.

*Means: request for a study or opinion from the Conseil d'État  
(SGG, Conseil d'État)*

■ *Promoting the effective implementation of measures*

The economic action of public persons on businesses will be much more effective if they have **been able to prepare for it**, even if circumvention strategies are sometimes possible<sup>642</sup>.

The conditions for the entry into force of measures must be subject to careful review<sup>643</sup> taking into account the requirements of the principle of legal security and beyond that, the time needed for businesses to adapt to them. It is therefore necessary to provide for deferred entry into force and, where necessary, transitional provisions allowing for a gradual implementation of the mechanism.

In fact, these principles underlie the procedure of common entry into force dates established by the Circular of the Prime Minister of 23 May 2011<sup>644</sup>, an original mechanism for which there is no real equivalence in the other countries studied<sup>645</sup>.

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642. Businesses can sometimes use information on the intentions of a public person to derive a benefit or avoid its effects. Certain decisions are better in this regard in not being announced in advance, in particular as regards transfers or acquisitions of shareholdings, so that they do not influence the market price of securities being bought or sold.

643. Associating businesses in developing draft economic texts, already advocated above in 3.2.2.1 is also a way of promoting the predictability of the action.

644. This regime applies to all the regulatory texts that concern businesses. Deferred entry into force is at least two months in principle and the effect of these rules is scheduled, except in special circumstances, for either 1 January or 1 July.

645. But in many countries, the rules for entry into force of texts reserve a greater adaptation time than this, which results, in France, from the principle laid down in Article 1 of the Civil Code (entry into force, in principle, on the day after publication). For example, in Norway, laws come into force one month after their publication in the Official Gazette. In Poland, the time in principle is 14 days and 6 months for codes; moreover, resulting from the case law of this country, laws introducing new taxes must be published before 30 November in the preceding year to which they apply.



The application of this mechanism nevertheless remains fairly limited: fewer than fifteen are subject to it for the 1 July 2015 deadline, which is low in relation to the number of texts of concern to businesses and published in the Official Gazette in the previous six months. More systematic use should be recommended.

The actual application of measures by companies can also be promoted by **an effort of support**.

For economic measures of a general scope, this involves publishing, at the same time as the text that establishes them, elements allowing a better understanding of its content and requirements<sup>646</sup>. Circulars, in particular, fulfil this function. They play an essential role, in particular, with regard to tax, that are binding on the administrative authorities<sup>647</sup>. The texts and case law have strengthened their scope and the requirement of transparency for their preparation and dissemination<sup>648</sup>.

The publication of “guidelines” or doctrine adhered to by the administrative authorities to allow businesses to understand how a mechanism will specifically be applied is also very useful<sup>649</sup>.

The right to consult the competent authority about an individual situation within the framework of the rescript<sup>650</sup> or other measures inspired by a philosophy close to it<sup>651</sup> facilitates implementation of the mechanism and should be expanded.

The same is true for the benefit of businesses of keeping permanent and open access to the administrative authorities to inform them of the difficulties that they face in applying texts. The use of forums, whether physical or electronic, in particular allows a continuous dialogue to be established between the public persons and the economic operators.

***Adaptation of the decision-making process: the example of the administrative procedure of the United States***

The U.S. regulatory procedure mainly stems from a text originally adopted in 1946 - the “*Administrative Procedure Act*” (APA) - whose main parts are:

- the publication, twice a year, of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, prepared by the *Office of Information and Regulatory Affairs* (OIRA)

646. The publication of decree notices (circular of the Prime Minister of 7 July 2011) contributes to this movement, delivering summarised information about the subject of the text, the public targeted, the standards it applies, the date of its entry into force as well as a brief description of its content.

647. Regime of Article L. 80 A of the Tax Procedures' Guide:

648. See Decree No 2008-1281 of 8 December 2008 regarding the conditions of publication of instructions and circulars; see also, with respect to the CE appeals regime Sect. 8 December 2002, *Mrs Duvignères*, No. 233618; GAJA No. 108 Dalloz, No. 2013.

649. See e.g., the guidelines of the DGCCRF or the doctrine of the shareholding State.

650. See in particular with regard to tax, Article L. 80 B of the Tax Procedures' Guide.

651. See in particular on this point the “project certificates” (Ordinance No. 2014-356 of 20 March 2014) as well as the study of the Conseil d’État, *The rescript: Securing initiatives and projects*, La Documentation Française, 2014.



and the *General Services Administration* (GSA); this publication allows an inventory to be made of all rules being developed, provides upcoming dates and identifies the sectors that may be affected;

- the justification by the agencies, during the active phase of developing new standards, of the content of their projects through detailed analyses containing impact studies and an assessment of the risks;

- the publication of draft rules in the *Federal Register*, accompanied by analyses and explanatory documents; this publication starts a period during which the public may submit comments to the agencies, which must respond to them (collectively) and take account of these comments in the final text;

- once this text is published, the new rules come into force only 30 days after their publication and 60 days for “*major rules*”; the agencies then publish guidelines to clarify the interpretation that they will adopt.

**Proposal 45: Help businesses adapt to new measures taken in the economic field**

1) apply more systematically common dates of entry into force of mechanisms applicable to businesses;

2) develop the use of guidelines within economic administrative authorities; strengthen use of the rescript; ensure by means of new technologies, a continuous dialogue with businesses on the conditions for the implementation of texts and economic decisions.

*Means: action by the public persons concerned  
(SGG, Ministry of the economy and sectoral ministries concerned)*

### 3.2.3. Developing experimentation and *ex-post* assessment

#### 3.2.3.1. Strengthening experimentation

■ *Insufficient use of experimentation*

Given the limits of modelling, measuring the precise impact of a new economic mechanism cannot be made without testing allowing its full-scale results to be assessed by comparing them with those of a “counterfactual”, i.e. an area or a population to which the measure has not been applied. The interest of this method has led to a revision of the Constitution to allow for a necessary derogation to the principle of equality (Articles 37-1 and 72)<sup>652</sup>.

652. France is one of the few countries to have a legal framework organising experiments. Federal countries have no need; their very structure allows mechanisms to be tested at the level of federated states, which are “*laboratories of democracy*” (according to the expression of Judge Bradeis of the Supreme Court of the United States). This is how a number of experiments in the *German Länder* are carried out, but also in certain emerging countries with a federal structure, such as Brazil or India. The practice of experimentation is more or less intense depending on the country. China is accustomed to pilot projects, that it then



Despite its usefulness, experimentation is only very rarely used currently, and has only been used very little in the economic field<sup>653</sup>. A widening of its use is possible in this field without modification of the texts. The experimentation culture must be developed both within the State and in the local authorities and be more valued in the public debate as compared to the dominant practice consisting of announcing “ready-made” reforms.

It could in particular be required that assessment authorities justify in the impact studies the reasons why it has not been possible to first test out the measure through experimentation. An annual report to Parliament on the use of experimentation would undoubtedly lead to an observation of the low take-up of the mechanism and maybe recall its interest to the legislator.

■ *The rigour required in conducting experiments*

Although the RSA - Active solidarity revenue remains an example of an experimental approach, its generalisation even though the results of the experiment were not known has demonstrated the difficulty of carrying out this type of procedure under rational conditions. Similarly, ending it before the scheduled end of the experiment is very harmful for using its results. If the results of a measure are below expectations, this must not result in it suddenly being stopped, failing which information may be lost that would have allowed a more relevant mechanism to have been developed<sup>654</sup>.

Experimentation may also take the form of a very gradual implementation of the reforms, for different groups and areas, in order to be able to learn lessons from the first steps before final deployment.

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generalises when they are satisfactory. Conversely, there is little experimentation in Japan, which is regarded by some observers as one of the causes of the rigidity of its economy. The same is true of Poland, where the lack of experimentation is perceived as one of the causes of the instability of economic legislation, which is finally tested out only full-scale and which must be modified or adapted very frequently (for example, in the field of public procurement).

653. See in particular the European Structural Funds with Act No. 2004-809 of 13 August 2004 on the basis of Article 37-1; the experiment of the active solidarity income (RSA) on the basis of Article 72 sub-paragraph 4 by Act No. 2007-1224 of 21 August 2007; the project certificates of Ordinance No. 2014-356 of 20 March 2014 relating to the experimentation of the project certificate on the basis of Article 37-1 of the Constitution.

654. The case of boarding schools of excellence, although not falling within the economic field, is an illustration of this. The decision to abolish these institutions, created starting in 2009, was announced in 2013.



**Proposal 46: Develop experiments and carry them out under conditions allowing lessons to be learned:**

1) justify systematically, where appropriate in the impact study, the reasons for which the use of experimentation has not been possible;

*Means: methodological guides for use by the central administrative authorities*

2) submit a report to Parliament each year on the experiments conducted or initiated in the past year;

*Means: decree; act if applicable*

3) carry out experiments for their entire term in order to be able to extract relevant data and information from them;

*Means: action of the Government; text putting an end to the experimentation*

4) encourage experimentation taking the form of a gradual implementation of a new mechanism to be able to adjust its parameters in the light of the initial experiences.

*Means: act or regulation introducing the measure  
(SGG, ministers concerned)*

### 3.2.3.2. *The a posteriori assessments should become systematic*

■ *Developing ex-post assessment of the texts*

The *ex-post* assessment is too little practised today<sup>655</sup>. The results of these assessments are not always passed on or exploited by the public decision makers. Often, an existing mechanism is only assessed once the decision has been taken to change it.

It would be interesting to draw inspiration from the European practice of “*review clauses*” (or even “*sunset clauses*”<sup>656</sup>) requiring a thorough assessment of the economic mechanisms so that they can be changed if the assessment reveals insufficient results. The *ex-post* assessment could be carried out by the department behind the measure, but based on a second independent expert assessment whose results would be made public. The provisions for financing the assessment should be provided as soon as the initial measure is adopted.

655. This situation is not particular to France. Some countries have in fact laid down in the texts the principle and sometimes the provisions of an *ex-post* assessment such as Switzerland (see insert), Norway (paragraph 16 of the Regulation regarding the financial management of the State), Italy (Act No. 246 of 28 November 2005 on verification of the regulatory impact; the creation in 2012 of the Commission for the revision of public expenditure) or South Africa (preparation of an assessment guide approved in 2011) but despite this, *ex-post* is not systematic.

656. “*Sunset clauses*” provide for the lapse of the measure at the end of a certain period of time and/or if it has not been assessed. “*Review clauses*” confine themselves to imposing the assessment, without the failure to do so having any consequences on the lifetime of the measure.



### *The a posteriori assessment and its methodology: the example of Switzerland*

Under the terms of Article 170 of the Constitution of the Swiss Confederation: *“The Federal Assembly shall ensure that the effectiveness of the measures taken by the Confederation undergo an assessment”*. The legislation includes a growing number of assessment clauses obliging the administrative authorities to check the effectiveness of the measures they adopt.

In 2001, the federal control of Finance (CDF) created an expertise centre for cost-effectiveness audits and assessments. The assessments also appraise as systematically and objectively as possible the effects of public action not only on the target audience, but also its impact on the whole of society, after a multidisciplinary analysis.

Before each assessment, the CDF carries out a feasibility study to ensure that the audits, which involve significant resources, will provide usable results. This feasibility study explores more deeply the draft of the project, determines the assessment methodology and settles the question of availability of and access to information. It also sets out what analysis technique should be used and which people should be questioned. Out of 10 criteria used by the CDF, 8 at least must be satisfied to begin the assessment. For example, the programme must have been running for a few years, its outputs must be quantifiable, the Federal Council and the Federal Assembly must have sufficient room for manoeuvre and the results of the assessment must be available in a timely fashion for the political discussions to go ahead.

#### ■ *Improving the reviews of public policies in the economic field*

The general revision of public policies (RGPP) has been an innovation in carrying out the reform of the State *“from concrete segments of activity, totally revised and analysed in their operation and their effects”*<sup>657</sup>. Modernisation of the public action begun since 2012 has widened the objective of these audits, besides simply a reduction in costs, and the list of the bodies concerned, now including the operators and the local authorities.

In the field of the economic action of public persons, assessments have been carried out on the effectiveness of the mechanism for supporting the internationalisation of the French economy, support for businesses, the steering of the social and solidarity economy policy, the tax incentive mechanisms for investment in France overseas, the control of companies, aid and support for companies, etc.

This work has, up to now, concerned fairly little the regulated sectors. Their importance in the economic field would justify however that they undergo in-depth assessments of the results of economic regulations in the light of the objectives pursued. This review should also focus on the relevance of the choice to maintain the use of a sectoral regulation, especially in particular given

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657. See *Review of the RGPP and the conditions of success of a new policy for the reform of the State*, IGA, IGAS, IGF, report September 2012.

the objectives already achieved – for example, replacing a public monopoly with a competitive market –. The independence of the regulators is not an obstacle to the very principle of these assessments, whose provisions will however need to be adapted: Parliament in particular could be associated with this.

**Proposal 47: Make the *a posteriori* assessment systematic**

1) develop review clauses in the texts establishing a new mechanism laying down the financing arrangements for the assessment;

*Means: text introducing the initial mechanism  
(SGG, Ministry of the economy and sectoral ministries concerned)*

2) conduct a periodic evaluation of the results of the sectoral regulations with regard to the objectives assigned to them by the law, including a review of the relevance of the choice of maintaining a sectoral regulation.

*Means: a law regarding independent regulators  
(Parliament, ministers concerned)*

### 3.3. Choosing the tool best suited to the objective pursued

Choosing the appropriate tools is a prerequisite for the efficiency of the economic action of public bodies. However, it is little studied and it is not even the subject of a definition or shared classifications (3.3.1). The range of tools and their composition are moreover highly subject to change. They must regularly adapt to changes in the context and needs (3.3.2). The wide range of tools used for economic action and their implications are poorly known about by the public bodies that use them. It is on this point that the most important progress can and must be made (3.3.3).

#### 3.3.1. The necessary definition of the concept of a tool for economic action

##### 3.3.1.1. A crucial choice

■ *The concept of a tool for economic action*

The frequency of use of the term “tool” in the economic field is due to its polysemous nature. The expression can thus relate to an entire policy (facilitation of credit is a “tool” of economic policy), or institutions (agencies and regulators are “tools” of economic action).



This study adopts a narrower meaning of the term: the tool is what remains of an action when the objectives that it pursues, the persons or bodies who decide it and the procedures followed to engage it, are excluded. The tool is therefore simply the instrument used by the public person to act.

But a tool is not the equivalent of a “measure” or a “mechanism”. A tool can be duplicated, is general and can be used in most sectors and for different objectives. It is the generic mechanism, the “matrix” of the measure or of the mechanism, which, in some way, constitutes the parameterised tool. The creation of an export guarantee for the benefit of SMEs is thus a measure and the tool used is the public guarantee, which can be implemented for other purposes.

The parameters used are a matter of economic and political appraisal and especially one of a choice of appropriateness. But the tool itself is a technical element whose use is overseen by a legal regime: grants, loans, companies, brands, etc.

The tools in question are those that may be used for the needs of economic action as defined above according to a criterion of finality<sup>658</sup>, i.e. designed to achieve an economic objective. But the approach must focus on those whose effects are measurable on their direct recipients, without being extended to the macroeconomic levers used for monetary and budgetary policies<sup>659</sup>.

The tools of economic action, within the meaning of this report, can therefore be defined succinctly as all the generic mechanisms usable by public persons when they develop, in a given field and context, specific measures to achieve micro-economic objectives.

#### ■ *A mixed range*

Apart from the economic purpose, there is little in common between a subsidy, the privatisation of a company, the creation of an urban development area (ZAC), assistance to entrepreneurs, a public contract or a communication campaign.

Some tools are economic by nature such as granting a loan or a guarantee or creating a public company. Others are economic due to the use which is made of them: regulating or communicating are not activities reserved to the economic field. Others, finally, are open to multiple economic uses and effects such as public contracts<sup>660</sup>.

The tools used come under the jurisdiction of public law (regulating an activity, laying down zoning in the economic urban planning field), or of private law

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658. See 1.3.3. above

659. See 1.1.1. above

660. A public contract can be an economic tool where a public person invests or consumes a good or a service; outsources an uneconomic activity that it could have organised itself (for example, the cleaning of its premises); or seeks to promote certain types of enterprises (respecting social and environmental standards) rather than others. See for a doctrinal approach to the concept of “tool” close to that adopted in this report, with regard to public procurement, S. Saussier and J. Tirole, “Strengthening the efficiency of public procurement”, Conseil d’analyse économique, note No. 22 April 2015.



(a guarantee and a loan are the mechanisms of ordinary business law). The actions which make up the medium may be formalised (decision of a regulatory authority) or not (a public declaration, advice given over a counter to a company). They are unilateral (the granting of a subsidy by a local authority) or contractual (a contract, a guarantee and certain subsidy provisions). Most have a direct action, others indirect, through the creation of a new legal person (economic interest grouping or limited company for example) etc.

### 3.3.1.2 *The interest of classifying tools*

#### ■ *The possible classifications*

Tools can be grouped according to the type of powers used by the public persons (use or non-use of prerogatives of public power), the degree of constraint exercised (measures imposed on everyone, or encouraging a change in behaviour), their nature with regard to spending or not (action including an immediate, deferred or zero cost), the positioning of the public person in relation to private operators (do, have done, contribute or help, encourage, accompany, monitor, prohibit, punish) etc.

But none of these classifications is enlightening by itself.

#### ■ *The proposed classification*

The Conseil d'État study proposes adopting a typology organised around **eight families**<sup>661</sup>.

These are tax incentives<sup>662</sup> (taxation of output in principle not having a direct economic objective), financial assistance (mainly given to businesses or their projects), management of assets (public and private, immovable and movable property and intangibles), the conduct of economic activities of a general interest (public management of services, delegations of public service, public procurement), businesses and public shareholdings, economic legislation and regulations (including also the implementing acts), public statements (individual stances or general economic communication) and, finally, support activities (primarily for the benefit of businesses).

The first five families have in common the mobilisation **of an economic value** by a public person, to make it available to economic actors or on the contrary to withdraw it, in order to influence their behaviour. This is the case of tax incentives (reduction in income tax or on the contrary an additional tax), financial assistance, management of the domain (the patrimonial value is reliant on the tool), the conduct of economic activities (the public person produces, has produced or consumes a good or a service with an economic value) as well as the creation of a public company (which will benefit from inputs or allocations and whose activity will produce economic value).

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661. See diagram below.

662. In the broad sense, i.e. both an incentive and a deterrent. It is sometimes referred to as behavioural taxation.



The three following families comprising economic legislation, public statements and consulting and support activities are based on a different logic. The cost of these activities is independent of the expected effect of the tool. The effectiveness of the tool relies primarily **on the legal or moral authority of the public person and its expertise.**

### **3.3.2. Tools that are open-ended by nature and which must remain so**

The list of tools and their regime are continuously evolving at the initiative of the State, the main designer of tools, but also local authorities, which seek to adapt their resources to the economic context and to the legal constraints.

#### ***3.3.2.1. A range of tools which must change with the needs***

##### **■ *Changes over the long term***

The tools for the economic action of public persons have changed considerably over the past thirty years with **the growth in regulations.**

This concept is linked both to a specific organisation, to ensure the independence of the regulator with regard to the government, and to the different types of action for traditional economic action under the influence of European law, budgetary constraints and Anglo-Saxon practices, public persons act less directly as economic operators. The number of public enterprises is falling and in those that remain, the weight of public actors is tending to diminish. Public persons are gradually opening up the markets to competition and refrain from helping the historical operators, except when this is necessary to carry out specific missions. At the same time, they avoid restricting private companies, except for compelling general interest reasons.

These changes have had a direct effect on the tools used, as illustrated by the relative decline of the Industrial and Commercial Public Establishment (EPIC) as compared to limited companies allowing a gradual withdrawal of the public shareholder to more easily be effected; or again the use of soft law, in preference to the “economic police”, to act on collective behaviour.

**More recently, the financial crisis** and the sovereign debt crises since 2008 have led to a return to old tools (such as the idea of nationalising certain assets) but also to the development of innovative tools to deal with new risks.

This movement affects economic regulations, as demonstrated for example by the use of “quota” mechanisms (such as quotas for the emission of greenhouse gases). It also concerns public contracts, more and more diversified in the texts and used in a more targeted way by the actors, which seek to promote categories of enterprises whose economic and social usefulness is considered higher (SMEs, innovative or socially responsible enterprises).





Financial tools remain highly dynamic, in particular taxation given the absence of a visible cost and the greater latitude that it offers with regard to European law. Granting subsidies remains a favourite tool of intervention for projects or is made in the form of co-financing with private funds by seeking leverage effects (a switch from “*financing*” to “*funding*”). The development of sovereign funds and pension funds also deserves to be mentioned. Financial engineering is increasingly sophisticated, particularly on the initiative of the European Union (use of the Structural Funds in particular).

Classic administrative tools are moreover revised for economic purposes. The approach through “land” is developing, including the increasingly refined use of urban planning law (in particular in Paris and Lyon). Public persons have understood the importance of communication and image in economic action and have, in this field, an increasingly professionalised approach (“*French Tech*”). The use of public marks is also made more strategically. Mediation and support functions that are somewhat frugal with public money are increasing (for export but also establishing businesses or structuring “clusters” or “channels”), with public persons thus playing the role of facilitator for businesses, whether they are in difficulty or looking to develop.

■ *The range of tools must not remain fixed*

Changes in tools must be known in order to be able to anticipate future developments. Thus, leaving a tool aside may lead to it being updated, or even creating a new tool designed to replace it.

Instituting, in partnership with France Stratégie, an intelligence and foresight function with regard to the tools for the economic action of public persons could allow changes under way to be anticipated. This would involve observing local innovations, in conjunction with the regions and associations of elected representatives (see 3.2.3 above), and to identify through the diplomatic network, relevant developments in various countries with economic development comparable to ours.

**3.3.2.2. Changes that are also needed in the legal system of the various tools**

■ *Reforms already completed or started*

The changing nature of the tools’ legal regime has been illustrated by three recent legislative amendments of significant scope: urban economic planning has been amended by Act No. 2014-626 of 18 June 2014 relating to the artisanal activity, trading and very small businesses; a framework has been provided for subsidies by Act No. 2014-856 of 31 July 2014 relating to the social and solidarity economy; the law governing company and public shareholdings has been overhauled by Ordinance No. 2014-948 of 20 August 2014.



Other reforms under way or announced relate to the tools of the local authorities with the Territorial Reform Act, on public procurement contracts<sup>663</sup> and on the sanctioning power of the regulatory authorities, which should be adapted in the next few months to take account of the decision of the Constitutional Council of 18 March last (*non bis in idem*)<sup>664</sup>.

■ *Other changes to consider as a priority*

To go further in adapting tools to the needs, several changes must be recommended as a priority.

The first could relate to the **field of public persons**, an issue which has not been exhausted by the adoption of the General Code of Property of Public Persons and by the case law established on this code.

Changes are desirable in relation to the conditions under which the authorisation for the private occupation of the public domain are issued. Where these authorisations are part of agreements of a wider scope (for example the delegation of a public service) and for which an advertising and competition procedure is needed, this procedure also applies to these authorisations. For authorisations and contracts whose sole object is the private occupancy of a dependency of the public domain, case law is based on the absence of a legislative or regulatory provision or principle requiring a public person to organise a prior advertising procedure, even if the occupant has the status of an operator in a competitive market<sup>665</sup>. Naturally, the authority managing the domain can organise an advertising procedure and, where appropriate, a competitive process so as to generate competitive tenders. It must then naturally comply with it.

But it is necessary to go further in order to foster better use of the domain and more profitable competition between the actors and, accordingly, to enshrine in positive law a solution making such an advertising procedure mandatory as well as, where appropriate, a competitive process.

Furthermore, an assessment should be made in order to consider the need to maintain, for the legal system of the temporary occupancy of the public domain authorisations (AOT), the existing differences according to whether they relate to the public domain of the State or the that of the local authorities. Simplification of the law could justify a standardisation of the applicable rules. The same is true for differences in the conditions of assignment, in particular as regards the prior reclassification of the public domain.

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663. Ordinance No. 2015-899 of 23 July 2015 which will enter into force no later than 1 April 2016.

664. See on this decision, 2.2.3.1 and 2.3.3.2 above.

665. CE, Sect., 3 December 2010, *City of Paris*, No. 338272 (case of the Stadium Jean Bouin); CE, 8 June 2011, *Autonomous Port of Marseille*, No. 318010; see C. Vautrot-Schwartz, "The future of advertising and the competitive process in issuing occupancy permits for the public domain", *Contrats et marchés publics*, No. 12, December 2012.

It would also involve dealing with the definition and the legal system of the intangible domain, which have not been specified by the General Code of Property of Public Persons<sup>666</sup>. The question of whether public marks belong to the public domain or to the private domain of public persons should also be clarified. The public marks regime could, if necessary, derogate from the ordinary law. Moreover, the question of the right of use by third parties of the image of public goods and the promotion of this image by the public person should be examined in order to define the legal regime that will be applicable to it.

**Proposal 48: Update the property law of public persons:**

- 1) introducing rules of transparency regarding the procedures for granting authorisations for private occupancy of the public domain;
- 2) standardising the rules applicable to the domain of the State and to that of local authorities;
- 3) clarifying the legal regime of the intangible domain of public persons, in particular for public marks and defining the legal regime of the image of public property.

*Means: a law*

*(Minister of Finance and Public Accounts; Minister of the Interior)*

Other changes concern **public enterprises**. Although the system has just been revised as regards companies and holdings of the State and although the bill for growth and business includes provisions supplementing these rules as regards operations on the capital of companies and local holdings, other changes are desirable.

The main field to be explored as part of a new possible reform is that of the Industrial and Commercial Public Establishments (EPIC) which have experienced profound changes whose implications should probably be acted on.

After the implementation of Order 2014-948 of 20 August 2014, they now alone are the only ones which remain governed by Act No. 83-675 of 26 July 1983, whose complexity and unwieldiness are known; the differences in the system compared with the law of public limited companies are no longer necessary and should be reviewed. The ingenious system adopted for the public group SNCF, which makes a public establishment a “subsidiary” and therefore allows it to place an EPIC inside a group and no longer only at its head opens up new prospects, which will have to be reviewed before considering organising it for other public enterprises<sup>667</sup>.

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666. See on this point in particular Ph. Terneyre, “The intangible assets of public persons,” *RJEP*, No. 714, December 2013, Study 16.

667. Second sub-paragraph of Art. L. 2102-4 of the Transport Code, introduced by Article 1 of Act No. 2014-872 of 4 August 2014 regarding railway reform.



The case law of the ECJ moreover results in asking questions about the “implicit” guarantee that the EPICs are said to have<sup>668</sup>. In order to guard against any difficulty, it would be appropriate either through the texts to make the conditions of liquidation of public establishments closer to those of ordinary law companies, by specifying that there is no systematic take-over of commitments, or to provide for remuneration of this guarantee<sup>669</sup>.

The cross-cutting rules for operating public enterprises should also be reviewed.

The deliberative bodies of public enterprises continue to allow a certain number of officials of public persons carrying out various functions to coexist (representatives of the shareholding public persons, government commissioners, a representative of the State appointed for a specific action; overall economic and financial control<sup>670</sup>). Although each representative body has its own logic, it would be appropriate to clarify the relations between them and to look into whether they could not be combined into one body.

Thinking should also focus on the movements of personnel between public enterprises and public “*holdings*”. Although it is usual, in the private sector, for staff of the parent structure to then be able to work within the other companies of the group, such movements may disregard the rules of ethics or even involve an illegal taking of interest<sup>671</sup> when the parent structure is a public administrative authority as is the case for shareholdings of the State.

**Proposal 49: Adapt the companies and public shareholdings regime with regard to the following points:**

- 1) renovate the status of EPICs (Industrial and Commercial Public Establishment) as regards the guarantee from which they are deemed to benefit and adapt their governance;
- 2) Clarify the roles of the various officials representing the State who sit on the boards or who attend them;
- 3) study the legal conditions under which the officials responsible for shareholdings of the State can then work within companies within this scope.

***Means: a law***

*(Minister of the Economy, Minister of the Interior, Minister of Justice)*

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668. Even though it has not had to rule on the assessments made by the court following the European Commission, the fact that the Court of Justice refused to censure its judgment gives backing to the idea that it supports the thesis of the implied guarantee for EPICs developed by the European Commission.

669. See on this point, the analysis developed in the study of the Conseil d’État on *Public establishments*, La documentation Française, 2009, p. 25.

670. See on this point the study by the Conseil d’État, *Government commissioners in enterprises*, La documentation Française, 2015.

671. Article 432-13 of the Penal Code.

### 3.3.3. Making more efficient use of existing tools

#### 3.3.3.1. Associating a tool with an objective and choosing the most effective tool to achieve this objective

##### ■ “One tool - one objective”

From the “Tinbergen rule”, according to which economic policy must be based on as many instruments as objectives that it assigns<sup>672</sup>, two principles for using tools for this policy may be deduced.

The first is to **define in advance the objective pursued**.

This principle is not always applied by public persons when they decide to implement an economic measure which they assume is good for the economy and which they announce without first carrying out a precise identification of the objectives and their prioritisation<sup>673</sup>, on the basis, in particular, of their more or less direct nature<sup>674</sup>. Such a reversal of the order of the factors presents several risks<sup>675</sup>.

The second principle, which is at the heart of the Tinbergen rule, is to assign **to each tool used only one objective**, among those which have been defined. Easy to state, this principle runs up against problems in implementing it due in particular to the many interferences that come into play between public policies.

Especially, its importance is unrecognised by public decision-makers, for whom it is often preferable that a tool is able to contribute to several economic objectives, thus proving its “versatility” or its “cost-effectiveness”, or that several instruments are used to support the same policy, thus establishing it as a priority and the determination of the public persons to implement it<sup>676</sup>.

However, having several tools serving the same policy contributes to an accumulation and stratification of measures over time and within the same territory, without a serious study of their compatibility. Several objectives pursued using a single tool makes the assessment of its effectiveness more complicated and less reliable<sup>677</sup>. In total, these methodological errors do not enhance the readability of the action and exacerbate the risk of interferences between mechanisms that

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672. J. Tinbergen, Dutch economist, winner of the Nobel Prize for Economics in 1969 in particular for his work *On the Theory of Economic Policy*, 1952.

673. A legal issue may arise with the prioritisation of tools: certain tools can be used with the idea of optimising their economic effects but they must not be diverted from their purpose: for example, a public contract can be awarded under conditions which promote SMEs but not to help SMEs; a police regulation must be passed to ensure the safety of persons and property and not to favour manufacturers of equipment required for this purpose.

674. Thus, for example, the immediate objective of the measure for acquiring green vehicles is the acquisition of these vehicles, and more indirectly the growth of the proportion that they represent in the car population in order to contribute to a better environment, an objective that is more abstract, less immediate and non-economic.

675. It is in particular a source of great difficulties in terms of compatibility with European law (see 2.2.2 above).

676. See also the use of “action plan(s)” and their catalogue of tools used to support the same objectives or neighbouring objectives.

677. See along similar lines, the contribution of Louis Gallois, p. 261 below.



may either act against each other or combine their effects to produce an excessive result compared to the objective, and therefore be counter-productive. Sectoral taxation illustrates these two serious drawbacks (see inset below).

■ *Choosing the best tool*

“Mundell’s rule”<sup>678</sup> completes Tinbergen’s rule by laying down that to achieve its objectives, an economic policy must use each instrument according to the comparative advantage which it has compared to other instruments.

However, although public persons have at least a vague vision of their economic objectives, they have only patchy information about the range of tools at their disposal, on their suitability for different uses in a given context, as well as on their degree of substitutability, their proximity and their complementarity<sup>679</sup>. Therefore, the choice of these tools is too often governed by habits or knowledge that is necessarily random of models used by others. The result is insufficient or faulty use, by public persons, of the diversity of instruments available.

**Proposal 50: Develop a guide of the tools of economic action to make better known to the administrative authorities the various tools available to them as well as their substitutability, their proximity and their complementarity.**

*Means: guide developed by the Conseil d’État*

**3.3.3.2. Objectifying the comparison of the merits of each tool through a rational analysis**

■ *Bias in the choice of tools whose influence must be limited*

Tools are subject to some effects of fashion or image<sup>680</sup>. Tools, new or well publicised, can exercise a particular attraction on public persons. This may have been the case for public-private partnerships when they were established or currently for certain financial engineering techniques, such as investment funds<sup>681</sup> and, more generally, the idea that public action should be inspired by the usual practices of business life.

678. R. A. Mundell, a Canadian economist, in particular the author of *The Appropriate Use of Monetary and Fiscal Policy for Internal and External Stability, Staff Papers* (International Monetary Fund), vol. 9, No. 1 (March 1962).

679. Thus for example, between subsidies on the one hand and loans and repayable advances on the other hand, the first, paid “as lost funds” being more suitable for low amounts while the second, designed to be returned to the public person at an agreed time, can take usefully take over for amounts above a particular threshold.

680. E.g. one could speak of a general movement to bring water back under municipal control, resulting in particular from the decision taken by the City of Paris in this respect. The reality and breadth of the phenomenon, however, remain difficult to assess.

681. E.g., the “sovereign funds” model was thus the inspiration behind the creation of the strategic fund for investment, now integrated into the Public investment bank.



It is thus to escape from public law, considered over-restrictive, that public persons have had recourse to *sui generis* arrangements, often quite sophisticated and hence difficult to control, such as the complex contracts designed in the 1990s to circumvent the application of the rules of public procurement<sup>682</sup>.

The choice of the tool can also be influenced by the concern of the public person to have its mechanism rely on a convenient mode of management, without questioning its relevance further. Thus, designing assistance to businesses by using tax incentives rather than a subsidy presents the advantage of ensuring control by the DGFIP, the public finances directorate, an experienced administrative authority with a very strong territorial network, while easing the burden on services that, given the purpose of the aid, would have been responsible for managing it.

The methods for accounting the costs generated by the use of certain tools also influence choices. Thus “tax expenditure”, although it is economically and financially comparable to public expenditure, is generally not taken into account in the quantified objectives that the Government sets to control the deficit.

Similarly, a tool that favours the expense being qualified as an “investment” will benefit from favourable budgetary rules, in particular for local authorities who will be able to finance it through borrowing. This is also the case now within the framework of European budgetary discipline, as the latest measures presented within the framework of the Juncker plan show<sup>683</sup>. And the use of capital allocations allows the corresponding expenditure not to be counted as falling within expenditure standards (so-called “non-Maastricht” expenditure).

*The excessive use of tools: the example of tax incentive in different sectors*

Sectoral taxation is not subject to a precise definition nor a systematic listing at the present time. The multiplication of original mechanisms means that sometimes one can be unaware of having created a tax as may have been the case of the contribution to the public electricity service (CSPE) in 2006 or certain bonus-malus systems for the consumption of energy in 2013.

682. See Ph. Terneyre, “Complex contractual arrangements”, *AJDA*, 1994, No. Special, p.43.

683. See on this point the communication of the European Commission of 13 January 2015 already mentioned, 1.1.3. above.



Sectoral taxation is very widely used in France. The studies conducted by the Inspectorate General of Finance on low yielding taxes, a scope which overlaps in part that of sectoral taxation, have identified a hundred specific levies providing revenues of less than EUR 100 million, i.e. a number up to ten times higher than that observed in other European States through the work of the European Commission.

The specific objectives of this taxation are various and sometimes contradictory: besides the incentive aspect and "the internalisation of externalities", there may be yield objectives, substitution for a price (for the use of infrastructure), compensation for responsibilities (such as those of the public electricity service), the capture of an economic rent (for example in the financial sector) or "aggressive" taxes imposed on an activity that the public authorities wish to discourage.

Sectoral taxation is moreover designed without any search for minimal coherence with general taxation: although they seek the same ends, the combination of sectoral taxation and general taxation can produce excessive and sometimes counter-productive effects; when they seek different ends, their effects have the tendency to be set off against each other with the risk of missing the different objectives to which they were assigned: the benefits of the research tax credit are very largely offset, in the pharmaceutical sector, by the specific taxation that is imposed on it<sup>(\*)</sup>.

<sup>(\*)</sup>See on this point, the proceedings of the Sectoral taxation symposium organised by the Conseil d'État on 5 June 2015; to be published in the collection "Droits et Débats (Rights and Debates), La documentation française.

#### **Proposal 51: Provide a monitoring function for the tools**

1) entrust to France Stratégie the mission of designing a system for identifying changes under way in using the available tools; identify those which would be appropriate, particularly in the light of local and foreign experience;

2) integrate into the monitoring function for tools, a tool for analysing and observing bias in the choice of these tools (fashion effects, provisions for taking it into account into the public expenditure standards, circumvention effect of public rules, etc.) and the over-use or under-use that may result from this.

**Means:** organisational text for France Stratégie

#### ■ *Identifying and effectively applying rational criteria for the choice of the tools*

The methodological biases in the choice of tools can be avoided by using a rational analysis based on four groups of criteria.

The first group corresponds to the criteria relating to the appropriateness of the tool with the objective pursued: it involves anticipating the effects of the measure on the economic actors, including unwanted effects, their possible reactions and



predictable results<sup>684</sup>. It is particularly at this stage that there is a need to ask whether a measure should be rather more restrictive or rather more incentive. The possibility of tuning the measure depending on the context must also be taken into account.

The second group brings together the criteria relating to the public resources that the tool uses in the short and in the long terms. Thus the immediate cost, the deferred cost in the long term as well as the potential hazards or risks should be taken into account. These are not only financial costs or risks (like those of a loan or a guarantee) but also administrative costs (investigation procedures, decision-making, staff and premises used, supplies, external services needed, etc.) and risks including legal ones in using the tool (which themselves supposes a level of expertise to be able to assess the costs).

The third group covers the criteria relating to control and assessment. On the one hand, this involves determining what controls the public person may operate on the actors whose activity it wishes to direct, influence, or assist, or regulate or with which it will have contracted, in order to determine whether the entities concerned have complied with their obligations (unilateral or resulting from their commitments). On the other hand, it involves predicting, regardless of the behaviour of the actors directly covered by the measure, how the expected effects can be assessed and measured.

The fourth group meets the criteria relating to the capacity of public persons to learn from the lessons of the assessment or a change in circumstances to develop the tool or to abandon it. This is the question of the mutability of the measure and the tool that it uses and the de facto irreversibility of certain mechanisms (drive and ratchet effects), especially when the actors become dependent on it or when abandonment of the measure is politically risky or costly.

**Proposal 52: Acquire means to choose the best tool for achieving the economic objective that will be assigned by applying the following procedure:**

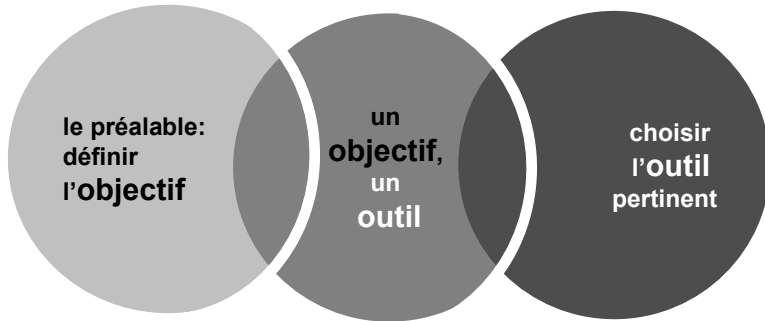
- 1) before making the decision to act, explain the objectives that one wishes to pursue in a prioritised way;
- 2) define one tool per objective;
- 3) undertake a systematic analysis of the relative merits of the different tools available prior to implementing them with respect to the four groups of criteria that are:
  - suitability for the objective;
  - the resources available;
  - the control and assessment possibilities;
  - the ability to make the tool evolve or to abandon it.

*Means: action by public persons*

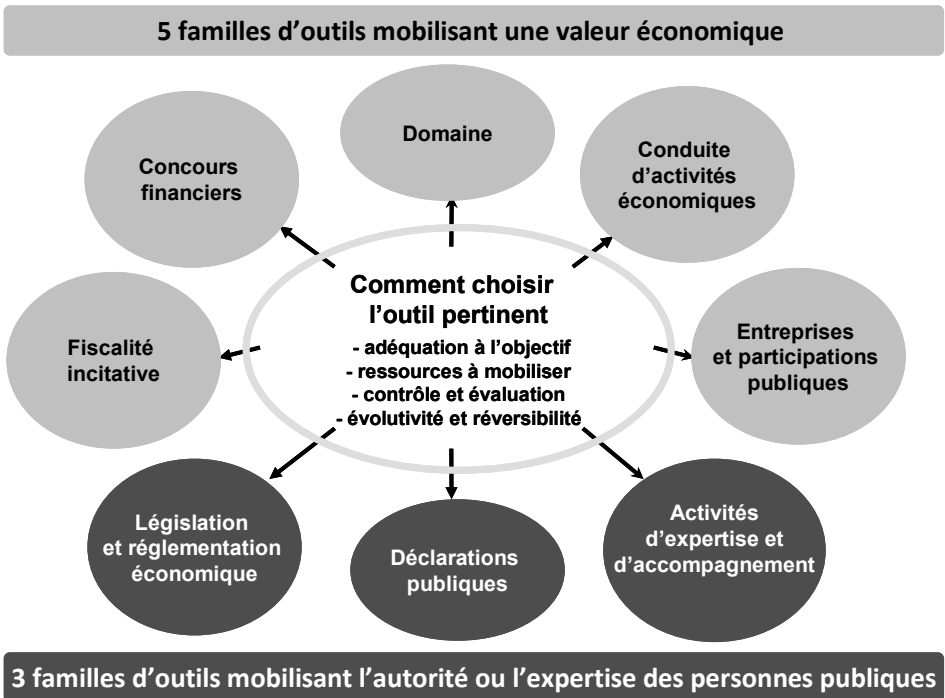
684. See for an illustration, with regard to public procurement, S. Saussier and J. Tirole, *op. cit.*



Choose one tool per objective by comparing their respective merits



The 8 families of economic action tools



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# Conclusion

One thing is clear: the importance of the economic action of public persons and the choices that underlie it remains unrecognised by the public persons themselves.

Firstly, they are unaware of *what exactly their economic action covers*, which is not surprising: the very concept of the economic action of public persons is not defined by the texts or by case law and has been of little concern to doctrine; moreover, there is no mapping or listing of this action, of the areas in which it is used, of the objectives it pursues or even of the actors that it involves.

Secondly, they are unaware of *the room for manoeuvre which they then have even though this is considerable*: this is due to a perception that is excessive of the transfers made at European level in the field of monetary and budgetary policy as well as of the consequences of the internationalisation of the economies; but it is also due to a distorted view of their amount of freedom in legal terms, in particular with regard to European Law, which is in no way an obstacle to the economic action of public persons provided that it is planned out *ab initio* within this framework of reference.

Finally they are unaware of *the methods which can be used to reinforce their economic decisions*: the public persons who carry out a real assessment of their measures are rare; even more rare are those which test out a mechanism before generalising it; with regard to the methodological principles on which rational decisions depend, these are the identification of objectives, the “one tool-one objective” rule and the selection of the best tool for this end, but they are often neglected.

This study contains 52 proposals for making progress on these three points. Most of them can be implemented immediately. Others require a specific reflection by the public persons, invited to implement them as a priority at the earliest opportunity.



More unusually, the Conseil d'État believed it could implement some of its proposals itself. These are those which seek to make better known to the public persons the tools they can use to act on the economy as well as the domestic, European and international legal framework in which they must be used. This is the subject of the *Guide of economic action of public persons tools* developed as part of this annual study and which is designed to be enriched and updated over time.

However, the tools that are best suited and used in the most rational possible way will only produce the expected results if the economic actors feel that they are working in a favourable environment. Useful and even essential, the agencies, measures and procedures designed to promote the competitiveness and attractiveness of the country are not sufficient to establish such a climate. The public persons must also manage to change the perception that the economic operators have of their action and to inspire their trust. This takes time and presupposes willingness, consistency and coherence in the conduct of all public policies.

