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4 Administrative law and the public regulation of markets in a global age

Marco D'Alberti

The role of public authority in the regulation of the economy has evolved over time. During the twentieth century, the intervention of the State and public administration into economic affairs steadily increased, at least until the 1970s, despite the strong, free-market critiques directed at this approach. However, since the 1980s, the process of globalization (due to the enhanced development of world trade and international communications), along with privatization, liberalization, and deregulation, have modified the scope and method of public intervention. More recently, the global economic and financial crisis that began in 2008 raises the potential of bringing about new forms of (sometimes intense) regulation and administrative interventions. In short, the pendulum may be swinging back, with the evolution of market regulation, as well as its impact on administrative law, continuing apace.

This chapter first tries to assess the principal trends in public regulation of markets since the outset of the twentieth century, emphasizing continuity despite the many changes that have taken place. The chapter then attempts to identify, in legal terms, the essential features of public regulation today, as well as their prospects beyond the present economic crisis. Finally, this contribution then considers the impact of changing forms of public regulation of markets on the substance and procedures of administrative law.

1. Public regulation of markets over the course of the twentieth century

At the end of the nineteenth century the structure of many national States began to change. The progressive enlargement of the right to vote, as well as the emergence of political parties and trade unions, brought about an expansion in the social ambitions of the State. This transformation was quite evident by the beginning of the twentieth century. Those groups that did not belong to the social elite expected public powers to strongly intervene in economic life, in order to increase public control of private property and private enterprise. Moreover, industrialization had in fact required significant support from public authorities, not only in England but perhaps more so in late-industrializing countries like France and Italy, which needed substantial public aid to catch up with more advanced economies. With industrialization of course came urbanization, a further factor in the expansion of public intervention by the dawn of the twentieth century.

As the regulation of markets gradually expanded in both scope and intensity, it also required a continuous commitment as well as a specific technical expertise, which neither parliaments nor governments could alone provide. Public administration became the protagonist in economic regulation, thus contributing to the development and extension of the administrative State. This happened both in countries with a longstanding tradition of public administration and in countries in which a professional civil service had

public regulation in many domains. Indeed, one can say that competition law is gaining primacy over sectoral public regulation in several economic sectors, such as financial markets, telecommunications, media, energy, transport, postal services. In principle these sectoral regulations have to comply with the rules of competition. This is an important change with regard to the past. Competition primacy is based on a variety of legal sources and tools, both at national and supranational level.

Many national antitrust agencies have played a crucial role in the effort to reform public regulation, urging governments and parliaments to modify or repeal laws and other public measures that distort competition, while also recommending the adoption of pro-competitive legislation and regulation. This sort of competition 'advocacy', combined with competition enforcement, has become more and more relevant. Similarly, national courts have enhanced judicial scrutiny of administrative measures that could alter competition. For example, administrative courts in France and Italy have annulled public contracts awarded without respecting the principle of competition, and authorizations granted to incumbent enterprises to the detriment of new entrants.[12]

Under the European Community Treaty (ECT), free competition has become a general principle of law. Legislation, regulation and economic policy of the Member States and the Community are to be 'conducted in accordance with the principle of an open market economy with free competition'.[13] Where undertakings engage in conduct contrary to European competition rules having direct effect (such as articles 81(1), and 82 ECT, – now article 101(1) and 102 TEFU – which deal with restrictive agreements and abuses of dominance), the European Court of Justice states that, to the extent such 'conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority which has been made responsible for ensuring that the competition rules and, in particular, article 81 ECT are observed, is under a duty not to apply the national legislation'.[14] European Community directives have further confirmed competition primacy over sectoral regulation.[15]

At the international level, the Organization for Economic Cooperation and Development (OECD) has vigorously supported competition primacy, stressing that economic regulation should promote and enhance competition. To this end, the OECD has laid down recommendations to Member States based on peer review. Governments have reacted with regulatory reforms (OECD 1997b). In this regard, it is worth noting the establishment, in 2001, of the International Competition Network (ICN), composed of antitrust authorities from all the continents. ICN does not exercise any rulemaking function but rather selects best practices and addresses recommendations to member authorities. One of the first documents produced by the ICN concerned competition

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[12] On this latter point see Consiglio di Stato, sec. VI, decision no. 336/2004, in 'Foro amministrativo C.d.S.', 2004. p. 469.

[13] Article 4, para. 1, ECT (now article 119, para.1, TFEU).

[14] Case C-198/01, *C.I.F.*, 2003 ECR I-8055.

[15] Directive 2002/21/EC, for example, provides that national authorities regulating electronic communication services and networks shall promote competition and carry out market analysis based on antitrust criteria.

of social market economy.[19] The decisions of the European Court of Justice (ECJ) have pursued the objective of balancing economic and social values. The result is a regulatory regime that carves out certain social ends from market relations and subjects them to the principle of solidarity. For example, competition rules on restrictive agreements and abuses of dominant position laid down in articles 81 and 82 ECT (now articles 101 and 102 TEFU) do not apply to the

> management of a scheme providing compulsory insurance against accidents at work and occupational diseases, where the amount of benefits and the amount of contributions are subject to supervision by the State and the compulsory affiliation which characterizes such an insurance scheme is essential for the financial balance of the scheme and for the application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them.[20]

In other words, social functions based on solidarity are not economic activities for the purposes of competition law.

Moreover, antitrust rules may have a limited application in case of public utilities: 'undertakings entrusted with the operation of services of general economic interest . . . shall be subject . . . to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.[21] The European Court of Justice has applied this norm in a case concerning universal postal services, which are to be granted to any person at a reasonable price, irrespective of economic profitability. This means that a restriction on competition may be justified if its purpose is to allow the operator bound by the obligation of universal service to perform its task of general interest and to benefit from economically acceptable conditions. In particular, it is possible to restrict competition where economically profitable sectors are concerned. 'Indeed, to authorize individual undertakings to compete with that operator would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs' than those adopted by the operator burdened with universal services. However, the 'exclusion of competition is not justified as regards specific services dissociable from the service of general interest, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit'.[22]

As regards the free movement of goods in the internal market, the European Community Treaty provides that free trade and the prohibition of restrictive measures may be subject to derogations. Member States may restrict imports or exports by adopting measures aimed at protecting relevant public interests, such as public order, public security, public health, unless they constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'.[23] These interests are conceived as

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[19] Articles 2 and 3 ECT (now replaced, in substance, by articles 3 and 6 TFEU).

[20] Case C-218/00, *Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*, 2002 ECR I-691.

[21] Article 86, para. 2, ECT (now article 106, para. 2, TFEU).

[22] Case C-320/91, *Corbeau*, 1993 ECR I-2533.

[23] Article 30 ECT (now article 36 TFEU).

exceptions to the principle of free trade and have to be strictly interpreted. State measures issued for their protection are subject to a proportionality test: they must be necessary, suitable to the end pursued, and no other less restrictive measure can be applied.

The European Court of Justice, however, has over the years expanded the list of the 'overriding reasons in the general interest' which may justify a restriction, well beyond those provided for in the Treaty. They include, inter alia: the protection of intellectual property; the need to protect recipients of services; social protection of workers; consumer protection; fair trading; the maintenance of a national radio and television system which secures pluralism; the sound administration of justice; the cohesion of a tax system; the good reputation of the national financial sector; conservation of the national historical and artistic heritage; the risk of serious impairment of the financial equilibrium of the social security system.[24]

Moreover, the Court has adopted a quite ample concept of proportionality, provided that national measures are neither discriminatory nor a disguised restriction on trade between Member States. For example, the Court holds that among the grounds which may justify derogations from free movement of goods 'the protection of the health and life of humans ranks foremost and, in so far there are uncertainties at the present state of scientific research, it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure and, in particular, the stringency of the checks to be carried out'. In particular, the Court has justified a national regulation prohibiting the placing on the market of fish products containing a low concentration of listeria monocytogenes.[25]

Let us consider now the international trade system. The WTO is a legal order whose main function is to guarantee free trade. However, world trade agreements also provide that the actions aimed at reducing tariffs and other barriers to free trade are to be conducted, inter alia, with a view to raising standards of living, ensuring full employment, sustainable development, protection of the environment. The General Agreement on Tariffs and Trade (GATT) lays down rules that are quite similar to those contained in the EC Treaty on the free movement of goods. Some exceptions to free trade are listed. Member States may adopt measures on grounds of protecting relevant public interests, such as public morals, human health, national treasures of artistic value, essential security, provided that they are not applied in a manner which would constitute a means of

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[24] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 18 May 2000, Case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, 2001 ECR, I-5473, para. 51; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, 1991 ECR I-4007.

[25] Case C-121/00, *Hahn*, 2002 ECR I-9193 (previous citation in the text is taken from para. 38). The Court has underlined that, according to scientific research, incidence of listeria on human health is 'relatively low – from two to fifteen cases per million population', but 'the fatality rate is reported to be between 20% and 40% and might approach 75% in immunocompromised individuals'. Moreover, 'it would seem' that the presence of listeria in food represents 'a very low risk' when its concentration is below certain rates; but there are 'large numbers of uncertainties which remain concerning the issue'. In this context, any scientific certainty being impossible, the Court has justified national regulation that restricts trade of smoked fish products containing 'even low concentrations of listeria', because this bacterial pathogen 'may constitute a risk to the health of particularly susceptible consumers.' Ibid., paras. 42, 43, and 46.

'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.[26]

But these exceptions have been narrowly interpreted so far. Dispute settlement Panels and the Appellate Body have conceived them as a *numerus clausus*, limited to those listed in articles XX and XXI, and have applied a very stringent proportionality test in order to justify the exceptional national measures aimed at pursuing public interests that may restrict free trade. In particular, the value pursued must be 'both vital and important at the highest degree', as in the case of human life and health protection against the very well-known and extreme risks stemming from asbestos fibers.[27] The WTO approach stands in contrast to the rulings of the European Court of Justice on similar issues.[28] It thus allows us to perceive at once the difference between the EU and WTO as to the effective protection assured to public and social interests vis-à-vis economic liberties. Although recent WTO conferences have tried to enhance the guarantees in favor of public and social interests, their protection has hitherto been recognized in a quite limited fashion.

3. Public regulation of markets and administrative law

Having analyzed the main features and trends of the public regulation of markets in the present age of globalization, we now turn to the question of how these developments have affected administrative law. I would identify four major impacts.

First of all, I would argue that market regulation has become one of the most important aspects of contemporary administrative law. Born in France and continental Europe at the turn of nineteenth century as the set of legal rules for *puissance publique*, administrative law then became the means for regulating various *services publics* as well as the *droit public de la régulation économique* in the twentieth century. The evolution of administrative law from public authority to services of public utility to public regulation of markets is quite evident all over the world.

Secondly, as mentioned, there has been the broad reduction in discretionary administrative power in the adoption of measures concerning market access: the so-called 'entry restrictions', such as authorizations or licenses. This trend, together with the diffusion of independent agencies, may contribute to lessening political influence on administrative action (Mashaw 1983, chapter 5).

Thirdly, the growing importance of the principle of proportionality, as well as regulatory impact assessment, not only reinforce post hoc judicial enforcement but serve as ex ante criteria for justifying administrative measures.

Finally, the principles and rules of competition law concern not merely the behavior of undertakings, but also the exercise of public power. As we have seen, there are widespread efforts to enhance the pro-competitive elements of legislation and regulation. Similarly, competition law principles are increasingly affecting the award of public contracts and the granting of licenses.

There are obviously many differences among diverse national experiences. States

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[26] Articles XX, XXI.

[27] WTO, Appellate Body, *EC-Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, 12 March 2001, paras. 172 ff.

[28] See the *Hahn* judgment, discussed above n. 25.

having a strong tradition of public administration or economic intervention, such as France or Japan, are more reluctant to reduce 'entry restrictions' and discretionary powers. Political influence on administration is hard to overcome in several contexts: for example, chairpersons and members appointed to boards of independent agencies are not always truly independent of their governments. Ex ante proportionality seems to be stronger in countries where regulatory impact analysis procedures are well consolidated, such as in the United States, Great Britain and Canada, while it encounters difficulties in States in which these procedures are at an initial stage, such as Italy. Competition primacy over sectoral regulation has suffered setbacks, notably in the United States, which was the pioneer of competition law. Nevertheless, despite these differences and difficulties, said transformations of public regulation and administrative law appear as a substantial tendency of our time.

The insertion of public regulation and administrative law in higher legal orders still raises a delicate question. As we have seen, global regulation of markets must strike a difficult balance between economic liberties and social values. Sometimes the guarantees granted to economic liberties, such as international free trade, are given greater weight over the protection of public and social interests.

Certain national traditions in administrative law seemed to favor economic interests, such as property and the freedom of contract and enterprise. Nevertheless, there has been an increasing sensitivity to social values as well. The history of administrative law after the Second World War shows a steadily wider interest representation and a progressively stronger protection of an ample sphere of rights. Signs of this evolution can be found in the judicial decisions of French and Italian administrative courts since the 1950s and in American administrative law since the 1960s (Jeanneau 1954, Maillot 2003, Reich 1964, Stewart 1975, Sunstein 1990).[29]

Today, however, some spheres of global economic law, such as within the WTO or international standards governing financial markets, are still marked by imbalances in favor of the stronger interests. It is thus time to translate more explicitly the sensitivity to social values that one finds in certain national traditions of administrative law into the global sphere.

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[29] In particular, the French *théorie administrativiste des principes généraux*, developed since the mid-1940s in the judgments of *Conseil d'Etat* and in scholars' contributions, brought about stronger guarantees in favor of the *droits des administrés.*

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