Comparative Administrative Law

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

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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

appeared only at the end of the nineteenth century, such as Great Britain and the United States.

In the very first decade of the twentieth century, one also began to see the emergence of public enterprises, both at national and local level. In Italy, for instance, municipalities took on important local services such as public transport and street lighting, previously in the hands of private entities. The law on municipalization entered into force in 1903, and two years later Italy nationalized the railway service (Piras 1967: 355 ff., Papa 1973, Giannini 1958: 227 ff., and 2004: 361 ff.). The Italian State also intervened to support private enterprises, especially with the aim of encouraging the industrialization of underdeveloped areas. Subsidies were granted, for instance, to many enterprises in the south of Italy, where a real 'Administration for the South' was formed (Melis 1996). In France, where public bodies became responsible for public utility services – such as public education, and transport – legal doctrine and jurisprudence developed the theory of *le service public* to capture this phenomenon (Chevallier 1991: 35 ff, Pisier-Kouchner 1972). In those countries where public utilities remained in private hands (for example in Britain), public controls of various kinds were imposed on railways, gas, electricity, or telephone services (Prosser 1997: 35 ff.).

Administrative procedures for the modernization of urban areas – including procedures governing town planning, compulsory purchases, or the construction of public works – expanded. New regulatory domains concerning such areas as working conditions, social security, or immigration also developed. In countries without a strong administrative tradition, these developments often transformed the institutional landscape. In England, for example, Parliament often assigned the implementation of regulatory programs to administrative tribunals, conceived as semi-independent administrative bodies with regulatory and quasi-judicial powers. English legislation, moreover, often precluded the common-law courts from exercising jurisdiction over the action of these tribunals (Robson 1928). In the United States, Congress began attributing important regulatory functions to independent administrative agencies, such as the Interstate Commerce Commission (1887) or the Federal Trade Commission (1914).[1]

The First World War brought about an astonishing increase in public interventions, not only to supply weapons but also to sustain populations, including the compulsory determination of prices, rationing of commodities, expropriation of private goods, controls on production, financial aid to agriculture and food industry, as well as organization of military and civil transport (Burk 1982). While there were some efforts to scale back these interventions in the 1920s, the onset of the Great Depression in 1929 once again spurred significant public intervention in the economy, particularly directed at banks and financial markets. In the United States, the Wall Street crisis led to the creation of the Securities and Exchange Commission in 1933 as a new independent agency, whereas other countries opted for other forms of public control of private finance. Keynes famously supported greater public intervention as a means of promoting economic growth (Keynes 1926). Hayek, by contrast, interpreted these developments as a dramatic break with the past. Writing in the mid-1940s and thinking mainly of England,

[1] On the similarities and differences between English 'administrative tribunals' and American 'independent agencies', see D'Alberti (1992: 73 ff. and 95 ff.).

he argued for a classical liberalism as conceived during the eighteenth and nineteenth centuries, rooted more deeply, in his view, in the basic individualism of Erasmus, Montaigne, Cicero, Tacitus, Pericles and Thucydides (Von Hayek 1944).

Over the course of the 1930s, public intervention became significant in numerous economic sectors, such as agriculture, iron and steel industry, transport, radio, telephone, telegraph, energy, health, social security, urban planning, and public works. Indeed, the depth of the crisis was so profound that public regulation increased not only in countries like Germany and Italy where longstanding traditions of public and administrative law lapsed eventually into dictatorship, it also strengthened in common-law countries not acquainted with political authoritarianism, such as Great Britain and the United States. Over the course of the 1930s, common-law systems also saw increased roles for legislation and administrative regulation, a trend that emerged at the beginning of the twentieth century but intensified with the economic crisis in the 1930s (Calabresi 1982). American scholars would note the severe stresses placed on the system of common law in the age of Franklin Roosevelt, in which the 'positive State' replaced absolute protection of private property and freedom of contract (Sunstein 1990).

Like the First World War before it, the Second World War demanded exceptional measures of public intervention. But it was in the postwar period, extending up to the advent of the oil crisis in the mid-1970s, that the trend in favor of public regulation found its fulfillment, particularly in Western Europe. While maintaining guarantees for private property and private enterprise, national constitutions generally granted public authority significantly greater regulatory leeway as compared to the end of the nineteenth century.[2] Nationalizations in France and Britain, as well as the State enterprise system in Italy, reflected a significant shift toward forms of public ownership in leading sectors (Brewer-Carias 1968, Durupty 1986, Prosser 1986, Giannini 1958). Economic planning also became more widespread, even in countries whose traditions had previously been hostile, such as Great Britain, where even conservative governments showed a willingness to engage in it (Giannini 1983 and 1995, De Laubadère and Delvolvé 1986, Budd 1978, Shonfield 1978). Finally, in the postwar decades, competition law, and the consequent public control over monopolies, cartels and mergers, eventually crossed the borders of the United States, infiltrating the legal systems of Germany, the EEC, and Japan. Administrative independent agencies, born in England and the United States, began spreading through continental Europe and other countries. They appeared in France and Italy in the 1970s.

Since the mid-1970s, however, the surge of inflation, the economic recession after the energy crisis and the exhaustion of the financial resources of the interventionist State, which took place in several countries, brought about a reaction to the enormous growth of regulatory programs. This led to a first phase of deregulations in some areas, such as financial markets, railroads, and airlines in the United States. This tendency accelerated during the 1980s and 1990s, when the process we now call 'globalization' became a dramatically more important factor in economic life. International trade and communications increased, and many countries, following the lead of Great Britain and the United

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[2] For example, the Italian Constitution of 1948 equally protected freedom of private enterprise as well as public controls on it, when justified by human dignity and social utility (article 41).

States, privatized public goods and enterprises, deregulated crucial economic sectors, worked to simplify administrative procedures, and otherwise abandoned general economic planning. This also happened in countries of communist tradition, such as China with the reforms adopted after 1979. The European Community liberalized several economic sectors, notably financial markets as well as significant public utilities, such as telecommunications, air transport, electricity and gas. Several monopolies collapsed and new operators entered the market. Moreover, a new *lex mercatoria* emerged in the last two decades of the twentieth century. *Lex mercatoria* is a private legal regime mainly built by big multinational companies through their commercial and financial contracts. The aim of these contracts is to regulate the relations between the parties in all their aspects, thus overcoming national laws and exceeding their sphere (Galgano 2001).

In short, the trend in public regulation in the 1980s and 1990s was nearly the opposite of the heavy public regulation that took place from the 1930s to the 1970s. And yet, despite the sense that public intervention was in decline and that a return to a self-regulated market was evident, public regulation of markets continued to play a substantial role. Privatizations occurred in some sectors, but as of today there remains a significant number of public enterprises, both at national and local level, while privatized undertakings continue to be subject to several forms of public control (Letwin 1988, Graham and Prosser 1991, Von Weizsäcker et al. 2005, Megginson 2005). Deregulation has not prevented public intervention and has often been flanked by measures of re-regulation. Simplification has had limited effects on legislation and administrative procedures.[3] Even if general economic planning was abandoned, various sectoral programs and devices continued to develop, such as urban and commercial planning, or energy, transport and health planning. Market liberalization required new rules: for example, 'asymmetric' public measures, limiting the incumbent's role in favour of newcomers, have been adopted to effectively guarantee market access to alternative operators. Most States enacted some form of competition law in the last decade of the twentieth century. Competition law not only served to forbid and punish cartels and abusive practices, but also to impose pro-competitive ends in sectoral regulation. The autonomy of the new *lex mercatoria* via transnational contracts found itself softened by the precedents of international arbitration and by standard clauses elaborated by entities such as *Unidroit* (Bonell 1995: 16). And flanking the *lex mercatoria* was the emergence of significant supranational public regulation, whether regionally (for example, in the European Community) or internationally (in the GATT/WTO).

The responses to the present global economic crisis have again enhanced the role of public regulation and intervention. Recapitalizations and nationalizations of banks, subsidies to industrial sectors, as well as some protectionist measures exemplify the recent trend. Consequently, one can fairly conclude that there has been great continuity in public regulation since the beginning of the twentieth century. Undoubtedly, during the 1980s and 1990s, the process of globalization became much stronger. As a consequence of privatization and deregulation, the State-entrepreneur and the State-regulator seemed to weaken. Nevertheless, as we have seen, public intervention in markets continued to play a crucial role. And the present global economic crisis calls for heavier regulatory

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[3] See the special number of *Revue du droit public* (no. 1/2006) devoted to the '*désordre normatif*'.

measures. Thus, the question presents itself: What are the main characteristics of the public regulation of markets today? And what are the prospects beyond the responses to the present crisis?

2. Contemporary features and trends in the public regulation of markets

This section identifies and discusses four main features of contemporary public regulation. In my view, these features are essential consequences of globalization and thus will likely be maintained in the regulatory regime even after the present economic crisis passes. They are: the duty to justify public regulation (impact assessment and regulatory necessity); the reduction of discretionary administrative power; the impact of competition law on sectoral regulation and administrative action; and the emergence of global regulation with the interaction among different legal orders.

2.1. The duty to justify public regulation: impact assessment and regulatory necessity

A substantial achievement of the last twenty years is the demand that regulators justify particular regulatory actions with sound reasons, including often a specific assessment of regulatory impacts. Several countries have adopted procedures to evaluate the impact of regulatory measures on the different markets before they are adopted. The United States, Great Britain, Canada, and the European Union have introduced regulatory impact analysis, which, through consultation with the interested parties, first evaluates the necessity of the regulation and then indicates various options, including the 'zero option', which means that no measure will be adopted. When regulation is considered necessary, the impact analysis evaluates if it suits the purpose and verifies whether there are less restrictive measures that can be applied to the regulated entities or persons (OECD 1997a and 2008, Strauss et al. 2008).

Different criteria of regulatory justification are provided for by several European Community directives. For example, the directive on services in the internal market aims, inter alia, at 'removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings'.[4] The concept of 'authorization scheme' is very wide and includes administrative procedures for granting authorizations, licenses, approvals or concessions. Included in this category is any obligation on the part of a service provider to obtain from a public authority a preliminary decision, either formal or implicit, in order to gain access to service activity. To 'remove overly burdensome authorizations', the directive provides that Member States may only make access subject to an *a priori* authorization if it is justified, in the sense that the authorization does not discriminate against the provider in question; is based on an overriding reason relating to the public interest; and the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective.[5]

At the international level, world trade agreements provide for similar rules: Member States cannot adopt measures relating to technical standards and licensing requirements if they constitute 'unnecessary barriers to trade in services', are not based on 'objective

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[4] Directive 2006/123/EC.

[5] See article 9 of the same directive.

and transparent criteria', and are 'more burdensome than necessary'.[6] The reasons for such regulatory justification are clear. As economic theory has underlined, regulation intervenes primarily in case of market failures. But there are cases of regulatory failure as well, when for example regulation is cumbersome, too costly for enterprises or substantially restricts competition. To avoid this, any new regulation requires justification in advance and overly burdensome existing regulations require revision. In the context of globalization, free movement of goods, services and capital should not be impaired unless relevant public interests are at stake, such as the protection of public order or human health. Free trade is the rule, while the protection of public interests acts as an exception to it. It is up to domestic regulators to justify the exception. Consequently, justification criteria focus on the necessity and adequacy of public regulation. In effect, earlier judicially formulated proportionality tests governing regulatory measures *ex post* and case-by-case (Rose-Ackerman 2008) have become general preliminary conditions for all public regulation.

2.2. *The reduction of discretionary administrative power*

Discretionary administrative power is the power to adopt an administrative decision based on a comparative evaluation of the public, private and collective interests emerging from the procedure before the deciding official (Giannini 1939, Galligan 1986). Discretionary power of public administration extended its scope with the growth of the functions attributed to the administrative State, particularly over the first half of the twentieth century. Over the second half of the century, however, legislatures and courts gradually established limits and controls on the exercise of discretionary powers, particularly with regard to the public regulation of markets. These limitations and controls reflect, in significant part, the strength of the economic interests subject to administrative action, implicating legal guarantees of private property, as well as freedom of contract and enterprise.[7] Moreover, supranational legal orders have had a substantial influence on restricting administrative discretion in the interest of free trade. Independent agencies also became a feature of the administrative landscape in many parts of the world in the second half of the twentieth century, often operating with quasi-judicial powers. In this case, their activity consists in applying law to facts more than in exercising the choice among interests on which discretionary power is based. This happens, for example, when an independent competition authority assesses whether undertakings have infringed antitrust rules on monopolies and cartels (Breyer 1982).

Many countries have lessened discretionary power to adopt public measures that impinge on enterprise's access to market. This has often included the elimination of concessions, franchises, authorizations, and licenses which, if maintained, must be

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[6] General Agreement on Trade in Services (GATS), article VI.

[7] At the national level, laws on administrative procedures often grant interested parties the right to be heard before action is taken against their interests. Even if such rules apply to almost all the fields of administrative action, their origins can be generally traced to guarantees of property and enterprise. The first Italian law on administrative procedure was promulgated in 1865, for example, to regulate expropriation: procedural rights were mainly attributed to land owners. The United States Administrative Procedure Act of 1946 arguably reflected similar concerns over protecting private property and enterprise.

justified according to objective, transparent and non-discriminatory criteria. This too means a reduction in discretionary power (D'Alberti 2008: 59). The process of European integration has also had similar effects. Several directives, for example, have introduced requirements of 'objective' assessment.[8] Moreover, a 'general authorization' system is provided for in the sector of telecommunications. Undertakings that are interested in providing electronic communications networks or services 'may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights'. They may just be required to submit a notification which allows them to begin their activity. Therefore, market access is not subject to a previous discretionary decision. Public authority may only exercise an *ex post* control over the undertakings' compliance with the conditions listed in the directive, such as interoperability of service, interconnection of networks, environmental requirements, or consumer protection rules.[9] This is the least onerous authorization system possible, which has been introduced in order 'to stimulate the development of new electronic communications services and pan-European communications networks and services and to allow service providers and consumers to benefit from the economies of scale of the single market'.[10] Another example can be found in the General Agreement on Trade in Services (GATS), which lays down rules to enhance free trade in the delicate area of services. Member States may adopt domestic regulations provided that they respect some limitations: for example, in certain cases, domestic measures of general application, such as laws, byelaws, and rules, are to be 'administered in a reasonable, objective and impartial manner'.[11] Again, this amounts to a reduction of discretionary power in the application of rules.

At the end of the nineteenth century, Albert Venn Dicey wrote that the Rule of Law does not allow the exercise of discretionary power (Dicey 1959, Jowell 1989). Actually, contrary to Dicey's understanding, this sort of power existed widely both in civil law and in common law countries. As we have seen, discretionary power expanded even further during the first half of the twentieth century, followed in the second half of the same century by a progressive reduction in various fields of administrative law. While Dicey was arguably mistaken that the Rule of Law did not tolerate discretionary power even in the nineteenth century, today's market regulation seems to reflect a Diceyan spirit. It is hostile to discretionary power.

2.3. The impact of competition law on sectoral regulation and administrative action

Competition law has always been concerned with business practices, seeking to prohibit and punish infringements such as cartels, monopolizations, and abuses of dominant position. Gradually competition law has expanded its role and today affects the shape of

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[8] For example, the authorization to exercise banking activity is granted if the applicant possesses separate own funds, a minimum initial capital and satisfies precise technical requirements. In any case, Member States may not require the application for authorization to be examined in terms of the economic needs of the market. Directive 2006/48/EC, modified by directive 2007/44/EC.

[9] Directive 2002/20/EC (previous quotation in the text is taken from article 3, para. 2).

[10] Same directive, recital 7.

[11] GATS, article VI, para. 1.

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, and 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 articles 101(1) and 102 TFEU – 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.

advocacy, urging antitrust authorities to support pro-competitive regulatory reforms before their respective governments, parliaments and public opinion (ICN 2002).

As we have seen, competition primacy can take a variety of forms. Sometimes it takes the form of recommendations, such as from the OECD and ICN. Or it can take the form of mandatory measures, like those from European Community legislation and jurisprudence. This primacy is not without difficulties and limits. For example, the United States Supreme Court has recently held that, where a highly specialized sectoral regulation has been adopted (for example, in the financial sector), specific regulation can prevail over antitrust rules.[16] Nevertheless, it is still fair to say that competition primacy over sectoral regulation has become a tendency of our times.

2.4. The emergence of 'global economic law' and the interaction among different legal orders

Economic globalization is not exclusively a product of our age. Rather, historians have seen earlier forms of globalization in, for example, the sixteenth century (Braudel 1982, Wallerstein 1978). Nevertheless, economic integration has experienced astonishing growth only since the beginning of the twentieth century (Osterhammel and Petersson 2005). As to the legal dimension of this growth, moreover, global economic law has strongly emerged primarily since the 1990s. The World Trade Organization was established in 1994. Financial markets have more and more become subject to international regulatory standards. Supranational norms have regulated, inter alia, environment and various public utilities, such as telecommunications, energy, postal services, and transport (Bermann et al. 2000).

The development of global economic law had a variety of sources: international and supranational public bodies; formal and informal networks composed of national regulators; hybrid entities; and national regulators applying supranational rules (Kinsbury et al. 2005).

Several international organizations, such as the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank (WB), perform regulatory functions. World trade regulation is particularly comprehensive and effective, whether derived directly from international agreements, or from the resolution of disputes by quasi-judicial entities (the dispute settlement Panels and Appellate Body of the WTO) (Jackson 1997). The European Union (EU) is a complete legal order, with primary and secondary legislation, a complex institutional organization, and courts of justice. Moreover, EU norms and judicial decisions bind Member States, their undertakings and citizens. Market regulation is in fact the EU's original and primary function: matters such as competition, free movement of goods and services, State aid, public procurement, telecommunications, energy, transport, postal services, financial markets, environment, and health are widely regulated by EU law (Cassese 2007).

Networks of national regulators usually adopt non-binding measures that nonetheless have a highly persuasive force. Among the many networks, the Basel Committee is perhaps the most well known. Composed of central banks and other national authorities

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[16] *Credit Suisse et al. v. Glen Billing et al.*, 551 US 264 (2007).

for prudential regulation, it has adopted standards on banking supervisory matters.[17] Another well-known example is the European Competition Network (ECN), composed of the European Commission and national antitrust authorities, which guarantees forms of coordination among members in the procedures concerning restrictive agreements and abuses of dominant position.[18] There are also a number of hybrid entities, composed of both private and public members. For example, the Codex Alimentarius Commission, established by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), issues standards for food safety. The Commission's activity, which started in the 1960s, gained more importance in the 1990s, when WTO agreements indirectly granted legal force to its recommendations (Bevilacqua 2006).

Finally, there are instances where a single national or even local regulator applies supranational norms or adopts measures having transnational effects. For example, according to EC Regulation no. 1/2003, a national antitrust authority may rule on a cross-border cartel case having effects in more than one Member State. Similarly, under directive 2004/18/EC on public procurement, a municipality may award a public supply contract to a foreign undertaking. In such cases, regulatory action goes beyond domestic dimension.

So-called 'global economic law' is the whole of all these measures – whether issued by international or supranational public bodies, transnational networks, hybrid entities, national regulators acting in non-domestic spheres – operating together with the new *lex mercatoria*. It is a highly complex body formed by a huge number of regulators and rules, and by different legal orders. One of the main issues of our time concerns whether this global economic law can strike an adequate balance between economic liberties, on the one hand, and social or public values, on the other. Does freedom of contract, enterprise, competition, prevail over the protection of public order, environment or health?

Some argue that global regulation has been unsuccessful in achieving this balance, one that has in fact confronted national democracies over the last two centuries (Stiglitz 2006). Actually, if we look at continental Europe, we see that several States, despite their different traditions, have tried to guarantee both economic liberties and public values such as the general interest, social cohesion and human dignity. Constitutions in France, Spain, Italy are good examples of this effort. In Great Britain, statutory legislation since the end of the nineteenth century has sought to reconsider and limit private property, freedom of contract, liberty of enterprise in the name of social values. The same could be said of the United States since the 1930s.

Can the same effort at balance be translated into global economic law? Since we cannot take into consideration all its components here, I will limit my analysis to some aspects of two legal spheres: European Union and World Trade Organization.

The core of the Treaty of Rome (1957) was of course the so-called four freedoms – free movement of goods, persons, services, capital – along with free competition, and the prohibition of State aid impairing it. Gradually, however, subsequent European treaties have extended legal guarantees to other interests and values as well, such as social cohesion, or the protection of the environment, health and consumers, according to the

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[17] The Basel Committee was established in 1974, but its best-known and most relevant activities on banks' capital adequacy started in the late 1980s.

[18] The ECN was established after EC Regulation no. 1/2003 entered into force.

model 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 TFEU) 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, and 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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