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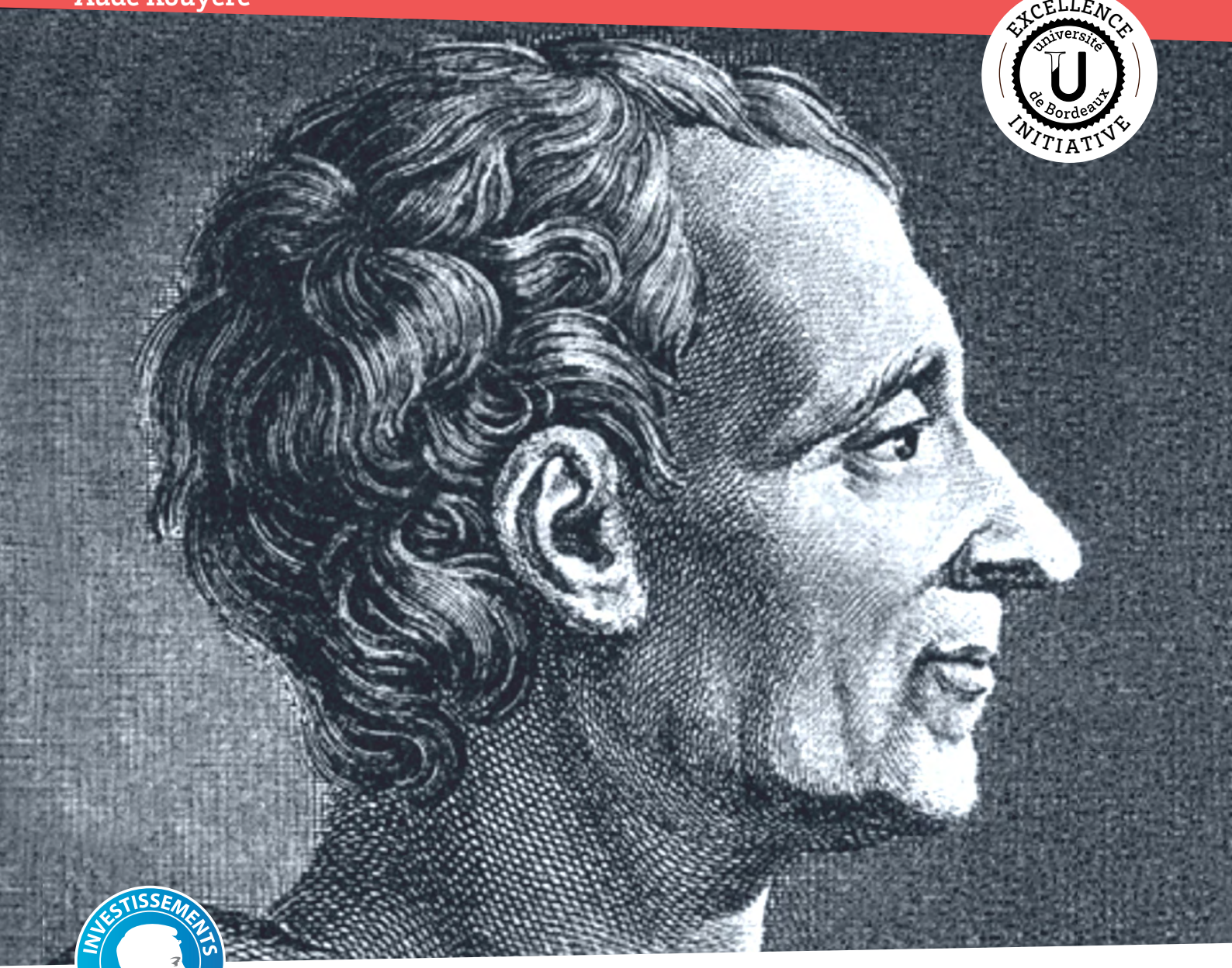

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Administrative Law:

Soft law in the hands of the courts

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CE Ass March 21, 2016, No. 390023, *Société NC Numericable*
CE Ass March 21, 2016, No. 368082, *Société Fairvesta International GmbH et autres*
CE 13 July 2016, No. 388 150, *GDF Suez*

The news being full of talk of contract law should not overshadow the more discreet but actually very audacious, unilateral acts. Within this rich and heterogeneous group, recommendations have just been the subject of developments in French case law, the practical and theoretical implications of which are quite remarkable.

Unilateral administrative acts are as varied as their legal effects. Indeed alongside those known as decisive administrative acts which produce a norm or rule affecting the legal order – i.e. which alter the state of the law by adding or deleting a provision or opting to maintain the existing rule against an application to amend the same – there are acts that do not display the same properties.

Among non-decisive acts, there are – in addition to acts confirming a decision and preparatory acts – acts designed to provide information, such as circulars or guidelines, but also acts setting down advice or recommendations rather than aimed at influencing behaviour. These various provisions all fall within the common remit of the same normative project, described as soft law. The latter term refers to what is now a recognised category, to which the *Conseil d'Etat* recently devoted a comprehensive study (1). These are "*instruments that are similar to the rules in that they are intended to modify or direct the behaviour of their recipients, without creating their own rights or obligations*" (2). These acts are normative in nature – from the Latin *norma*, meaning "square, rule" – as they deliver a line of behaviour. However, they are singular in that this nature is more or less established without ever being in the same way as decisive acts. Circulars and guidelines – formerly known as directives – clearly tend to be prescriptive. However, recommendations, position papers, press releases, communications etc. also have a prescriptive purpose that is not so easily argued. It is these measures that are the focus of this paper. They are produced by conventional administrative authorities but also by independent administrative authorities vested with regulatory missions (known regulatory authorities) and have as such the power to issue recommendations to operators within their scope.

Non-decisive acts that do not affect the legal order are not considered likely to be subject to judicial review. This perfectly logical conclusion is somewhat disrupted by the changing views taken by the administrative courts of this type of provision. Long focused on the intention of the entity producing the act, the courts' analysis is turning progressively towards the reception that is made by the intended recipient. This approach then leads the courts to admit actions brought against some of these non-decisive acts in light of the normative impact they produce.

Beginning several years ago, this trend is now well established with regard to opinions, recommendations, warnings and statements adopted by the regulatory authorities. On the occasion of three cases decided in 2016 (3), the *Conseil d'Etat* admitted the possibility to appeal on grounds of *ultra vires* against such acts, in this case "releases" posted by the French financial markets authority (AMF) in *Société Fairvesta International GmbH*, "pronouncements" from the competition authority in *Société NC Numericable*, and "communications" issued by the energy regulatory commission (CRE), "*when they are likely to produce significant effects, including economic effects, or are intended to have a significant influence on the behaviour of those persons to whom they are addressed*" .

We shall examine the contribution that is this development in case law from the point of view of the legal and specifically judicial status of the administrative norms of soft law (I) and then consider how the judge sees the judicial review of those singular acts (II).

(I) Soft law acts are justiciable

Soft law acts may be identified on the basis of three criteria systematised in the *Conseil d'Etat*'s study, cited above: the act is non-decisive, and therefore does not create a law or legal obligation; it has a shape that is akin to a legal rule, and it aims to influence the behaviour of its intended recipients. The category is, in reality, highly heterogeneous and the stated prescription is more or less strict - there is talk of a "*graduated scale of normativity*" - depending on the links that the act has with "hard" law.

The decisions handed down by the *Conseil d'Etat* in 2016 marked a significant change in the legal status of so-called soft law, although some notable precedents had paved the way for this new development in case law.

The court had already allowed applications for judicial review with regard to certain acts of soft law (4). This was the case for acts called 'good practice recommendations' produced in the healthcare sphere. The court's reasoning began with the application of the case law in *Duvignères* (5) accepting that mandatory circulars are subject to applications for judicial review (6). Here already, by reference to the mandatory nature of the act, consideration is given to a detail that is partly though not exclusively subjective. The court ploughed on with this line of reasoning and decided to consider these acts for what they really are, i.e. references in treatment matters, based on "scientifically accepted data" which health professionals have an ethical obligation to take into account and, as such, adversely affect them (7). These acts have a clear authority that strengthens the prospect of penalties in the event that they are not observed. The same ruling was then applied to a scenario that particularly concerns us here, namely the positions and recommendations of the French Competition Authority. The *Conseil d'Etat* stated that "the positions and recommendations that it formulated on this occasion do not constitute decisions adversely affecting individuals; however, it would be a different matter had they the character of general and statutory provisions or individual prescriptions, any disregard of which the Authority could later censure" (8).

The 2016 decisions go even further. The *Conseil d'Etat* began by reiterating established solutions, recalling that "*the opinions, recommendations, warnings and statements adopted by the regulatory authorities in carrying out the tasks entrusted to them, may be referred for judicial review when they take the form of general and mandatory rules or they posit individual*

prescriptions, the disregard of which may later be censured by those authorities", adding that "*these acts may also be the subject of such an action brought by an applicant showing a direct and specific interest in the annulment thereof, when they are* ***likely to produce significant effects,*** *including economic effects, or* ***are intended to have a significant influence on the behaviour*** *of those to whom they are*" (our emphasis). The new admissibility criterion for such appeals, which have two branches, takes full account of the specificity of soft law as defined, particularly given that the subjective detail pursuant to which these acts have in fact an effective impact on behaviour and therefore adversely affect individuals, despite the absence of a "bindingness" strictly inherent to the power of "hard" law. It will obviously be noted that the words used to formulate this criterion remain relatively evasive. What is a "significant" effect? What is "significant influence" on behaviour? There will necessarily and fortunately be an evaluation and gradation in the assessment of these effects.

II. Judicial review is suited to the characteristics of those acts

While it accepted the admissibility of an application for judicial review against acts of soft law that are "*likely to produce significant effects, particularly of an economic nature*" or were "*intended significantly to influence the behaviour of people to whom they are addressed*", the *Conseil* was aware of the specificity of the normative project that such acts implement. It is interesting also to note that the court does not use the word "decision" but "act" in referring thereto, thus openly displaying the justiciability of a non-decisional act.

This can be seen in the use of admissibility requirements and that of practical judicial review.

The application is open subject to conditions relating to the authority issuing the act and the *locus standi* of the recipient challenging it.

The choice was made initially to limit the opening of judicial review applications to acts of soft law meeting the criteria mentioned above and issued by regulatory authorities in the performance of that mission. It is understandable that this advance is first reserved for authorities that have a very specific vocation to produce such acts and have this type of normative impact. However, as indicated by the insightful comments contained in the decision (9), it would be logical that this remedy should subsequently be opened up to similar acts produced by other administrative entities.

It is stated, moreover, that the applicant must have a "*direct and specific interest*". These precisely stipulated characteristics correspond to a fairly strict conception of *locus standi,* which only the first line of persons covered or affected may claim. However, this is consistent with the type of normative effect which is a determining factor here, and which consists in producing an impact that only those directly concerned will feel.

It must be added that the issue of the timescale for appeal, which was not settled by the first two decisions, was appropriately addressed by the *GDF Suez* decision of 13 July 2016 (10), which specifies the starting point of the timescale for appeal. The time limit as stipulated in the relevant provisions begins to run, as regards professionals in the relevant regulated sector, from the time of the publication of the act on the website of the issuing authority, in the area dedicated to the publication of the authority's acts.

Judicial review must be suited to the particularities of the normative process in question

It should be said, first of all, that it has already been accepted for some time that the use of soft law by the administration may give rise to an action for damages (11). However, such litigation was to be supplemented by an application for judicial review focusing on the act itself, not just its prejudicial consequences.

The question of the type of remedy (application for judicial review or full remedy proceedings) and, therefore, the role of the court in the exercise of such a review, is loaded with important issues. The court should not, in fact, be driven to take the place of the regulatory authority which issued the soft-law act in question and thus act as a "regulating court" (12). Litigation must remain an objective dispute based on a specific act and not extended to the circumstances.

Since there no legislation providing for full remedy proceedings in this case, applications for judicial review have proved necessary. However, the fact remains that one can see a paradox in subjecting a non-decisional act (deemed therefore not to affect the state of law) to judicial review. Questions inevitably arise as to the usefulness of annulling an act of soft law consisting in formulating a viewpoint that, in any event, has been expressed and already produced its effects or influence.

The *Conseil d'Etat* stated in its 2016 decisions that "*it falls to the court, in hearing arguments in this sense, to examine the defects which may affect the legality of these acts* ***taking into account their nature and characteristics and the discretion available to the regulatory authority***" (our emphasis), adding that "*it also falls to the court, if submissions are made for the purpose, to use its injunction powers* ". It may already be considered that the court will review whether the authority which issued the soft-law act has done so within the scope of its competence, complied with the process for elaborating said act, committed no misuse of its powers, has not violated hard law or internal soft law, has committed no error as to the relevant reasons, facts and law. The court will conduct a full review but must take into account the discretion of the regulatory authority and, in order to do that, restrict sais review (if necessary) to the facts of the manifest error of assessment.

Beyond these traditional benchmarks of judicial review, it will fall to the court to build its own case law in this area and, as it states expressly, adapt its review to the specificity of this own normativity which is so particular to regulation (13).

The developments in case law wrought by the 2016 decision are part of a profound transformation in the view taken by the court of the practice of law. By introducing a factor relating to the subjective impact of a regulatory standard for its intended recipient, the court has developed a way of considering the law governing acts, not to mention administrative law more generally. The viewpoint shifts away from the issuer to the receiver. This gives rise to complex extra-legal considerations that open up a comprehensive approach to law. The words of the celebrated Maurice Hauriou, "*a little sociology leads away from the law; while much sociology leads one back to it*" (14) are particularly relevant here, even in the spheres of economics or psychology. All these parameters contribute to a reality of law that one must attempts to grasp over and over again.

Notes:

(1) Conseil d'État, *Étude annuelle 2013, Le droit souple*, La Documentation française.

(2) Concl. S. von Coester sur CE Ass 21 mars 2016, n° 368082, Société Fairvesta International GmbH et autres, RFDA 2016.497.

(3) CE Ass 21 March 2016, n° 368082 368083 368084, *Société Fairvesta International GmbH*, concl. S. von Coester RFDA 2016. 497; CE Ass 21 March 2016, n° 390023, *Société NC Numericable*, concl V. Daumas RFDA 2016.506; AJDA 2016. 717, chron. L. Dutheillet de Lamothe & G. Odinet; CE 13 July 2016, n° 388150, *GDF Suez.*

(4) cf chron. L. Dutheillet de Lamothe & G. Odinet, AJDA 2016. 717

(5) CE sect 18 décembre 2002, n° 233618

(6) CE 26 sept. 2005, n° 270234, Conseil national de l'ordre des médecins, à propos des recommandations de bonnes pratiques de l'Agence nationale d'accréditation et d'évaluation en santé rédigées de manière impérative

(7) CE 27 avr. 2011, n° 334396, Association pour une formation médicale indépendante, CE 4 oct. 2013, n° 356700, Laboratoires Servier

(8) CE 11 oct. 2012, n° 357193 Société Casino Guichard-Perrachon, n° 346378, Société ITM Entreprises

(9) L. Dutheillet de Lamothe et G. Odinet, op cit supra

(10) op cit supra

(11) CE 31 mars 2003, n° 188833, Ministère de l'économie, des finances et de l'industrie c/ Laboratoires pharmaceutiques Bergaderm, à propos d'un avis de la commission de sécurité des consommateurs

(12) cf Conclusions de S. von Coester et V.Daumas précitées

(13) G.Timsit, « Normativité et régulation », Cah. Cons. const., n° 21, janv. 2007

(14) M. Hauriou, « Les facultés de droit et la sociologie », Revue générale du droit, 1893, p. 289-295