

**OECD REVIEWS OF REGULATORY REFORM**

**REGULATORY REFORM IN FRANCE**

**THE ROLE OF COMPETITION POLICY IN  
REGULATORY REFORM**



**ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT**

## ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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## FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in France. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in France* published in June 2003. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in France. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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## CHAPTER 3: THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM<sup>1</sup>

### Box 1. SUMMARY OF THE CHAPTER

Conceptions of competition in France are the object of wide debate. Some solid progress toward reform have been achieved in France. But competition law is still characterised by conflicting purposes and a dual institutional structure that can be a source of difficulties. Introducing competition into traditionally monopolised sectors is proceeding, deliberately. The risks of cross-subsidy distortion are well understood in principle. Decisions of the *Conseil de la concurrence* and the sectoral regulators have tried to support competitive neutrality, to the extent that can be done in the absence of real structural separation. European-level developments motivate these changes, and France's regulatory bodies recognize that the relevant markets are becoming continent-wide. France has not chosen the solution of complete structural separation between historic infrastructure monopolies and competitive enterprises in order to eliminate the incentive and capacity to distort competition through cross-subsidies. Instead, France prefers to apply behavioural controls by applying the abuse of dominant position provisions of competition legislation. In wholesale and retail distribution, notably, competing conceptions of competition appear. Rules about discrimination, unfair competition, and pricing are not unknown in other countries, but they are not usually found where competition policy is defined coherently and effectively. In France, businesses have learned how to operate within this incentive structure to develop relevant marketing strategies, from small shops to the *grandes surfaces*. But the cost of adhering to these complex constraints, many of which are parts of what is considered to be the competition law, may tend to protect incumbents from competition.

The structure of the competition policy bodies reflects these complexities. Principles of the law follow the common European standards, and the method of applying it is well suited to implement the European Commission's new approach of decentralised *ex post* enforcement through national institutions. The *Conseil de la concurrence* has been the model for an independent decision-making agency in France, and it works well with the other independent, sectoral agencies. The Directorate for competition and consumer affairs in the Ministry of Economy, Finance, and Industry is the other authority responsible for implementing competition policy, with a large staff, in part because of its monitoring duties. The co-existence of two enforcement bodies might be a source of synergies, but it also carries risks of friction. Some aspects of the structure are problematic, such as the fact that the Council, which is an independent decision-making body with regard to sanctions, has little discretion about managing its case-load, which leads to delays in reaching final decisions. In addition, the merger decision process appears to leave much to Ministerial discretion. Some others are promising, such as providing for appeals from independent regulators and competition decisions to the same general jurisdiction Court of Appeal.

### **Box 2. COMPETITION POLICY'S ROLES IN REGULATORY REFORM**

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise that had supported regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that policies which had appeared similar may have led to different outcomes.

Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

### **Competition policy foundations**

The emergence of more self-confident competition policy institutions in France over the last 20 years is changing the terms of debate. The value of state intervention in the economy is widely presumed in France. In this setting, the merits of decentralised market competition may have been doubted. Vigorous competition policy initiatives at the European level have prompted changes in the framework in France. Restructuring in monopoly sectors is having an impact on the legal structure that once supported state intervention, leading it to embrace market principles. Liberalising reforms pursued by all governments are leading to irreversible changes in France's traditional approach.

In the past, intervention by the state has been an important component of French economy policy. From price controls to deal with depressions, to indicative *planification* in the post-war era, past policies presumed central direction and implied industry-wide co-ordination. The state's direct participation in the economy remains large, despite the 2 privatisation programs that have largely reversed the nationalisations of the early 1980s, and even some of those dating from the post-war period. The state still owns most of the large infrastructure firms (EDF, GDF, *La Poste*, SNCF, RATP) as well as firms that manufacture defence products (GIAT) and aircraft engines (SNECMA). The state still has controlling interests in listed companies such as *Air France*, *France Telecom*, *Renault*, and *Thales*.<sup>2</sup> Nevertheless, market competition is open and robust in most sectors. The political and cultural idea of central control to preserve national solidarity may be more significant as a symbol than as a reality in the marketplace, for the scope of intervention is constrained by commercial imperatives and by EU law, and firms have learned over the decades how to compete within a renewed regulatory framework.

The competition law framework can be traced back to the Revolution, when the foundation was set for the law that controlled cartels until 1986. The earliest effort echoes Adam Smith's famous aphorism of the same era about proclivity to collusion: the *Loi Chapelier* of 1791 prohibited members of the same trade from assembling to regulate their "common interest." In 1810, the Penal Code prohibited concerted action to manipulate prices "above or below that which natural and free competition would have set." This provision, Article 419, remained on the books for another 176 years. The prohibition fell into disuse in the second part of the 19th century, as courts in France, like those elsewhere in Europe, distinguished between good and bad cartels and found few of the latter that deserved sanction. The law was amended in 1926 to incorporate the judicial interpretations that had weakened the Article 419 prohibition. Although the French delegation presented a cartel control plan to the World Economic Conference the following year, France did not adopt competition legislation at that time, when other countries were doing so. In the 1930s, as fashions turned to corporatist conceptions, cartels were accepted as means to achieve stability and improve competitiveness. The government even required them in some industries.

Over this long period, the law of unfair competition (*concurrency déloyale*) occupied much of the attention that might have gone toward developing public law about restraints on competition. The courts created private law doctrines based on a brief, simple, and general part of the French Civil Code that requires payment of compensation for harmful conduct. Rules about fair competition found support both in a liberal outlook that promoted economic opportunity to compete and in the traditional linkage of fair treatment with community cohesion.

In the post-war period, rules about competition appeared in the form of amendments to the price control laws and to the Napoleonic penal code. A 1945 *Ordonnance* made refusals to deal, price discrimination, and some other practices unlawful. This was accomplished by treating these practices as similar to or assimilated with unlawful pricing, and the rules were applied by the agencies responsible for price control. The parliament tried to pass a general competition law in 1953, but failed to agree on a text. Instead, the government issued a decree, implementing the 1945 *Ordonnance*, which looks much like a modern competition law, foreshadowing the provisions and even the language of today's statutes.<sup>3</sup> This decree applied only to joint action, not to single-firm conduct, and it was still tied to effects on price. An exemption for conduct pursuant to other law or regulation preserved officially sanctioned controls and cartels, and criteria for exemption were broad. Thus administrators had discretion to approve or disapprove depending on policy goals.<sup>4</sup> The system was extended in 1963 to cover abuse of dominance, although that power was not used until the late 1970s, and the link to effects on price was removed in 1967. But at that time bureaucratic direction of the economy dominated these still-modest competition policy tools.

Precursors of today's institutions applied these post-war competition rules. The minister of economic affairs and finance was the ultimate decision-maker, and the ministry's price directorate was the principal administrator and source of interpretive guidance. The 1953 decree added a new feature, the *Commission technique des ententes*. This body of outside expertise was charged with investigating alleged violations and advising the ministry about what ought to be done. It appears to have been a compromise invention, to provide something that looked like a tribunal outside the government but that was well short of judicial enforcement. Its processes and even its decisions were secret until 1959, when its annual reports began to be published. Until 1977, it had little support staff and thus had to depend on the *Direction générale des prix et des enquêtes économiques*.

Fundamental change in this system began in the late 1970s. External economic shocks called into question the *planification* approach. During the presidency of Valéry Giscard d'Estaing, when Raymond Barre was prime minister, price controls were cut back and the competition law framework was strengthened in 1977 and 1978. Changes included providing for fines and injunctions, expanding the horizons of the "technical" Commission by renaming it as the *Commission de la concurrence* and augmenting its resources, and most importantly, providing for merger control. Motivations were mixed,

though, particularly about merger control. France could argue more plausibly that EU merger control was unnecessary if it had a national merger control system in place. In the event, over the next 8 years only 8 mergers were investigated, and only one was opposed. But these incremental changes prepared the way for general reform.

In the mid-1980's, a consensus to promote competition and curtail controls emerged in France as the government changed its policies. The minister of finance and economy appointed a committee of experts to examine options for a stronger competition law framework, looking to Germany and the EU for nearby models. The resulting legislation, the 1986 *ordonnance* on competition and freedom, abandoned administered pricing, marking a fundamental change.<sup>5</sup> To underscore the new reliance on market competition rather than administrative intervention, the *ordonnance* tried to make competition law enforcement independent, by upgrading the *Commission de la concurrence* to the *Conseil de la concurrence* ("*Conseil*") with power to initiate proceedings, issue orders, and impose fines. Its substantive norms followed the principal competition provisions of the Treaty of Rome. France was thus among the first to respond to the increasing confidence and coherence of EU competition law by strengthening and adapting its national law. The 1986 legislation had "major symbolic importance" in Europe, and showed France's commitment to competition policy. (Gerber 1998) Accommodation of European competition policy rules continued in 1992 when the *Conseil* was given the power to apply Art. 85 and 86 of the EU treaty (now Art. 81 and 82).

In 2001, France's competition law was comprehensively restated and codified in the law about *nouvelles régulations économiques* (NRE).<sup>6</sup> The NRE reforms improved the processes of investigation and decision and added a premerger notification requirement, stronger sanctions, and a provision for leniency. Many of these measures follow procedural developments and requirements from EU law and enforcement practice. By contrast, substantive parts of the latest law address topics that do not parallel features of EU competition law, adding to the detailed rules related to the concept of abuse of economic dependence. In 1996, the *loi Galland* had already extended the powers of the *Conseil* to cover "abusively" low prices.<sup>7</sup> The degree of attention to these subjects, both in the text of the law and in the practice of the enforcers, particularly the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* ("DGCCRF"),<sup>8</sup> reveals the central importance of concepts from the traditional French jurisprudence of unfair competition.

The goals of France's policy must be inferred from practice, for the statute contains no explicit statement of purpose. The agencies that are responsible for applying the law say that it seeks to assure both free and fair competition. Insistence on both of these themes is unsurprising, in light of the historical focus on *concurrence déloyale*. In terms of general economic effects, competition policy aims to make the economy function well, to promote growth, employment, and price stability. In terms of standard technical welfare economics concepts, it seeks to maximise total surplus, allocate producer resources optimally, and prevent excessive consumer prices. But a revealing caveat notes that pursuit of economic efficiency in the sense of "classical theory" is not the only objective of competition policy. Rather, it seeks to promote an "effective" competition that leaves room for other concerns ("*préoccupations*") that may not be directly about competition.

The preoccupation that takes precedence has been public services, and the concept of *service public*.<sup>9</sup> The public has demanding expectations about the provision of services, on common terms and at common prices across the entire country. In practical terms, there is concern that public service functions will not be provided in competitive markets, or at least that exposure to market incentives and disciplines will change the nature, quality, and price of public services. It could also change the means of providing them, leading to a different cost structure that could have particularly significant implications for labour. Rhetoric on the subject is often more moral than practical, though, expressing the concern in terms of conflict between the values implied by market competition, of freedom of action and economic efficiency,



and the social values exemplified by public service, of equality, social solidarity, and security. The rhetoric overshadows alternative analyses of the issues in terms of public goods, collective action, and regulatory theory about the control of natural monopoly and the distortions of cross-subsidies. Nevertheless, the public service sectors in France are moving toward accommodation with the new, competitive environment in Europe. Despite concerns about the effects on its public service traditions, France is implementing the kinds of restructuring in these sectors that economic analysis recommends—and that EU directives require—although the pace of implementation and the indirect form it sometimes takes are adapted to domestic sensitivities.

Reforms motivated by competition policy and mediated by competition law have called for rethinking fundamental structures of French law. Change has been prompted not only by EU-level competition law about state aids and public services, but also by decisions from the *Conseil* under French law about cross-subsidies and other abuses. In principle, dedication to public service co-exists with competition law. Relations between private parties and the government with respect to functions performed under authority of public law have been under the administrative law jurisdiction of the *Conseil d'État*. France's competition statute applies to production, distribution, and service activities carried out by public entities, though, and in case there might be any doubt, in particular (*notamment*) in the framework of public service concessions. (Art. L. 410-1). In an interesting strategic choice when the law was adopted in 1986, competition law, being a means of regulating private conduct, was assigned to the private-law courts and the *Conseil de la concurrence*. This includes its applications to the commercial activities of public enterprises—but not mergers, which are under the jurisdiction of the Minister and the *Conseil d'État*. Applying principles from the competition law conceived in terms of business conduct to activities placed under public authority, as the *Conseil d'État* has done since 1997, is a novelty. (du Marais 2002)

Although competition in public service sectors has come slowly, competition in markets for goods appears to be reasonably healthy. There are regulatory constraints affecting retail locations and marketing strategies that should be corrected, but businesses have adapted to these constraints and apparently compete within them, while consumers too have learned how to cope with them. By contrast, there are more complaints about conditions of competition in services. Problems reported range from deceptive or incomplete descriptions, preventing buyers from comparing offers, to long contracts preventing switching to alternatives (and thus discouraging new competitors by tying up potential customers). Sensitivity to the notion of *service public* colours and perhaps distorts perceptions. Consumer groups complain that liberalisation and privatisation have tended to undermine those services. Yet their complaints are particularly intense about areas such as the postal system where little has changed, while they give higher marks to the historic incumbent in telecoms, the sector that has liberalised the most.

Liberalisation magnifies the risk that competitive markets will be distorted by the effects of cross-subsidy from protected or regulated operations. This risk has been the principal competition policy concern in the public service sectors in France, where privatisation and commercialisation are more evident so far than liberalisation and competition. It is also a concern beyond France's borders. The former monopolies in telecoms, electric power, gas, and postal services have actively invested in other countries and markets. Foreign firms' uneasiness and suspicious reactions to these perceived threats of subsidised competition have forced faster opening to market competition for these services in France. Major French infrastructure firms found their ambitions of foreign expansion frustrated by hurdles which would only be lowered if France opened its own markets. The momentum of the tradition of supporting the interests of national champions now paradoxically promotes the cause of competition.

### **Substantive issues: content of the competition law**

The outlines of France's law follow the EU model and principles about restrictive agreements, dominant firms, and mergers. There are some notable variations, though. In France, the criteria for

exemption apply directly, without any requirement or provision for notification and approval. Thus France already uses the same system to apply its law that will be used under the EU's modernised system of enforcement. In France, balancing against economic benefits could lead to exemption from the prohibition against abuse of dominance, but in the EU that is only possible with respect to the prohibition against restrictive agreements. In practice, exemptions from either prohibition have been rare. The French law embodies its distinctive heritage, for the book of the commercial code about anti-competitive practices and merger control also contains the residual authority to control prices and an entire title devoted to unfair market practices.

### Box 3. THE COMPETITION POLICY TOOLKIT

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

**Agreements** may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

**Vertical agreements** try to control aspects of supply and distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

**Abuse of dominance** or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

**Merger control** tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

### *Horizontal agreements*

Agreements that have the purpose or the possible effect of preventing, restricting, or distorting competition are prohibited. (Art. L. 420-1) The general prohibition does not distinguish between horizontal and vertical agreements, nor does it prescribe in its own terms any rules of *per se* illegality. In practice, the economic justification for taking strong action against horizontal cartels is well recognised: when successful, they have the same effects as monopoly, of raising prices, reducing output, and transferring wealth from consumers. The law closes potential loopholes by banning tacit agreements as well as explicit ones, and by banning agreements reached indirectly through intermediaries (including ones outside France) as well as agreements entered between parties directly. The law sets out four characterisations of the prohibited tendencies: limiting access to a market or free competition by others; creating obstacles to setting prices by market forces (making them higher or lower); limiting or controlling output, outlets [*débouchés*], investment, or technical progress; and dividing markets or suppliers. Conduct that is covered by other rules in the code might be treated as a violation of this prohibition too if it involves agreement. Sanctions are potentially severe. Firms could be subject to a substantial administrative fine (up to 10% of turnover), and individuals could be subject to criminal prosecution and punishment.<sup>10</sup>

The law does not prohibit an agreement (or other conduct) that has the effect of ensuring “economic progress,” provided that a fair share of the benefits must go to customers and competition must not be eliminated for a substantial part of the market. An amendment in 2001 made clear that “economic progress” can include creating or maintaining jobs. (Art. L. 420-4) These are not criteria for exemption; rather, they define the scope of the prohibition itself. The parties must, however, carry the burden of demonstrating these criteria if challenged. The *Conseil* interprets the criteria narrowly, demanding that progress benefit the whole economy, not just the parties to the restraint, and that the benefits be related directly to the restraint. Those benefits need not flow to consumers directly. Conversely, though, the benefits of a restraint are not established just because consumer interests were involved in negotiating it. Thus the *Conseil* was not persuaded to accept an industry-wide arrangement that banks had negotiated along with consumer groups.

Conventional conspiracies, especially bid-rigging, have been frequent targets. Restraints advocated by self-regulatory bodies have come under scrutiny. For example, the opposition of the pharmacists’ association to home delivery service was found not to be the prerogative of a public body, but a prohibited agreement to prevent competition. Devices to facilitate oligopoly co-ordination have come under attack too. The most dramatic horizontal case to date was against a customer-allocation agreement among mortgage lenders. In the scope of the investigation, the importance of the industry and the parties, and the unprecedented size of the fines—€171 million (FF1.14 billion)—the 2000 decision by the *Conseil* marked a coming-of-age for French competition enforcement. Notably, the sector was subject to regulation, and the banks tried in vain to obtain regulatory blessing for their conduct. The experience illustrates how illegal constraints can arise from industry habits that have been encouraged by regulatory tolerance, the extent of the harm they can cause, and the difficulty of proving them.

#### **Box 4. THE CASE OF THE BANKS' "NON-AGGRESSION PACT"**

Banks were found to have agreed not to offer to renegotiate mortgages, except for their own current customers. The events dated from about 1993. The *Conseil* opened the matter on its own initiative, based on hints about the conduct in press reports, and issued its decision in 2000.

The banks realised the risk to their profitability if they started competing to get new customers by offering lower rates, and thereby gave customers something to use in bargaining to renegotiate with current lenders. To support a policy of non-negotiation, the banks looked to the regulator for instruction or protection, claiming that the inevitable downward spiral in market interest rates would cause financial crisis. The letter from the governor of the Bank of France (18 July 1995) to the president of the credit association, though, simply called on them to exercise "individual discipline" and the usual good management in granting credit. That is, it obviously did not support or sanction a collective strategy.

There was little direct evidence of a nation-wide agreement among the banks. There was no proof of meetings and no written undertakings of an agreement, at least at that level. But there was considerable evidence at the local level, about the basic understanding not to enter refinancing negotiations with new customers and about systematic surveillance to detect cheating. There were allusions to the existence of a national agreement and instructions not to solicit clients from certain groups. There were policies of refusing to negotiate with some clients with no provision for exception for clients whose business would be valuable, a condition that the Council thought made no sense unless part of a common understanding. There was evidence of invocation of a "non-aggression pact" to justify refusing to renegotiate. And there was a process of monitoring to be sure no one broke ranks by offering better terms to third-party customers. Proof of the agreement could not rely on showing a single document or shared communication. The case had to be made by collecting individual pieces of circumstantial evidence. To prove there was a national agreement, and to identify which banks participated in it, the *Conseil* had to assemble and sift all of this particular, local evidence.

The task of estimating how much the constraint affected competition was novel, in part because the *Conseil* had not taken any actions in this sector before. Because interest rates were falling over the period and banks were renegotiating with current customers, it was difficult to isolate the effect of the agreement not to negotiate with new ones. Examining the total amount of credit outstanding from the firms in the agreement (about FF400B) and comparing that with the amount that was renegotiated (about a tenth) and with the changes in interest rates over the period supported a rough estimate of the scope of the effect. Still, it was impossible to say whether, in the absence of the agreement, all of the "eligible" debt would have been refinanced at lower rates.

To compute the fine, the *Conseil* had to identify a quantity in the banking sector's operations that corresponds to turnover. It decided to use the category that the EU merger regulation uses to determine whether a banking sector merger is large enough to be reportable (*produit brut bancaire*).

Frequent charges of bid-rigging in public procurement (*marché public*) suggest that the threat of pecuniary sanctions does not deter repeat violations. Administrative fines were increased as of 2002. But a credible threat of penal sanctions against individuals could be even more effective. Individuals can be prosecuted, and they face up to 4 years imprisonment and a fine of €75,000 if they dishonestly take a personal, determinative part in conceiving, organising, or implementing a prohibited practice. There has been little if any use of criminal processes in cartel cases, though. Technical impediments related to the statute of limitations were corrected in 2001, and the changes could make cartel prosecutions more feasible. Investigating cartels is difficult and time-consuming. The changes reduce somewhat the risk that a prosecution will have to be dropped because the matter is too old.<sup>11</sup>

#### ***Vertical agreements***

The same statutory language applies to vertical agreements. (In addition, some vertical relationships and practices, including minimum resale price maintenance, are subject to specific regulation in parts of the law dealing with unfair practices). The intent and effect of agreements among parties at

different stages of the distribution system is often to support competition rather than hinder it. Thus, the *Conseil* takes a more tolerant approach to vertical restraints such as selective or exclusive distribution or franchising, being concerned principally about the extent of market foreclosure and cumulative effects. If competition persists (and if there are no clearly prohibited practices such as resale price maintenance), the *Conseil* is likely to find that there is no restraint. In a similar case, the European Commission might find that an exemption is justified. The legal characterisation differs, but the results are about the same. The *Conseil* has relied upon the EU's revised regulation about vertical restraints as a guide, even for practices that are not subject to EU law because the jurisdictional test under the Treaty is not met. The Parliament recently authorised an accelerated procedure for small cases, which will probably be applied principally in controversies over vertical restraints.

Decisions of the *Conseil* recognise the realities and efficiencies of modern distribution networks. Even concerning resale prices, the *Conseil* has avoided a doctrinaire approach. Recommended or maximum prices have not been found to violate the law unless they amount to minimum price controls. A supplier might even be allowed to protect the image of its trademark by discouraging discount promotions. But following the same principles as the EU vertical restraints regulation, an anti-discounting policy or product promotional program that amounts to resale price maintenance will be struck down. A supply network with a dominant position in the market might be permitted to set requirements to standardise transactions, but not to demand exclusivity or set common prices. A supplier with a small market share is likely to be given much greater latitude in its methods for choosing distributors. Systematic, non-discriminatory measures to protect brand integrity are usually acceptable as long as they do not bar entry or prevent price competition.

Changing rules expose differences in viewpoint between the *Conseil* and the DGCCRF. These are illustrated by a recent decision of the *Conseil*, which approved several aspects of the Benetton distribution system that had been challenged by retailers operating under contracts with the supplier. The DGCCRF supported the retailers' complaints and has appealed part of the *Conseil* decision, contending that the facts about the practice (pre-ticketing) justify *per se* treatment. The *Conseil* is principally concerned about effects on market competition, and thus it is unlikely to intervene in the absence of market power. For example, the *Conseil* rejected one charge in the *Benetton* case because the brand's share of the overall market was too small for the practice to have affected competition.

## BOX 5. THE EU COMPETITION LAW TOOLKIT

The law of France follows closely the basic elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

**Agreements:** Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term “agreement” is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81’s coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private “fair trade practice” rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.

**Exemptions:** An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable “block” exemption regulations, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the “white lists” and “black lists”). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

**Abuse of dominance:** Article 82 (formerly Article 86) prohibits the abuse of a dominant position and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50 percent, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

**Reforms in administration:** Recent reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria will apply directly in decisions applying the law, and these decisions will increasingly become the responsibility of national competition authorities.

### *Abuse of dominance*

In addition to the general rule against abuse of dominance, abuses related to price are also treated separately. Abusive exploitation of a dominant position, in the French market or a substantial part of it, is prohibited. (Art. L. 420-2) The statute provides a non-exhaustive list of particular examples of abuse: refusal to deal, tied sales, discrimination, and imposition of unreasonable commercial conditions. The list does not include excessively high or predatorily low prices, but each would probably be considered abuse, consistently with the interpretation of similar laws elsewhere. Another part of the competition law (Art. L. 410-2) reserves the power to control monopoly prices by decree, after consulting the *Conseil* but without the need to go through the enforcement process. Predatory pricing is covered, in effect, by separate article, which prohibits prices that are excessively (“*abusivement*”) low with respect to costs of production, processing and marketing and that have the purpose or possible effect of eliminating a firm or product from

the market or of preventing entry. A dominant position is not explicitly an element of this violation, nor is it necessary to show that the predator would recoup its losses through future monopoly pricing. (Art. L. 420-5) Sanctions for violating the basic prohibition are the same as for violating the prohibition about restrictive agreements, and include administrative fines up to 10% of its worldwide turnover. Private parties may bring civil actions for nullification and damages. Criminal penalties might even be applied against responsible individuals.<sup>12</sup> There is no provision for divestiture.

The same section also prohibits abuse of economic dependence, either of a supplier or customer. The same sanctions apply. The 2001 NRE changed the placement and formulation of this prohibition, putting it alongside the rule about abuse of a market dominant position and adding a proviso requiring that the conduct might affect the functioning or structure of competition. (Art. L. 420-2) That is, it is not enough that the conduct harm the dependent firm. In addition, there must be at least the potential for a more general effect on competition in the market. The rules about restrictive practices are connected to the rules about anti-competitive practices. Discrimination in price, delay in payment, or other conditions of sale or purchase that are listed in the part of the statute about unfair practices are all considered abuses of economic dependence under this section of the statute too if they have the requisite general effect on market competition. (Art. L. 442-6). Economic dependence is no longer defined in the statute, as a situation in which the customer or supplier has no equivalent alternative. Removing that language, though, does not mean that the lack of an alternative is no longer relevant. But the lack of alternatives that defines dependence evidently differs from the lack of substitutes that defines a market. Dependence is relationship-specific. Whether a firm has enough coercive power to make its suppliers or customers vulnerable depends on how important the firm is to their business. A renowned brand or trademark might be enough. But the rule does not protect suppliers or customers from the consequences of their own strategic choices. A firm that chose to be a franchisee cannot complain of being dependent on its franchisor.

France's law permits conduct that would otherwise be considered abuse of dominance if it meets the same exemption-like criteria that permit otherwise prohibited restrictive agreements: ensuring "economic progress," provided that a fair share of the benefits must go to customers and competition must not be eliminated for a substantial part of the market. Here too, these criteria would be directly applicable, without any need (or procedure) for prior approval; however, the dominant firm would have the burden of showing them.

The *Conseil* defines markets through a multifactor, *ad hoc* economic approach. The principal criterion for identifying product markets is functional substitutability. Customer responses are considered an essential criterion, but no single factor is determinative. Demand substitutability is key because of the direct link between the demand elasticity that a firm faces and its market power. The *Conseil* may find that distinctions in taste and demand define different markets for the same physical product, or that differences in cost or price level for what appears to be the same product might also define different markets. Considerations of supply capacity or substitutability may support definitions based on demand considerations, but unless the market would otherwise be a true monopoly, these factors are considered more relevant to potential entry. In identifying geographic markets, transport costs in comparison to value are a basic factor. In addition, the *Conseil* will consider differences in standards or legal requirements or even differences in taste—demand for tourist items is defined by local origin, for example. But for such constraints, the market-expanding trends of European harmonisation, corporate concentration, and trade globalisation make it increasingly likely that the *Conseil* will find that markets are European or even global in scale. The *Conseil's* description of its approach implies that it is likely to define product markets narrowly, but may define geographic markets broadly.

Dominance is defined, as in EU jurisprudence, as the ability to operate independently without taking account of the conduct or reactions of competitors. Conditions of the market and the situation of the enterprise are both relevant. Dominance can result from monopoly due to legal privilege or market power

due to substantial market share. Other considerations that could lead to dominance include membership in an extended group, weakness of competitors, technological advantage, or specific know-how. Collective dominance has been recognised, although in circumstances where the joint action looked like a market division agreement.<sup>13</sup>

A common setting for abuse is disputes over the terms of new competitors' access to the networks of traditional monopolists. In France, this has happened mostly in telecoms. On several occasions the *Conseil* has taken action against product or pricing strategies of the historic incumbent, France Télécom, that threatened to forestall the realistic possibility of competition for services such as high speed internet or local calling. And the *Conseil* found that the national TV broadcaster, TDF, improperly discriminated in dealing with tower access and maintenance, in order to thwart the 1986 reform that tried to introduce competition in broadcast TV and to discourage third-party maintenance services. There have been few cases about access in other network industries, though, a fact that may be explained by France's relatively slow pace of liberalisation in other sectors.

Preventing distortions by old monopolists moving into new markets has been a more prominent issue in France than assuring access by new competitors to the network sectors. Pricing or product strategies that are supported by cross-subsidy are an abuse of dominance, where they amount to predation or lead to lasting disruption of the market. The *Conseil* has repeatedly advised about how to manage the cross-subsidy risk as historic monopolies are being restructured to follow EU directives. Applications of the principles have ranged widely, from the geographic institute for undercutting its competitors' prices for maps and guides, to the rail system for an exclusive marketing arrangement with a hotel chain.

A strict predation standard is hard to apply in the context of cross-subsidies. The conditions in which the concepts of predatory pricing can be applied to diversification by public monopolies were set out in a 1996 *Conseil* opinion about *La Poste*. Predatory intent to exclude competition is generally presumed where price is below average variable cost, and intent must be proved independently where price is below average total cost but not below average variable cost. A public entity is likely to have higher costs than a private firm, to the extent that the public entity is not subjected to the same profitability discipline, at least for its activity devoted to the public service. Other aspects of its cost structure may be necessarily different. The status of its personnel may increase its personnel costs, while its sources of funds may reduce its effective cost of capital. Thus, it may require close examination and correction to determine whether what look like losses, when compared to the average costs on its competitive activities, actually imply predatory intent.

Cross-subsidy that does not amount to predation might still be objectionable. The *Conseil* has contended that low prices by an affiliate of a public entity can be anti-competitive, even if they were not technically predatory (that is, consistently below average variable cost), if they were possible only because of profits from the public monopoly activity and they lead to a lasting distortion of the market. That scenario was found in the lottery operator's effort to get business for its computer and information technology support unit. About one-sixth of the unit's bids for third-party maintenance contracts were below its average variable costs. That proportion might be too low to prove predation, but the subsidies were nonetheless found to be anticompetitive. The low bids were possible only because of the support from the parent's profits (and from the marketing advantage of the parent's reputation), and the effect on the capacity of competitors could not have happened without the cross subsidies. These are principles with potentially broad application in overseeing how public service monopolies take corporate forms and try to diversify into competitive markets.

Eliminating the incentive and capacity for cross subsidy distortion through complete structural separation between public monopolies and competitive enterprises is not supported in France. Instead, France prefers to apply behavioural controls to abuses by historic infrastructure monopolies. Public entities



holding dominant positions in markets are permitted to enter other, competitive markets, as long as they comply there with the law about abuse of dominance. This leads to the use of competition law as a regulatory instrument, to monitor their prices and product offerings so that their lower capital costs, name recognition, or other consequences of their public-service role and status do not give them advantages over private firms in commercial market competition.

### ***Mergers***

The substantive criterion for controlling mergers is eclectic and thus practical. The statute mentions several possible grounds for concern: substantial lessening of competition, creation or strengthening of a dominant position, or creation or strengthening of buying power that puts suppliers in a position of economic dependence. (Art. L. 430-6) Rather than choose between conceptions of merger law, which have been the subject of debate at the EU, the French law includes all of them, on the grounds that different tests address problems in different time perspectives.

All theories of competitive effect might be relevant: horizontal, vertical, multi-market and conglomerate portfolio or scale effects, and potential competition. Oligopoly has been included since the original 1986 *Ordonnance*. It is not mentioned in so many terms, but applications to the problem have been developed in practice. Tacit collusion is treated as collective dominance, requiring a means for disciplining defectors and thus a multi-period dynamic process. Unilateral effects in differentiated product markets, where the merging firms' products are each others' closest substitutes, have not yet been found to justify prohibiting a merger, in the absence of a dominant position.

New merger guidelines, stating familiar principles and methods, were published for consultation in December 2002. These take account of EU and French decisions and discuss in detail the analytic methods developed by US enforcers. They explain the multi-factor approach to market definition and analysis, relying principally on demand substitutability. Supply substitution is considered in the definition of the market only if switching output would be fast and likely. Otherwise, the potential for competition from different supply sources is treated as relevant to effects, rather than to definition of the market (and hence measurement of market shares). A merger or acquisition of a failing firm could be approved if the target would otherwise quickly leave the market, the acquiring firm would pick up most of the target's business anyway, and there is no less anti-competitive alternative to the acquisition. It is not necessary that the target firm be in or near formal bankruptcy. The general rationale for this treatment is that competition would be harmed at least as much by the target's failure as by its acquisition.

Potential contributions to economic progress could outweigh a transaction's anti-competitive effects and thus lead to permitting the merger. Decisions may consider such factors as improvements of production, economies of distribution costs, new products, environmental benefits, and international competitiveness. In literal terms and conception, this is not quite an efficiency defence, but the effect is evidently similar to examination of efficiency gains. These considerations of non-competition policies only become relevant if the balance of competitive effects is negative.

Notification is mandatory and wide-ranging, under the NRE procedure that became effective in May 2002. Basic technical concepts of the notification regime such as the definition of a concentration follow EU practice. Notification and control under French law only applies to transactions that do not come under EU jurisdiction. Whether a merger must be notified depends only on the parties' turnover, since the NRE changes removed market share as a criterion. Notification is required if the parties' combined worldwide turnover exceeds €150M and the individual turnover within France of 2 or more parties exceeds €15M. These thresholds are comparatively low within the euro area, particularly with respect to the parties' turnover in the country. Thus France is likely to be examining and controlling a larger number of smaller mergers than its neighbours. (The thresholds are to be increased in the near

future). Notification and waiting does not delay open market acquisitions, because title may be transferred pending the Minister's approval authorising the parties to implement the acquisition by exercising the rights attached to the shares. The obligation to notify and obtain prior approval is enforced by stiff penalties. Violation risks a fine against the enterprise of up to 5% of turnover in France (potentially including the turnover of the acquired party as well), and against individuals responsible of up to €1.5M. The Minister can order the parties to rescind the transaction.

Decisions about merger control are made by the Minister of Economic Affairs, Finance, and Industry. The Minister might approve the transaction, with or without voluntary commitments of the parties; authorise it subject to orders to correct competition problems or to promote other economic or social goals to compensate for reduction in competition; or prohibit the transaction (or order corrective measures, if the transaction has already taken place). An order prohibiting a merger or imposing conditions on it must be issued in conjunction with the minister responsible for the sector concerned. If no action is taken before the statutory deadline, a notified transaction is deemed to be approved. Review may involve 2 phases. In phase I, the Minister has 5 weeks to approve the transaction or seek voluntary commitments, usually structural, to remedy possible problems. If the parties propose such commitments, there must be at least 3 weeks to consider them; hence, the initial period might be as long as 8 weeks. The Minister may decide during phase I that there are competition issues warranting a phase II procedure, which is necessary in order to disapprove a merger or impose conditions on it. A phase II proceeding involves getting the advice of the *Conseil*, which must give its opinion within 3 months of the request. The Minister then has 4 weeks to decide what to do (which again might be extended by up to 3 weeks to consider the parties' proposed commitments). Appeal would be to the *Conseil d'État*. The Minister's decision is published and could be challenged not only by parties who are subject to an order controlling or prohibiting their merger, but by competitors or customers who object to an order authorising a merger. Thus the Minister's assessment of considerations permitted by the law might be subject to oversight, even if there is no opinion on the matter from the independent *Conseil*.

The *Conseil* role in merger control is advisory. Although the Minister must refer a merger to the *Conseil* for an opinion before blocking it or imposing conditions, the Minister need not follow that opinion. The Minister has approved mergers that the *Conseil* advised against, and the Minister may block or impose conditions on a merger even if the *Conseil* finds no fault with it. DGCCRF has often been more dubious than the *Conseil* about permitting mergers between suppliers in order to counterbalance the buying power of large retail chains. For most transactions, the opinion of the *Conseil* is not sought. The *Conseil* has been consulted for its views about 4-7 times per year. Some sectors have never been the subject of *Conseil* advice about a merger. The *Conseil* has a limited power of initiation, in that it can call to the Ministry's attention competition problems that have resulted from past combinations. (Art. L. 430-9) The *Conseil* did this in 2002 concerning joint subsidiaries formed by the 2 major water companies to bid on projects without competition from their parents. The *Conseil* asked the Ministry to order the parent firms to modify or reform these arrangements.

In banking, mergers are subject to prudential supervision.<sup>14</sup> The banking regulator, CECEI (*Comité des établissements de crédit et des entreprises d'investissement*), must approve mergers and acquisitions involving banking services. An uncertainty about the application of competition policy to bank mergers was resolved by legislation in August 2003, so that mergers in that sector are subject to the same competition review as those in other sectors. CECEI had attempted to impose competition-related conditions on its approval of a major merger, but the *Conseil d'État* had ruled that the power of CECEI was limited to matters of banking sector stability and financial prudence.

In reviewing acquisitions involving France's traditional monopolies and firms in other industries or sectors, the principal concern has been the risk of abuse through cross-subsidy or other unfair advantage. An example is the complex transaction in 2001 which resulted in the transfer of the energy support

subsidiaries of the electric power monopoly, EDF, to a holding company that EDF jointly owns with one of France's large water supply utilities, Vivendi.<sup>15</sup> The operating units of the holding company, Dalkia, sell energy-related services in competitive markets such as cogeneration, both in France and internationally. The Ministry approved this restructuring, without asking for the advice of the *Conseil* because the *Conseil* had already examined the same market and issues in reviewing a precursor transaction. Approval was subject only to undertakings by the parties that they would limit the exchanges of information among EDF and the Dalkia group, avoid discrimination, and ensure that EDF buyer power did not permit Dalkia to get better prices than normal. Dalkia would divulge the proportion of a bundled offer that was due to electric power, on request of its clients, and would advise DGCCRF too.<sup>16</sup> To reduce scepticism about the potential effectiveness of these Chinese walls, DGCCRF said it would demand further authorisation as if it were a new merger if it turned out that EDF, with a 34% share, exercised a "determinate influence" over Dalkia. But the opportunity and incentive for abuse do not depend on the minority shareholder wielding a determinate influence. EDF's marketing materials call attention to its link with Dalkia and to joint offerings with this subsidiary, implying that Dalkia enjoys the financial and business support of a firm that remains, in effect, the dominant actor on the national electricity market. Still, the restructuring is an improvement, to the extent that it puts EDF's activities in complementary competitive markets into a different corporate structure that is more transparently capitalised and formally at arm's length from the historic monopoly.

### ***State aids, procurement***

Competition law does not formally deal with the effects of subsidies or aids, although distortions of competition due to implicit cross-subsidy are significant in the analysis of abuse of dominance. DGCCRF has responsibilities in another area where public funding affects competition, namely public procurement and bidding. DGCCRF representatives serve on contract boards and have powers under the Commercial Code to investigate circumstances of awarding contracts. This is a major undertaking, with over 20,000 contract boards per year plus thousands of referrals by prefects and public concession files. Anticompetitive practices found in auditing procurement files are the basis for many of DGCCRF's referrals to the Competition Council (6 out of 19, in 2000; 7 out of 16 in 2001), as well as to the prosecutor under the penal provisions of the competition law.

### ***Unfair competition***

Most of the law about "freedom of prices and competition" is actually about unfair practices. Rules about "transparency, practices that restrict competition, and other prohibited practices," in Title IV, account for more than half of the competition statute's substantive text. These issues of pricing, discrimination, bargaining power, and dealings along the supply chain occupy a similar proportion of enforcement attention at DGCCRF. The headings in Title IV mention competition, but its subject is better understood as fair dealing, as this part of the law targets market practices that do not harm the economy in order to protect smaller firms from the effects of buyer power and discrimination. Nonetheless, some of the rules in Title IV, notably the ones described as dealing with "practices that restrict competition," overlap the familiar competition law principles that are included in Title II (about "anticompetitive practices"), and others are incorporated by reference into the prohibition against abuse of economic dependence. (Art. L. 420-2) DGCCRF considers its responsibilities for restrictive practices and anticompetitive practices to be complementary and consistent with each other.

Although price control was eliminated when the competition law was adopted in 1986, the chapter on transparency contains some rules about price-based marketing. One of them, transposed from the consumer code, simply requires that prices and terms must be clear to consumers at the point of sale (Art. L. 441-1). Another controls price-cutting promotions for perishable products, principally to protect competitors against unfair practices. Admonishing that discount sales for these products, if too frequent or

too long, could make markets “disorganised,” the law authorises limiting their timing and duration. (Art. L. 441-2) (In addition, the generally applicable regime under the Consumer Code limits sales at deep discounts (which would otherwise be prohibited as “below cost”) for other merchandise. Stores must confine these price-cutting promotions to the same time periods (up to 6 weeks, twice a year). A decision interpreting the Consumer Code’s prohibition of deceptive advertising permits other truthful discount offers<sup>17</sup>). The dates are set locally, in part by negotiation among commercial and consumer interests. The system and the sale schedule are explained on the DGCCRF website). The other rules in this part control dealings between businesses, specifying required details about bills and payment terms and delays. (Art. L. 441-3) The requirement to indicate explicitly any reduction in price related to the sale appears intended to document rebating, and perhaps to detect and discourage tax evasion as well. Sellers must make available to potential buyers, on request, a schedule of their prices and terms, including discounts and commissions. Terms for late payment include a minimum charge (at least 1.5 times the legal interest rate), to prevent firms from offering or demanding disguised discounts through late payment. (Art. L. 441-6) Promoting price uniformity and discouraging discrimination would also tend to discourage price cutting competition.

Rules about tying, resale price maintenance, and sales below cost resemble or restate other parts of the law. One of them quotes parts of the consumer code that regulate sales or offers with premiums, refusals to sell, and minimum quantity requirements. (Art. L. 442-1). There is a separate and explicit prohibition of resale price maintenance. (Art. L. 442-5). And Title IV also deals with conduct analogous to predatory pricing. This provision, which dates from before its present statement in the *loi Galland* of 1963, sets penalties for resale at a price below purchase cost, that is, below invoice price plus taxes and transport costs. (Art. L. 442-2–442-4) There is no need to show dominance, likelihood of exclusion, or indeed any effect on competition. Exceptions are permitted for changes in season, style, or upstream price levels. Smaller resellers may meet the competition of another seller in the same area, but only if the other seller’s price is legal. And prices may be cut for food products that are about to spoil, but the lower price must not be advertised outside the store.

Other prohibited “practices that restrict competition” would often have little effect on markets, though they could affect particular competitors’ positions. These 7 specific prohibitions against discrimination and extortion of unfair advantage may also be prohibited as abuse of economic dependence if there is an adverse effect on market competition. (Art. L. 442-6; Art. L. 420-2, ¶2) The first is a general prohibition against granting or receiving discriminatory prices, payment terms, or conditions, if discrimination is not justified by compensation actually received and it creates a competitive advantage or disadvantage. The second, which was added by the NRE, targets hidden rebates and discriminations involving promotional allowances or services. Other abuses that are specifically prohibited include obtaining or seeking unwritten advantages as a condition for transmitting orders, using the threat of termination to seek or obtain prices or terms that are “manifestly exceptional to general conditions of sale,” terminating an established commercial relationship without prior written warning (except for breach of contract or *force majeure*), selling outside a contractually restricted distribution system (if the system is legal under the competition law), and abusive payment terms. Contracts may not envision retroactive benefit from rebates or discounts, demand payment for shelf-space access before transmitting orders, or prevent transferring bills due to third parties for collection. These practices affect the relative bargaining positions of buyers and sellers, and some may lead to secondary-line effects on rivalry.

These rules have been expanded in order to control the abuse of what are termed “margins in arrears” (“*marges arrières*”). These are devices which have the effect of changing the prices effectively paid from those shown on the invoice at time of delivery. Their proliferation demonstrates the bargaining power of the 5 or 6 largest distributors and retailers of consumer goods. Taking advantage of the suppliers’ need to be present in these outlets, these firms reportedly exact up to 50% of the price through such charges and rely on late payment to suppliers—averaging 66 days after delivery—for their own working capital. The charges are often nominally in exchange for marketing services, but multiple billing leads to

doubt that they really represent payment for services rendered. Rather, they appear to be devices for discriminating among customers or for evading—or profiting from—the prohibition against setting retail prices below invoice cost. Public enforcement of these controls on supplier-distributor relationships has been strengthened substantially, in part to compensate for suppliers’ fear of commercial retribution if they bring suit over mistreatment themselves. DGCCRF now has the power to bring civil actions to request that a judge invalidate abusive agreements, order reimbursement of undue amounts, and impose fines, which can be substantial—up to €2 million.<sup>18</sup> DGCCRF also intervenes to support private suits about unfair discontinuation of supply relationships. The billing-transparency rules are enforced by criminal penalties.<sup>19</sup> There are also fines for late payments and criminal penalties for fraudulent market manipulation and disparagement.

Despite the increased enforcement power, negotiated resolutions are preferred. Reaching a negotiated settlement may be more urgent, now that claims of abuse threaten harsher consequences. The NRE provides for a special *Commission d’examen des pratiques commerciales* (CEPC) to identify abusive practices and develop codes of good practice. One of its functions may be to serve as a framework for negotiations between supplier and distributor interests. CEPC has a structure in which stakeholders are represented, with equal numbers of producers and resellers as well as representatives of government. CEPC can initiate inquiries and receive and consider complaints, and it is to give advice and recommendations about general issues and about specific practices, including transaction documents and contracts. A May 2003 circular from the Ministry encourages negotiation to move toward greater reliance on clear, general conditions of sale set in advance. The circular amounts to a general guideline about Title IV, explaining in detail what firms can do and what they should avoid.

### ***Consumer protection***

Strong consumer protections depend on regulation as much as on competition. DGCCRF has a number of direct consumer protection functions, about fraud, deception, distance sales, door-to-door sales, and pricing and discounts. DGCCRF also deals with trademark and copyright violations, passing off, and product counterfeiting, providing another line of protection against market misrepresentation. In France as in many other countries, combining competition and consumer protection enforcement responsibilities can strengthen both and make them mutually consistent. The *Conseil* does not have these direct consumer protection functions, but there has always been a representative of a consumer organisation among its members, and cases motivated by consumer-level concerns are welcomed. Consumer groups can bring complaints to the *Conseil*. (Art. L. 462-5). Private consumer organisations are active and well organised to participate in cases and policy-making.<sup>20</sup>

### **Institutional issues: enforcement structures and practices**

Two bodies are responsible for application of competition law. One of them, DGCCRF, is within the Ministry of Economy, Finance, and Industry (MINEFI), and thus is part of the system of public administration that is subject ultimately to the administrative law jurisdiction of the *Conseil d’État*. The other, the *Conseil de la concurrence*, is a collegial decision-maker with the status of an independent administrative authority. It is not part of the judicial system, but its procedures are similar and appeals from its decisions are taken to the Court of Appeal of Paris.

### ***Competition policy institutions***

DGCCRF acts in an executive capacity, preparing rules and legislation, directing investigations, and initiating enforcement against restraints and abuse of dominance. It also prepares merger control cases submitted to the Minister for decision. It is a large organisation, with many offices at the local level. Of the 6 operating sections in DGCCRF, one deals with all matters of competition enforcement and another with

consumer law issues and product safety. Half of the operating sections are assigned, by sector, to market oversight. This complex of functions is a natural consequence of DGCCRF's historical heritage as the descendant of the *Direction Générale des prix et des enquêtes économiques*.

The *Conseil de la concurrence* acts as the collegial decision-maker for enforcement matters other than mergers. It is a quasi-judicial body, the successor of the *Commission de la concurrence*, created in 1977, and which replaced the *Commission technique des ententes*, created in 1953. The *Conseil* has the power to issue orders and impose fines after court-like hearing procedures. It has the status of an "independent administrative authority," attached administratively to MINEFI. Members are appointed by the Minister for terms of 6 years, which are renewable. The 17 members of the college of the *Conseil* that constitutes its decision-making body are assigned by law. Nearly half (8) must be public magistrates, that is, present or former members of the *Conseil d'État*, *Cour de cassation*, *Cour des comptes*, or other administrative or judicial body. Experts in economics, competition, or consumer policy must be appointed to 4 positions. For these expert positions the public magistrate members submit a list of nominees from whom the Minister chooses. The remaining 5 members are to come from business or professional backgrounds. The *Conseil* may act as a body, or in sections of several members, or through the "permanent commission" of the president and 3 vice-presidents. (Art. L. 461). These 4, of whom 3 must be magistrate members, are the only members who serve full time. The *Conseil* is outside the government, and most members have other responsibilities. Some of them may tend to represent interests, if not constituencies, though. But it is independent of politics, as none of the members has a direct political responsibility and the appointments over which the minister has the most discretion comprise less than a third of the membership.

Decisions and official materials are accessible on Internet.<sup>21</sup> The web sites of the two bodies contain the basic legislation, the decisions of the DGCCRF, the *Conseil*, and the courts, press notices, and annual reports. An extensive general guideline about merger policy and procedure is now in preparation. There has been little use of formal or explicit guidelines to date about other topics. As a decision-making tribunal with a quasi-judicial status, the *Conseil* does not issue guidelines. There are sources of guidance in addition to particular formal decisions, though, notably the extensive annual reports of the *Conseil*, which contain reviews of decisions and thematic studies. The *Conseil* may also give advisory opinions in response to specific requests.

The *Conseil d'État* is increasingly involved in competition issues, although its primary role in the system for applying the competition law itself is limited to reviewing decisions about mergers. It has a two-fold role of advising the government and of acting as the ultimate authority of the administrative jurisdiction responsible for the performance of public service functions and those implying a public power prerogative<sup>22</sup>. Its members are often appointed to official bodies<sup>23</sup>. The *Conseil d'État* is now often called upon to consider claims about anti-competitive conditions and practices, both about mergers and in dealing with liberalisation in the public sector. It reviews some of the decisions, such as those imposing fines, taken by sectoral regulators. It may consult the *Conseil de la concurrence* about competition policy questions. Where the basis for jurisdiction between the administrative and judicial systems is contested, a special panel composed equally of representatives of the *Conseil d'État* and the *Cour de cassation*, the *Tribunal des conflits*, resolves the conflict.

### ***Competition law enforcement***

The enforcement method resembles the "modernised" EU process, of *ex post* direct application. There is no requirement for submitting applications for approval or exemption, except for mergers. Matters can be brought to the *Conseil* by the Minister for Economic Affairs or by complainants, which can be businesses or consumer groups. The *Conseil* may also initiate an inquiry on its own, but this prerogative is constrained by its lack of resources, and it typically has to resort to DGCCRF assistance to do the actual

investigations. Several aspects of the investigation and hearing procedures have been reformed under the latest legislation, to conform better to principles of due process protection that are developing under European Convention on Human Rights. For example, the principle of impartiality requires separating investigation from judgment. It is the *rapporteur general*, not the President, of the *Conseil* who may designate an investigator, with the same investigative powers as the DGCCRF has, or request that the DGCCRF undertake an inquiry. The DGCCRF appears as the *commissaire du gouvernement* in proceedings before the *Conseil*.

The *Conseil* process is mostly written and non-public. The function of decision-making is separated from the functions of investigation and instruction. The members of the *Conseil* are only involved in an investigative proceeding in deciding about treatment of confidential information.<sup>24</sup> At the outset, the initial position and objections of the *rapporteur* are presented to the parties, in writing, and the parties have an opportunity to respond. The process is repeated at the end of the investigation. The principle of “good faith” requires the *Conseil* to make the whole file available to respondents and other parties. Before the *Conseil* issues a decision, there is an opportunity for a hearing. To respect the separation of the functions of investigation and decision-making, the role of the *rapporteur* ends with the presentation of the case at the hearing. The *rapporteur* is not authorised to defend its position after the hearing with the parties and does not participate in deliberations, which involve only decision-making college of the *Conseil*. The decisions include an explanation of the reasoning, in part to give parties an effective opportunity to appeal.

The most commonly used investigative powers do not require judicial oversight. The procedures for “simple inquiry” may be employed without judicial authorisation in advance. These powers are nonetheless significant. The most important is access to business premises to examine and copy documents and records. Relatively informal processes are widely used in proceedings for interim measures. The “heavy” process, of coercive orders and search and seizure, requires a court order. It is more resource-intensive and hence is used less often. (Art. L. 450-4). Searching a home requires a court order. The new investigational powers of the NRE are being tested in court. The courts appear to be handling these interlocutory matters efficiently (and usually, though not always, upholding the DGCCRF’s actions).

Long delays for full decisions encourage parties to ask for interim relief instead. To reach a final decision from the *Conseil* in a full proceeding can take 3-5 years. (Advice about mergers, which are subject to a statutory deadline, is subject to a 3 month deadline). It is evidently difficult to dispose of insignificant matters expeditiously in the absence of a clear *de minimis* rule or a process for summary disposition. Accelerated procedures for small cases, which were introduced in mid-2003, are untested. Cases may have to be dropped if they are not decided within the statutory period of limitations, which is 3 years. This happened in 2002 to 20 matters, about half of which had been initiated by the Minister for Economic Affairs. In order to get a decision of some kind more quickly, firms increasingly request interim relief. The *Conseil* may enjoin a practice or order parties to return to the status quo ante, in order to avoid serious and immediate harm to the general economy, the sector at issue, the interests of consumers, or the complainant. That process can take less than 3 months. Although this interim order is, by definition, not permanent or final, the decision may signal the likely long-run outcome clearly enough for the parties to negotiate a resolution.

Potential sanctions are comparable to others in Europe, plus criminal penalties against individuals. The *Conseil* can order parties to cease anti-competitive practices by a set deadline and can impose specific conditions. The *Conseil* can order something different from what the parties request, but there are some limits. The *Conseil* may not restrain or suspend a public tender, because letting a public contract is a matter for administrative jurisdiction; however, the *Conseil* can deal with misconduct such as collusion among the bidders. Orders from the *Conseil* are backed by fines for non-compliance, which are also imposed by the *Conseil*. The sanctions for violating an order, including one for interim relief, are the

same as for substantive violations. The potential fines were increased substantially in the 2001 amendments. For an enterprise, the cap is now 10% of turnover (after tax). The basis is global turnover, not just turnover in France. To raise the basis, and thus the potential fine, a bit further, it is the highest periodic turnover after the violation began, and it includes total group turnover if the enterprise's accounts are consolidated with others. For individuals, the fine that the *Conseil* can impose is capped at €3 million. The maximum sanction is still theoretical, as the *Conseil* never imposed a maximum sanction even when the base for calculation was lower. Criminal penalties are also possible, in principle. An individual who takes part personally and decisively in the design, organisation, or execution of anticompetitive practices with intent to defraud could be punished by up to 4 years' imprisonment and a fine of €75,000. (Art. L. 420-6). The *Conseil* can refer such matters to the public prosecutor.

A multifactor balance means sanctions may not be strictly proportional to gain or harm. The *Conseil* takes into account the seriousness of the violation and the firm's economic situation. The offence is considered more serious if, for example, the agreement involves major firms at a national scale, because that will persuade smaller firms to go along with their behaviour. This implies that larger firms could expect a disproportionately larger penalty, and smaller firms might expect to get off more easily. Other factors relevant to the gravity of the offence include whether the violators are prominent within their industry, how well they knew the competition law, how much prices were raised, whether they had violated the law before, whether they participated in several sectors or markets, whether consumers were affected directly (with particular concern about effects on consumers of limited means or in difficult circumstances), and whether public purchasers were cheated. The degree of harm to the economy and the competitive process is distinct from the direct harm to participants in the market, although there are some common indicators of the general harm and the direct effects. The situation of the particular violator is also considered. Sanctions could be increased in case of recidivism or for exemplary effect against a particularly notable violator, or against the leader of an agreement. Factors that might tend to reduce or eliminate sanctions include liquidation of the violator or complicity of the customer.

A leniency system is now in place. The offer of leniency in order to encourage violators to come forward, which was added by the NRE, is an innovation in French law. (Art. L. 464-2). Clemency for cooperation is one element. If a party does not contest charges and promises to correct future conduct, the *rapporteur* may propose that the *Conseil* take account of the lack of contest to reduce the sanction. More particularly, partial or total relief from financial penalties may be accorded to a participant in an anticompetitive agreement that establishes the existence of the agreement and the identity of the participants with evidence that the *Conseil* did not previously have. The *Conseil* is to work out specific terms, after receiving the views of DGCCRF and the leniency applicant, setting out conditions to be met in order to qualify. If the conditions are met, then the *Conseil* may, in its final decision, grant partial or total relief in proportion to the contribution that the leniency applicant made to establishing the infraction. Perhaps because this is a first step, into territory that is unfamiliar in the French legal system and that may be inconsistent with some of its traditions, it is a short one. The system leaves much to discretion and negotiation, so a leniency applicant may not have a clear expectation about the extent of the likely benefit of coming forward first. The relationships between leniency for individuals and for enterprises and between administrative sanctions and criminal prosecution, which are key to persuading individuals to give evidence about enterprise violations, remain unclear and untested.

Decisions of the *Conseil* are reviewed by the courts that decide private law controversies. Parties may appeal decisions of the *Conseil* to the court of appeal of Paris, and from there to the *Cour de cassation*. Competition cases are heard by a specialised panel. The process is fast, taking about 8 months in total, including 2 months to prepare the decision after the judgement is announced. The court proceedings are public, unlike the hearings at the *Conseil*. DGCCRF ensures compliance with orders and collects the fines, and DGCCRF appears in court in matters involving the decisions of the *Conseil*. DGCCRF can itself appeal decisions it does not agree with. The *Conseil* may submit its own views to the court in writing, but



does not appear at argument.<sup>25</sup> About a third of the decisions of the *Conseil* are appealed, but most—recently, about 80%—are upheld on the merits.<sup>26</sup> Dilatory appeal does not appear to be a problem. Appeal does not suspend the obligation to pay the fine and comply with the order, unless the court rules otherwise, which it rarely does. The court can require the losing party to pay some of the winner’s costs, but the amounts are low and this too is done rarely.

An appeal may be submitted to the *Conseil d’État* against the Minister’s decisions about mergers. This includes decisions to permit mergers as well as prohibit or otherwise control them, for disappointed customers or competitors can appeal too. The process of appealing official actions to the *Conseil d’État* is fairly efficient, with decisions typically taking less than a year.

### ***Other enforcement methods***

Private lawsuits have been important. Parties can recover damages due to violations of the basic prohibitions by filing civil suits in court. (Civil code, Art. 1281) There is no provision for awarding damages in proceedings at the *Conseil*. Private suits in France are apparently at least as common as in Italy, where about 10 are filed each year. The structure of the French competition law (and the Italian law too) has probably facilitated private suits. Unlike the EU system, there is no process of administrative authorisation or exemption. The law applies directly, and thus parties need not await an action by the *Conseil* to determine whether statutory conditions have been met.<sup>27</sup> To some extent, the wider availability of private actions may act as a safety valve to alleviate problems due to delays at the *Conseil*.

Enforcement of EU competition law in France by the European Commission has also been important. EU competition law applies where the jurisdictional requirements are met. The basic substance of France’s competition law is essentially the same as the EU law. Having an alternative system for applying the same rules can be valuable. It may be more effective, and it may appear more credible to other parties affected, if competition law is applied to public entities, public service operations, and national-champion firms by an authority that is not part of the framework of the French government. In 2001, the European Commission made 2 significant decisions about France’s historic infrastructure firms. It found conflicts of interest in the supervision of France’s postal monopoly, leading to a threat of discrimination against firms in competitive services markets. And it demanded conditions before permitting the historic electric power monopoly to proceed with an acquisition of a power firm in Germany.

### ***International trade issues in competition policy and enforcement***

France applies the “effects” test, claiming the power to enforce its law against conduct abroad that affects competition in France. French authorities claimed jurisdiction to examine the acquisition by an American firm, Boeing, of another American firm, Jeppesen, which had no operations and few sales in France. The possibility of effects on customers or competitors in France was enough.<sup>28</sup> Where effects might come from beyond the border, the effective economic market might be wider than the national border, too. In examining domestic effects of foreign conduct, the *Conseil* has considered how likely customer responses in expanded markets could be sufficient to resist the threat of market power. For example, in examining whether French customers would be harmed by a combination of UK manufacturers (one of which was a subsidiary of a French supplier), the *Conseil* noted that customers might turn to output from other capacity elsewhere in Europe (which evidently did not appear in market-share data based on sales). Conversely, the *Conseil* could apply the competition rules of the EU treaty (which it has had the power to do since 1992) to conduct in France that has effects elsewhere in the EU. The interesting test of that power would be a claim that competition in related markets elsewhere in the EU has been distorted by conduct that was possible only because of cross-subsidy from profits of providing public services in France. Although the *Conseil* is independent, complainants might feel more confident

taking such a case to the European Commission or to their own national enforcers, if their laws too apply the “effects” test.

Co-operation with other enforcers is now easier, but France appears cautious. The NRE has made it easier to exchange information with other enforcement authorities, by introducing a degree of mutual recognition of means for protecting confidentiality. Confidentiality is no longer a bar to exchanging information, as long as the exchange is among enforcers that are subject to the same obligations of confidentiality, and the same guarantees and protections apply as in France. France retains considerable scope for discretion to decline, though. Co-operation will be refused if the request from another enforcer threatens French sovereignty, security, essential economic interests, or public order. France also will not co-operate if the result could be multiple jeopardy, that is, if there is already a criminal proceeding underway in France based on the same facts and against the same persons, or if they are already subject to a final order and sanctions based on the same facts.

### ***Agency resources, actions, and implied priorities***

Resource levels are unclear, but look low, and are growing slowly. Combinations of functions in DGCCRF make it difficult to assess inputs. The *Conseil* evidently has a staff of about 120 employed full-time, of whom about 30 are permanent *rapporteurs*.. It relies largely on DGCCRF for investigation support. DGCCRF has some 4000 staff, most of them engaged in doing other things other than competition law investigation and enforcement. The administrative headquarters in Paris has about 400 staff, and there are over 3000 agents in regional offices around the country. Some of the regional staff is organised into teams handling competition cases. There is a section devoted to national scale investigations, which had a staff of 60 in 2002, which also handled consumer and other matters as well as competition cases. DGCCRF devotes about 170 man years (about 4% of its staff) to anti-competitive practices (that is, Title II matters) and another 125 (about 3% of its staff) to restrictive practices (that is, Title IV matters). Consequently, only a small minority of its staff is actually engaged in competition enforcement, although others may make some contribution, as they comprise a nationwide network of official oversight that sometimes turns up information about competition enforcement issues.

**Table 1. Trends in Competition Policy Resources**

	Person-years <sup>1</sup>	Budget <sup>2</sup>
2002	296	€18.4 million
2001	277	€16.7 million
2000	268	€15.3 million
1999	271	€15.0 million
1998	276	€14.4 million

1. Estimate, combined for *Conseil* and for DGCCRF staff dealing with anti-competitive practices. In addition, about 125 DGCCRF staff deal with restrictive practices under Title IV.

2. Estimate, combined for *Conseil* and for DGCCRF concerning anti-competitive practices.

Source: (Government of France 2003)

Cases involving unfair and restrictive practices are important at DGCCRF, while infrastructure occupies the *Conseil*. Measured by the number of cases, most of DGCCRF’s enforcement output falls under Title IV, with tens of thousands of actions every year, which are mostly simple infractions of formal

clauses. With respect to the anti-competitive practices prohibited by Art. L. 420, the largest single category appears to be cases that result from the supervision of public markets, that is, procurement irregularities such as bid rigging. The proportion of the staff working on mergers is low (or at least was low before the notification program became effective): in 2000, out of about 175 staff involved in competition matters, only about 15 reportedly dealt with merger review and enforcement. The distribution of formal actions by the *Conseil*, including both enforcement and advice, shows that bid rigging is an important problem, and that telecoms and transport services are common areas of controversy. The number of matters presented to the *Conseil* for investigation and adjudication of alleged violations of law has been dropping, from a total of 135 in 1998 to 82 in 2002. The number of complaints from businesses and business groups has fallen by half (from 72 to 38), while the number submitted by consumer groups has risen, although the total remains low (from 1 to 4). Most strikingly, the number of matters submitted by DGCCRF dropped by two-thirds, from 30 to 11. As more demanding standards of proof at the *Conseil* lead to more dismissals, and the *Conseil* works off the backlog of cases that accumulated because of the delays in its decision process, DGCCRF has looked for other means of resolving matters.<sup>29</sup> The number of decisions by the *Conseil* has remained steady at about 110 per year.

**Table 2. Sectors Involved in Conseil Decisions (number of actions)**

Economic sector	2001	2002
Post and telecoms service	9	14
Construction	14	11
Transport (land)	7	8
Wholesale and retail intermediaries	5	7
Recreation, culture, & sports	6	6
Utility services (electric, gas, heat)		5
Business services		5
Retail trade & repair services	9	5
Health and social services		4
Information technology	4	
Printing and reproduction		3
Transport (auxiliary services)	4	
Water		3
Chemicals	3	3

Source: *Conseil*, 2002

**Table 3: Trends in Actions by DGCCRF<sup>1</sup>**

	1998	1999	2001	2002
Price and competition (total)	57,346	64,371	103,587	85,163
Unfair competition and transparency	32,717	35,863	32,289	
Anti-competitive practices	4,239	5,560	5,003	
Concentrations	34	10	10	125

1. The DGCCRF Annual Report for 2000 does not include data about actions, and the report for 2002 organises the data differently.

Source: *DGCCRF Annual Reports*

**Table 4: Trends in Decisions of the Conseil Imposing Sanctions**

	1998	1999	2000	2001	2002
Decisions involving financial sanctions	32	13	28	30	12
Companies or groups sanctioned	76	58	67	116	103
Total amount of sanctions imposed (€ million)	13.7	9.3	189 <sup>1</sup>	51.1	64.3
Average sanction imposed (€ million)	.18	.16	2.82 <sup>2</sup>	.44	.62

1. Of which €174.4 million represents the sanctions imposed in the mortgage case.

2. Without the mortgage case, the average is € .22 million.

Source: *Conseil Annual Report 2002*.

## Limits of competition policy: exemptions and special regulatory regimes

### *Economy-wide exemptions or special treatments*

France's tradition of *service public* is challenged by demands for liberalisation. France is adapting by extending the conceptual reach of its administrative law about the principle of promoting competition. The principle is being implemented cautiously.

Competition law generally defers to other laws and regulations if they are inconsistent. Conduct that results from the application of law or regulation is not subject to the prohibitions against anti-competitive practices. (Art. L. 420-4(I.1)) A similar principle is found in most countries. In some places, it results from interpretation and the application of general rules of statutory construction. In France, the competition statute contains the explicit rule of precedence. But the scope and effect still depend on interpretation and application in practice. The *Conseil* contends that the conduct at issue must be a direct and necessary consequence of the other law or regulation. This reading would not exempt conduct merely because another law authorises or tolerates it. At the extreme, a narrow reading would only exempt anti-competitive conduct that the other law requires, to resolve the dilemma of being forced to violate at least one of them. In examining claims of exemption, the *Conseil* considers the legislator's intention about the economic goal that is said to justify otherwise anticompetitive conduct. Presumably, if the goal of the law or regulation was not inconsistent with competition, and there is no indication the legislator intended to create an exemption, then the argument for exemption would be rejected. As in other countries that use the EU toolkit, the demand for particular legislative exemptions may be less, because the competition law itself contains criteria and procedures for considering claims for exemption.

The general grounds for exemption recognise the position of small businesses, by permitting agreements whose object is to improve the management (*gestion*) of SMEs. (Art. L. 420-2). There is no general exemption or threshold, though, and recent legislation was limited to providing for faster handling of small cases at the *Conseil* and increasing the merger control threshold.<sup>30</sup> Small size and limited effect have not excused conduct such as colluding about public works contracts nor justified reducing the penalty for it. To regulate permissible co-operation, the NRE added a section about retailer co-operative groups to the *Code de commerce* (Art. 124-1) These groups may promote common commercial interests, by developing sources of goods and services for members, managing common services in an area, providing help about accounting, finance, and methods, and implementing a common marketing strategy through branding and advertising, including common prices.

Although there is no explicit exemption for labour organisations or for conduct that only affects the market for labour services, an implied exemption can protect some labour groups' actions. The *Conseil* tried to apply the law to conduct by union groups—sabotage of a non-union competitor's distribution—that impaired product market competition. The court of appeal did not disagree with the principle, that the competition law could be applied to *syndicats*. But the court limited the potential scope of its application, by requiring that at least one party to a restrictive agreement be an economic actor in the market affected. Presumably, the law could have been applied to an agreement restricting product market competition that involved both unions and competing firms.

Public entities and firms that perform public services are covered by the law, but not always by the process of the *Conseil*. In principle, the competition law is neutral with respect to the ownership of capital. Publicly owned entities are explicitly subject to French competition law. (Art. L. 410-1) It is not the nature of the entity, but the nature of the action, that determines whether the competition law applies to it. The competition law and enforcement process do not apply to the performance of public services under public authority. Such actions are subject only to administrative law jurisdiction. But the *Conseil* may examine the acts of entities that perform public services which are unrelated to those services, such as

selling advertising space in the phone book, or that can be addressed without putting into question an administrative decision, such as discriminatory conduct by a firm that has an authorisation to perform a public service as a monopoly. It is not the nature of the entity, but the nature of the act that determines whether competition law is applicable. The same principles apply to sub-national levels of public authority. To the extent they are engaged in the kind of market conduct described in the competition law, that is, production, distribution, or services, they may be subject to the oversight of the *Conseil*.

The allocation of responsibilities has evolved quickly, as the legal structure of central control has confronted the concept of competition in regulated sectors. The positions of the administrative law about competition reversed in only 7 years—or perhaps only 3. In 1989, the *Tribunal des conflits* decided that, in principle, administrative judges could not apply the competition law (at that time, the 1986 *ordonnance*). (It also ruled that the *Conseil* could not apply the competition law to public services, either). That view was affirmed, or at least was being followed, as late as 1993. But in 1996, the *Conseil d'État* annulled a decree on the grounds that it necessarily created a dominant position (following a principle of EU competition law). And in 1997, the *Conseil d'État* essentially overturned the 1989 position, by applying the principles of France's own law about abuse of dominance to judging the terms of a concession contract. That is, the principle of competition, taken from France's general competition law applicable to private marketplace conduct, was accepted into the jurisprudence applicable to evaluating and controlling administrative action.

The *Conseil* appears to be testing the limits of its jurisdiction, too. Government-owned enterprises and firms performing public service functions are under surveillance to detect abuses. When the public airport operator refused to give off-premises hotels access to the on-airport information desks, the *Conseil* found, and the court agreed, that this was not part of the public service prerogative and that it imposed an anti-competitive constraint on the hotel market. Some distinctions protect the competitive prospects of new entrants to formerly monopolised markets. For example, the electricity and gas utilities were not permitted to tie financial aid to long-term exclusive contracts, and a national television broadcaster was not permitted to impose exclusivity clauses on reproduction rights. The constraints, although connected in the contracts to the public service functions, were not necessary to perform them.

### ***Sector-specific exclusions, rules and exemptions***

In France, “regulatory reform” is often identified with bringing competition to the utility and other public service sectors. This does not involve undoing explicit exemptions from the competition law, so much as making in-depth changes to a governing system that was previously attuned to the pre-eminent role played by the state. In adapting to the new policy environment, France has supported the efforts of its historic monopolies to reinvent themselves in increasingly competitive markets, while trying to preserve their special role in providing public services. Thus it sees the challenge as creating opportunities for competitive entry while not undermining the profitability that the incumbent needs to fulfil its public service undertaking. To that end, sectoral regulators are to set the necessary equilibrium, a “corridor of viability,” concerning prices and terms.

The risk that cross-subsidy will distort competition is a constant concern, yet France has not chosen the path of structural separation aimed at eliminating that risk through formal separation and isolation of the public service monopoly element. An enterprise with a legal monopoly may enter competitive markets, including ones that are related to the monopoly sector, as long as it does not abuse its position to impair competition in those markets. At the extreme, this means it may not drive out others or prevent entry through tactics other than competition on the merits. The *Conseil* has tried to forestall smaller-scale distortions, too. The *Conseil* detailed what has become a familiar analysis of the cross-subsidy problem in a 1994 opinion about the provision of auxiliary, competitive services by the electricity and natural gas monopolies. Although using the profits of the public service function or monopoly to support entry into a different, competitive market activity is not by itself considered an abuse, the profits

applied to that purpose must not be the profits that are supposed to support performance of the public service obligation. Anti-competitive conduct that is made possible only by that source of funds would be treated as abuse. If the claim for universal or public services, supposedly justifying special treatment or funding, includes things that a competitive market could and would supply without intervention or support, or the provisions for investment in infrastructure are inflated or subsidised, then the market is likely to be distorted in ways that protect the incumbent from entry and price competition. The *Conseil* reiterated these points in 1996 opinions about the national railway's involvement in competitive courier services and about the postal system's involvement in financial services, and on many other occasions since. It seems to be necessary to repeat the lesson every time the issue arises, which is often.

### *Electricity*

Electric power in France was until recently an integrated, state-owned monopoly. The nuclear plants of *Électricité de France* (EDF) account for 76% of French electricity production, and another 14% of national production comes from hydropower. That fuel mix results in low emissions, low variable costs, and moderate prices by European standards. France exported 14% of its production in 2000, while importing less than 1%. Perhaps because its current system appears successful, France has preferred a slow pace of change. The 1996 EU directive called for first-phase liberalisation by 1999, but France did not implement this directive in national law<sup>31</sup> until 2000. France supported extending the target for full liberalisation. The target date for both electricity and gas is now set for 2007.

Generation is highly concentrated. The only significant generators in France other than EDF are an affiliate of the national coal company, SNET, and the hydropower firm in the Alps, *Compagnie Nationale du Rhône* (CNR). Together these represent only about 5% of national production.<sup>32</sup> Several very small producers are under contract to sell their power to EDF, mostly under programs to promote new technologies. Entry into generation is controlled by authorisations or tendering. Power plants are licensed by the Ministry of Energy. Foreign suppliers can sell to eligible customers in France, if there is enough transmission capacity at the border.

Network management is done by an entity, RTE, that is still formally a part of EDF. By law, RTE's accounts and management are separated from EDF's operations in generation, supply, and distribution. EDF nominates the RTE manager (suggesting 3 candidates), and the government makes the appointment, after getting advice from CRE. The pro forma balance sheets that were entailed by separating RTE had to be audited, to check the basis for setting transmission tariffs. This arduous process was not completed until late 2002.

The market opening target in France's 2000 electricity law was 30% of consumption, which was defined by setting the level of eligibility for competitive service at 16 GWH per site. To facilitate opening, a power market, Powernext, has been operating in Paris since the end of 2001, dealing in contracts for next-day power. Powernext is owned and controlled principally by transmission interests.<sup>33</sup> Its objective is said to be to create a reference price that will stimulate competition and help rationalise the markets at the European level by enlarging the number of possible hubs. Although there are only a few actual generators in France, other suppliers are present due to PowerNext, to virtual production through EDF, or through international exchange. Reducing the eligibility criterion in 2003 by about 50% doubled the number of eligible sites, but the proportion of power sales that was open to competition increased from 30% to 37%. A more significant change is expected in July 2004, when all businesses will be able to choose their suppliers. That will be 2.3 million customers, at 3.6 million sites. Households will be able to choose in July 2007.

The rate of switching by eligible customers has been non-negligible. By 2003, about 17% of the eligible customers were supplied by someone other than EDF, and about 240 sites (out of 1300 eligible)

had switched at least once. The threat to switch has no doubt helped some customers who stayed with EDF to renegotiate better terms. RTE enters contracts for balancing service, and it buys power on the market to make up line losses. Other suppliers may serve these markets, and indeed EDF has only a small share of line-loss make-up sales, which make up 25% of the eligible market furnished by EDF's competitors.

Despite the changes in the last few years, though, France has not moved nearly as far as others in Europe, either in law or in fact, toward open, competitive electric power markets. In 2002, the extent of France's market that was declared open, at 30%, was the lowest in Europe. By then, 5 countries had already opened entirely. (Because the French market is so large, in terms of the total amount opened it ranks 5<sup>th</sup>). The expansion of eligibility in 2003 does not significantly change France's rank. Unbundling France's transmission system, by management and accounting separation, was minimal compared to others which had nearly all<sup>34</sup> adopted legal or even ownership separation. Distribution was subject only to accounting separation, while 6 European countries had already gone to legal separation. And the market shares for generation confirm the limited extent of competition. In France, the largest 3 generators had 92% of the power market, a share topped only in Belgium, Greece, and Ireland. In France, there was only 1 company, EDF, with more than 5% of total national generating capacity. In other large European countries (Finland, Germany, Italy, Spain), there are at least 4 firms with shares that large; in the Netherlands there are 6, and in the UK there are 8. Despite the non-competitive market structure, though, power prices in France had not been unusually high, nor low, compared with other European countries, and the estimated network charges appeared to be about average.

Public service objectives in the electricity law of 2000 address equity and planning. The first objective underlines a characteristic feature of the concept of *service public*: a standard, and uniform, price and quality of service everywhere, including Corsica and overseas departments that are not connected to the national grid. The second objective is to guarantee the right to electric power. The third objective is long-term supply security and environmentally-friendly sources. A program of annual investment and a schematic for developing the transmission network are approved respectively by CRE and the Minister. Equalisation funds finance the additional costs of serving disadvantaged regions and those who are unable to pay.

The regulatory authority, CRE (originally the *Commission de Régulation de l'Electricité*, and now of *Energie*) is responsible for ensuring non-discriminatory, transparent third-party access to the transmission system. The CRE had about 80 employees and a budget of about €11M responsible for electric power matters; these figures became about 96 staff and a budget of about €12M when it also became responsible for gas. It is not a general regulator for the sector, because licensing and rate decisions are made elsewhere. CRE proposes tariffs for transmission and distribution network access and advises about rates for non-eligible customers, but these are only recommendations. Determining the prices where there is still a monopoly is the responsibility of the ministry of energy and economy. CRE maintains and publishes lists of the eligible customers and of potential suppliers. It supports the development of transmission and distribution networks, through approving RTE's annual investment programme and advising about long-run network development. CRE offers advice about the appointment of RTE management; the director of RTE is nominated by EDF, but appointed by the government. It polices accounting separation to prevent cross-subsidy, discrimination, and distortion of competition. Contracts between users and RTE, and protocols between EDF and RTE, are filed with CRE. CRE also receives notices of refusal to enter contracts and deals with contract-related disputes. CRE has the power to order interim protective measures and sanctions, but it does not have power to order construction of facilities. If access requires investment in a direct line, CRE can only offer advice in the event the competent administrative authority refuses to authorise construction. Appeals from CRE decisions about access disputes go to the Paris Court of Appeal, which also hears appeals from the decisions of the *Conseil*.

CRE powers are exercised in connection with the *Conseil*. The energy law anticipates that most of the repeated controversies that will arise between participants in the sector will be technical. If CRE encounters conduct that amounts to abuse of dominance or a restrictive agreement, it is to transmit that to the *Conseil*, because CRE is not competent to decide such matters itself. Conversely, the *Conseil* is to refer disputes in the energy sectors that do not amount to competition law violations to CRE. Each body can ask the other for advice. Both are concerned to prevent distortions from cross-subsidisation, and thus they have often consulted about separation rules and cost accounting for public service obligations. CRE approves the rules about accounting separation, that is, the rules for imputing costs, the delineation of accounts, and the principles of relations among regulated and non-regulated activities, with the advice of the *Conseil*. The *Conseil* has already had occasion to issue a decision on complaints by third party producers, finding that delays and failure to advise about new technical requirements for grid access hampered the development of competition.

Effects of EDF ventures on competition have been subject to scrutiny outside France, too. The European Commission intervened in 2001 concerning a proposal by EDF and a group of 9 district power firms in southwest Germany to acquire joint control of EnBW (Energie Baden-Württemberg AG). Concerned that the combination would strengthen EDF's position by eliminating potential competitors, the European Commission demanded several conditions for approval, including divestiture of an interest in a Swiss electric power company and releasing CNR from its exclusive sale commitment to EDF. In addition, EDF was required to make 6 GW of its capacity in France available for competitors to bid for and sell as if it was their own. These conditions supported development of competition in France, by making available enough power to supply 30% of the part of the market that was to become eligible for competition. The obligation to make EDF capacity available for sale by others may be ended after 5 years, if there are enough alternatives by then. The European Commission also intervened in an acquisition across the other border, by EnBW (after EDF had obtained joint control of it) and a Spanish investment group of control over Hidroeléctrica del Cantábrico. Here the concern was strengthening of the joint dominance situation in the Spanish wholesale market, which is protected in part by capacity constraints on the French-Spanish interconnector that isolate Iberia. The European Commission accepted a commitment from EDF and RTE to expand the interconnector's commercial capacity from 1.1 GW to 4 GW.

EDF also has interests in power firms in the UK and Italy. EDF wants to expand its share of the European market, from the 18% it now holds to 22-23%. The contract between EDF and the government for 2001-03 envisioned the necessity of expanding the possibility of competition in France, in order not to restrict EDF's ability to expand elsewhere in Europe. Other countries were considering or adopting rules prohibiting acquisitions or activities by firms connected with states that denied reciprocal market access or investment opportunities. Perhaps looking toward more fundamental restructuring, if not privatisation at least in part, EDF has begun to make each of its branches responsible for meeting targets and making its own profits. The chairman of EDF reportedly wants half of its revenues to come from operations other than selling electric power in France by 2006, and recognises that expanding its operations into other countries must mean permitting others to enter France. (Mallet 2002)

### *Natural gas*

Natural gas has also historically been run as a *de facto* integrated, publicly owned monopoly. By far the largest and most important operator is *Gaz de France* (GDF). Until 2000, GDF had a monopoly on importation. GDF has 88% of France's pipelines. The firm that has most of the rest, 10%, is GSO, which is owned jointly by GDF (with 30%) and TFE (70%). Another TFE affiliate, SEAR, has the remaining 2%. GDF's network in central France is operated by *Compagnie Française de Méthane* (CFM), which is also jointly owned by GDF (with 55%) and TFE (45%). GDF and affiliates operate 3 geographically-concentrated pipeline systems, each managing its own pipeline and delivery system and selling for industrial consumption and local distribution. Local distribution is controlled by local authorities. Most



granted operating concessions to GDF, although there was an alternative provider, and more have been authorised since 1998.

The 1998 EU directive was not transposed into French national law until 2003; the deadline was 2000. France's failure was the subject of a formal proceeding by the European Commission. Despite the lack of a statutory basis for restructuring, a transition regime was put in place permitting some customers to choose a gas supplier anywhere in Europe.<sup>35</sup> GDF and its affiliates have posted transport rates for third party use, and GDF a tariff for access to its LNG terminals in France. The threshold for customer eligibility to choose was set at annual consumption over 25 million cubic metres on one site, to achieve the EU directive target of 20% of the market. By August 2002, only 9 customers, at 16 sites, had changed supplier. Even though most of these were unusually large users, these changes represented only about 4% of the national market, a rate of switching that was about average for Europe at the time. Competitive pressures have not affected consumer prices nor have they reduced GDF's profitability, though. Prices are higher than in European jurisdictions where markets have been liberalised (though they are lower than in other European non-producing countries). Legal uncertainty resulting from the failure to transpose the directive and the lack of a regulator had inhibited buyers and sellers from testing the possibilities, although the ministries had given the president of CRE some responsibilities concerning access tariffs and accounting separation before the directive was formally transposed.

The energy law of 2003 has resolved many of these uncertainties. CRE's jurisdiction was expanded in 2003 to cover gas as well as electricity. GDF lost its legal monopoly over import and export. The 3 pipeline operators are subject to a requirement to provide third party access. Some additional users became eligible to change suppliers when the law became effective. In August 2003, the market opened more, to about 37% of the market at 1200 sites. In July 2004, all businesses will be able to choose their suppliers, and in 2007 competition will be opened to household customers.

Developing competition in gas faces challenges that are not present in electric power. France depends upon imports. Sources are varied, including Norway (29%) and the Netherlands (12%) and spot purchases, but half come from monopolies in Russia and Algeria. Supplies are tied up in long term contracts, whose terms reflect the preference to assure revenues and recover investments, more than to create competition. CRE has proposed a network access tariff to permit more competition. The 3 principal pipeline operators, the networks to which third parties must gain access as competition develops, are integrated into other stages of the industry, and they are nearly all connected to GDF. Under the 2003 law, the operators have separated their accounts for transport, distribution, storage, and LNG, and they are preparing to separate the transport operation by the July 2004 deadline set under the second EU gas directive. At one time, CRE recommended that GDF end its participation in the other 2 operators and sought to expand access to LNG terminals to improve competition.

Motivations in the gas sector parallel those in electric power. The gas industry, like the electric power industry, is beginning to think in terms of a continental market. The chair of GDF has affirmed that it is ready to change its corporate status, and is reportedly assembling capital to support acquisitions and expansion outside France. (Mallet 2002) The European Commission approved GDF's acquisition of a German oil and gas producer in April 2003. To enable GDF to expand beyond France, France has had to open its own markets.

### *Telecoms*<sup>36</sup>

France Telecom (FT), the historic monopoly, was partly privatised in 1997. The state still holds more than 60% of FT's shares. Prices for universal services are set by the Minister for Economic Affairs, Finance and Industry, based on proposals of the regulator. Unbundling of the local loop as of 1 January 2002 established the legal conditions for open competition there.

The telecoms regulator, set up in 1997, is the *Autorité de Régulation des Télécommunications* (ART). Consultation between ART and the *Conseil* about competition issues and cases is supported in the telecoms law.<sup>37</sup> There is no formal protocol or agreement between ART and the *Conseil* about allocating jurisdiction, because the telecoms law envisions a clear distinction between their powers. Some kinds of industry disputes might be taken to either body for decision. (Parties might prefer going to ART for a faster decision. ART has a 6 month deadline and can usually decide in 4 months). To assure consistency in application of the telecoms regulations that copy competition principles, appeals from ART decisions about interconnection, access, and installation are taken to the same court that hears appeals from the *Conseil* and CRE, the Paris Court of Appeal. But parties may also take their complaints to the *Conseil*, and the *Conseil* has taken interim measures in telecoms matters. It prevented FT from using low-price service bundles including local service, so that potential competitors for the local loop service would have a realistic chance of getting into the market. And the *Conseil* ordered FT to open up to competing internet providers, letting them bid for high-speed access by offering them access to a permanent virtual circuit or equivalent.

### *Railways*

The rail system is still a state-owned monopoly, SNCF. The expectation of continued monopoly is embedded in the basic labour arrangements, which have been unchanged since 1937. Encouraging competitive entry in rail service will be more difficult than it has been for air transport, because SNCF is not responsible for raising its own capital and the assets it employs are amortized. The system is reorganising its operations and finances, but resisting larger-scale change at least for now.

France has not transposed the EU directives into statute. Similar measures are being implemented through decrees to separate facilities and operations. A decree of March 2003 opens the way to competition for freight transport. Ownership of track and responsibility for infrastructure management were shifted from the national rail system, SNCF, to an accounting entity, *Réseau ferré de France* (RFF) in 1997. There is no competition, either in or for the market, for passenger service. This public service is generally efficient, although the quality of service may suffer during labour disputes. There is little competition in freight service, either, where there is no public service obligation or expectation. Freight operation is very inefficient. In an admittedly extreme case, it can take 14 days and 20 changes of crew or equipment for a freight train to traverse France from north to south. The EU calls for open, competitive entry for international freight on what is defined as the European rail network by 2003, and on the member states' networks by 2006.

Would-be competitors will face an incumbent with a lean cost structure, shorn of historic obligations. The structural changes reduced SNCF's apparent debt burden by passing it to RFF. In 2001, the system debt, mostly in RFF, totalled about €40 billion. RFF is only an accounting device, not an operating entity. RFF pays SNCF to perform track maintenance services, while SNCF pays usage fees to RFF. RFF pays more for maintaining and improving track than SNCF pays for using it. The resulting gaps are backed by public subsidies to RFF. The annual cost to the public of subsidies and debt service was estimated at about €10 billion, by the official body that oversees the railways. (Mallet 2002)

The public service issues in rail concentrate on the concerns of outlying districts to maintain their level of service. It was long claimed that an integrated national monopoly was needed to cross-subsidise those services and maintain uniform fares and services despite differences in costs. But SNCF has been stepping back from such guarantees as uniform frequency of service. In the late 1990s, several regions negotiated with SNCF about the type of service they wanted and how to pay for it. In these experimental regions, regional traffic grew nearly twice as fast as elsewhere. The increase in transparency about needs and costs is a step toward a more market-based approach. The experiment was extended to the whole country in 2000. In addition, some bus-rail competition is appearing in regional transport schemes.

## *Airlines and airports*<sup>38</sup>

Formally, there is no exemption from the competition law for airlines and airport services. Most controversies about competition in these sectors have been decided by the *Conseil d'État*, on the grounds that they involve the terms of public service, rather than through application of the general competition law by the *Conseil de la concurrence*. Air travel services have been occasions for defining the boundaries between those jurisdictions. Cases have involved discrimination by the Paris airport authority about maintenance of jetways and about prices for flight information between on-airport and off-airport hotels. These have also been occasions for co-operation and consultation between the two jurisdictions. In a 1999 case, the Paris airports authority had refused access to a car rental firm, and the *Conseil d'État* asked the *Conseil de la concurrence* whether the two main airports of Paris were separate markets for this purpose. Mergers in civil aviation, including Air France's investments in or acquisitions of regional carriers, have been approved by the Minister of Economy. The *Conseil* has not been consulted, as the Ministry has determined that the transactions would have no effect on competition or that potential competition would be sufficient to control abuse.

## *Postal service*

The monopoly in postal services is entrenched. *La Poste* is the largest single employer in the country. It was set up in 1991 to be an "independent public operator," taking over the assets of the government postal administration. As such, it has a separate legal personality, independent of the state. The definition of the part of the market reserved to *La Poste* is the largest that the EU directive permits. Rather than adopt new general legislation to transpose the 1997 EU directive, for which the deadline was February 1999, France added clauses to the regional planning law. Market opening has been minimal, permitting some competition in the non-reserved parcel and express services. Prices (for stamps) are somewhat higher than in more competitive countries, although consistent with average levels in Europe. Tasks not accomplished include separation and transparency of accounts to discourage cross-subsidy. Accounting separation is planned for 2004. A mediator about universal service disputes has now been appointed, attached to the deputy minister for industry within MINEFI, to oversee how *La Poste* is performing. So far, this mediator has no role about financial or economic issues, and it is a facilitator and ombudsman, not a decision-maker with power to issue sanctions or orders. The mediator was established in response to an enforcement action by the European Commission, which found in 2001 that France's laws for governing *La Poste* were insufficient to prevent discrimination against mail preparation firms competing with its subsidiaries. A draft law submitted to Parliament in July 2003 defines universal service, transposes the May 2002 EU directive concerning the limits of the monopoly, and assigns regulatory authority in the sector to ART. This draft also makes ART responsible for accounting principles. *La Poste* plans to publish consolidated accounts detailing results for its separate activities.

*La Poste* provides non-postal services, for social as well as commercial reasons. These functions also present opportunities for distortion of competition because of the cross-subsidy from protected monopoly operations. The most important is financial accounts. About 3 million people use these postal financial services, mostly those who are too isolated, too poor, or too unreliable (because of their legal record) to use the commercial banking system. In rural areas these operations are particularly important. An examination by the *Conseil* concluded that 75% of the window transactions in rural areas were about banking. Financial services represent about 25% of the operations of *La Poste* and more than half of its profits. These represent about 10% of the relevant markets. *La Poste* also has a significant insurance business, which it has considered expanding.<sup>39</sup> *La Poste* enjoys several competitive advantages in providing these services. It has the largest network of service windows in France and a large "sales" staff, because letter carriers also handle payments and even sell policies and products. It has an established public image, supported by advertising; indeed, most of *La Poste's* advertising is about these financial services. Its offices can offer extended hours, because of the public service aspect of the postal operation. It

is effectively exempt from capital ratio requirements that apply to banks (although it is subject to some financial sector rules applied to deposit-taking institutions and financial products), as well as from many of the tools of civil process to enforce obligations. The OECD has recommended making the financial operations fiscally transparent, so the net costs can be determined. (OECD 2001) Transparency and separation of accounts are also necessary, to police abuses from cross-subsidy.

### *Banking and other financial services*

The banking sector is not exempted from the competition law. The decision of the *Conseil* about the banks' "non-aggression pact" was an occasion to make that clear. But the *Conseil* must co-ordinate its actions in this sector with the sectoral regulator. Complaints must be communicated to the banking commission.<sup>40</sup> If the *Conseil* decides to impose sanctions, and in doing so it does not follow the advice of the banking commission, it must explain its reasons for departing from that advice. In the non-aggression pact case, the banking commission advised the *Conseil* that it had no evidence of a national agreement or of constraints on competition, and noted that banking margins were eroding during the period in question. Those positions did not persuade the *Conseil* to drop the matter. The *Conseil* responded that the fact that the banks were competing for new business did not justify refusing to compete about existing clients, and that financial difficulty in the sector did not justify anti-competitive practices.

Bank mergers are now subject to the usual competition policy oversight. Before August 2003, they were not subject to control by the minister,<sup>41</sup> but instead only to the oversight of the banking regulator. The *Conseil d'État* had ruled in early 2003 that the banking regulator could not impose conditions to protect competition on its approval of a bank merger. This conclusion was reached by parsing the logical relationships between the provisions of the banking and competition laws about which parts of the competition law apply to banking. The resulting vacuum of competition policy oversight was quickly filled by new legislation about the financial sector, which provides that the common system of competition policy control also applies to mergers there.

### *Media*

Mergers in the media are subject to the general rules about mergers. In addition, they may be examined by the media regulator, CSA (*Conseil supérieur de l'audiovisuel*), which is concerned about matters of viewpoint and content diversity and concentration within or across media sectors. CSA must be consulted about mergers in the "audio-visual" sectors that go into phase II.<sup>42</sup> CSA has 1 month to offer its views. DGCCRF would be concerned independently to the extent that a merger affected related markets, such as advertising, sports or movie broadcast rights, satellite capacity, or access. The *Conseil* has jurisdiction over claims about abuse of dominance in the sector, but it consults with CSA when they come up.

### *Books*

Publishers can set the retail price of first editions,<sup>43</sup> and retailers cannot discount below that price more than 5% (with some exceptions, including schoolbooks). The rule of the nationwide *prix unique* took its current form in the *loi Lang* of 1981. The rule is enforceable by fines, upon complaint by competitors, trade associations, authors and authors' organisations, or consumer groups. It amounts to an exemption from the otherwise *per se* prohibition of resale price maintenance. The French public authorities intend to preserve the existing national system.

Some form of exemption from the prohibition against resale price maintenance is common. It was accepted by the ECJ (in 1985) so long as it does not constrain trade between member states. Several other European countries have a one-price system, through legislation, which the publishing industry of

course supports. The EU competition authorities have been on guard about their effects on trade among EU member states.

The asserted basis for the exemption is refusal to consider books as a market product like others. Three objectives are typically identified. Of these, 2 relate to potential market failures due to the nature of demand and supply in cultural goods: to maintain a dense and diversified distribution system of independent, traditional bookstores, and to support variety in authorship and publishing, particularly of difficult, slow-selling, but high-quality works. The third objective, that all citizens pay the same price throughout the country, seems based on a sense of democratic equity, that all citizens should be equal before the book, as well as a belief that this will stimulate reading. The legislature was evidently concerned that, in the absence of the rule of uniformity, the market would become dominated by a small number of homogeneous distributors, whose low prices would reduce margins available for publishers and authors. There may also have been a concern about the effects of consumers free-riding on the advice of traditional booksellers, only to make their purchase from a discounter.

The rule is a derogation from the freedom of pricing and the competition rules that apply to buying and selling other things. It requires an outcome that the competition law would otherwise prohibit parties from reaching through a vertical agreement. It does not completely eliminate competition, though, because it only applies in the vertical direction. Horizontal agreements among publishers or among booksellers would still be subject to the prohibitions against restrictive agreements and abuse of dominance. France has argued that, to the extent that there are no significant barriers to entry into publishing, distribution, or retail sale, horizontal competition would be strong and vertical restraints along the distribution chain would be unlikely to reduce consumer welfare. Instead, restraints could improve efficiency.

A theoretical analysis implies that this restraint could produce some effects that are inconsistent with the objectives, though. If suppressing retail price competition contributes to raising average prices, in order to support less efficient small booksellers, that would tend to depress overall sales and thus reduce reading, rather than promote it. Whether the system of uniform, publisher-controlled prices keeps small shops in business and supports a subsidy to books that are bought by small numbers of readers would depend upon particulars about the different nature of demand for popular items and for esoterica. Economic analysis shows that a rule of mandatory fixed resale prices for books would lead to more titles being published, but prices would be higher, particularly for the slower-selling ones, and thus fewer would actually be sold. The higher-than-competitive prices might be considered equitable, if most buyers of slow-selling esoterica were higher-income readers. The lower-than-competitive sales might be acceptable to authors and publishers, if they have other sources of income, or if it is more important to be well reviewed than to be widely read. How well the small shops and obscure works are supported by the absence of discounting for best-sellers depends upon the relative price elasticity of fast-selling and slow-selling titles. For some blockbuster best-sellers, there may be a “bandwagon effect” that makes demand for them highly price-inelastic. High-profit sales of those items would tend to support the conventional cross-subsidy argument. But if demand for best-sellers is much more price-elastic than it is for esoterica, then the usual argument for controlling prices, that best-sellers will subsidise the rest, is not sound. Instead, widespread resale price maintenance would have the same output-reducing effects as monopoly, but the high-culture esoterica would be most susceptible to market power. If the problem is double marginalisation—market power and uniform prices at each level—then the preferred solution would be maximum resale price commitments, rather than fixed prices or minimums. Price ceilings would be enough to generate system profits to attract entry and perhaps subsidise publication of riskier titles. Theory would explain the observed practice, of setting minimum prices, as an effort by incumbent retailers to discourage the entry of new forms of distribution.

Nonetheless, experience with the *loi Lang* shows that it has not prevented the emergence of new distribution systems. The number of publishers in France has remained stable, at nearly 500, of which only about 20 have sales over €40M. The law has sustained a few that might otherwise have exited, but concentration in publishing actually increased some. Still, in 1997, the top 15 firms had only 55% of sales. (That may have increased since then, though. When the second largest French publisher announced plans to buy the largest in 2003, the EU opened a full investigation, and DGCCRF also asked to review the transaction, because of concerns about effects both in publishing and in distribution in France). The retail market has diversified. The *grands surfaces* have advanced, while traditional bookstores have kept over 65% of sales and mail order sales have been stable, while overall sales have increased. Creativity survives, as the numbers of new titles and titles on sale both increased (new titles, from 25,600 in 1981 to 39,500 in 1991 and 54,400 in 2001; titles on sale, from 354,900 in 1981 to 376,100 in 1991 and 464,000 in 2001). And just as the economic model predicts—more titles, but fewer sales because of higher prices—the average print run declined (from 13,500 to 9,500 between 1981 and 1991). Nevertheless, total book sales have risen.

France offers a test of the effects of vertical price control on cultural goods, because its rules are different for books than for recordings. Resale price maintenance is the rule for books, but it is not allowed for discs. In the market for discs, the industry is concentrated in 7 major producers. Most of the sales are due to the heavily promoted top fifth of the list—and high prices are rationalised as needed to pay the high promotional costs. Half of CD sales are through *grandes surfaces*, which typically carry only one-tenth of the variety of titles that are carried by specialist stores and chains. The CD marketing situation no doubt responds to the evanescence of popularity of the top sellers. It may also be an accommodation to the producers' refusal to accept returns of unsold discs. The latter practice marks a significant distinction between the recording business and book publishing. In many countries, including France, publishers rather than retailers bear most of the risk for a new title, because publishers accept returns of new books, especially hardcovers, at or near cost.

Anomalous treatment of cultural goods calls for justification. DGCCRF held a seminar about competition and cultural products in October 2001 to explore the issues. France has many controls and rules of exception, such as quotas about film production, special merger rules, and state subsidies and fees. For competition policy officials, the interesting analytical question is whether there are special characteristics of cultural products, considered in a market context, that would explain differences in how they should be treated. They are “experience” goods, whose quality is often unknown before consumption. Consumers demand both familiarity and novelty, a combination that makes it difficult for producers to predict the market. The combination implies a rapid rate of innovation and a high risk of failure. Like some other sectors that challenge basic analysis, cultural goods such as books are produced at relatively high fixed cost but nearly trivial marginal cost. Co-ordination along the distribution chain may well be justified, to spread the risks and support the innovation that consumers demand. For cultural officials, special treatment is justified to promote culture and quality. Their concern is that competitive markets would tend to a uniformity that would drive out cultural diversity and quality, however quality is defined. A critical examination of the tools of the cultural exception, informed by understanding of how markets work, could make those tools more effective. That examination could also help avoid the emergence of perverse effects, by setting some limits on rules that protect cultural industries against innovation.

### *Professional services*

In some areas, rules protect or require otherwise anti-competitive practices by providers of professional services. For example, the fees of doctors, dentists, midwives, and medical auxiliaries are generally administered and set by agreement between their associations and the social security funds. However, a minority of doctors, and specialists in particular, are able to set their fees freely. There are rules controlling advertising by lawyers and accountants as well as medical professionals. Because these

restraints are backed by rules issued by public authority, there is little scope for intervention by the *Conseil* against the anticompetitive restraints they contain.<sup>44</sup> The *Conseil* has tried to keep professional societies to the limits of their authorised public interest mission. The *Conseil* challenged the pharmacy association, for a boycott to prevent the development of home delivery service. A chief target for decades has been recommended fee schedules. The predecessor of the *Conseil*, the *Commission de la concurrence*, took action against a recommended fee system of the Paris bar in 1979. Recognising that these fee recommendations are not mandatory, the *Conseil* has nonetheless struck them down because they have the effect or goal of reducing competition among the members by discouraging setting fees based on individual costs and strategies. The Court of Appeal of Paris has regularly upheld the *Conseil* on this point, turning aside the traditional rationalisations that the professions have invoked.

### *Retail trade*

Large-scale retailers are subject to some rules that are designed to preserve smaller stores in the face of large-store competition, but that probably have had the unintended effect of reducing competition among *grandes surfaces* and protecting those that exist against any new competition. The rules seek to promote a variety of nearby stores and avoid the dominating effects of large retailing groups. These laws also have the goal of limiting negative externalities associated with disorganised development of large-scale stores, weakening economic activity in small towns, congestion of main roads in urban areas, and tax competition between localities. Under the *Loi Raffarin* (and following similar rules that have been in place since 1974), new large stores (3000 sq m) must be approved by departmental commissions, in which a majority are local elected officials, subject to an independent administrative authority; there is an appeal to the national level. The law is not oblivious to competition. Potential entrants can support claims for authorisation to operate by showing that there is not enough competition in the area. The French authorities have argued that this provision keeps the development of large stores under control and has, at the same time, allowed nearly 3 million m<sup>2</sup> of floor space to be opened every year. Nonetheless, it presents a barrier to entry that has to be taken into account when considering competition issues, such as mergers, in retail and in supply of the goods carried by the *grandes surfaces*. Another control with a similar *judo*-like effect prevents the large-scale distributors from advertising on TV. The prohibition saves them from the temptation to do battle with each other in that arena. The French authorities have set a timetable for removing this prohibition.

Retail pharmacies are subject to controls on location and operation. Licensing does not involve explicit consideration of “unmet need,” a standard that could be used overtly to prevent competition. But licensing is based on the population served, though, and France considers itself over-served now, with fewer population per pharmacy than some other European countries. The law to control the number of pharmacies was intended to keep down health insurance expenses.

### **Competition advocacy for regulatory reform**

There are two vehicles for analysis and advocacy of competition issues in the legislative and regulatory processes. DGCCRF participates in inter-ministerial review of proposals of all kinds.<sup>45</sup> In addition, the *Conseil* must be consulted about proposals that would control prices or restrain competition, that is, any proposed regulation to establish a regime whose direct effect would be to impose quantitative restrictions on access to a market or entry into a profession, establish exclusive rights in certain zones, or impose uniform practices about price or terms of sale. (Art. L. 462-2). The *Conseil* may also be consulted about any question of competition by the government, parliamentary committees, and regional governments, as well as trade associations, unions, consumer groups, chambers of commerce, and similar private bodies acting in the interests of their members.

The *Conseil* has issued dozens of opinions over the last decade in response to such requests. Many have dealt with plans for restructuring and opening network industries to competition, including implementation of EU directives. Consultations with the *Conseil* increased steadily, from 12 in 1991 to 35 in 2000, before declining to 26 in 2002. One reason for the decline is a reduction in the number of merger referrals; the *Conseil* treats its involvement in the merger review process as response to a request for consultation. In 2000, there were 3 consultations by the *Conseil d'État* about price-setting in situations of monopoly or shortage (required under Art. L. 410-2), but none in 2002. About half are usually general requests for advice about competition issues. Courts may request the views of the *Conseil* about anticompetitive practices on their dockets. There are usually several requests for advice from ART and CRE as well. A common subject of the policy analysis and advice about public service sectors is the risk that cross-subsidy will distort competition.

There have been many occasions to examine claims and concerns about cross-subsidy in the electric power sector. At first, in 1994, the setting was operations by the monopoly provider in complementary, competitive markets, and the theme of the advice was structural separation and transparency. Affiliation with a historic monopoly can give a firm advantages in access to capital and to consumers, because of the monopoly's nationwide network and public service image. To guarantee that affiliates perform under conditions that are comparable with those of competing private enterprises, the *Conseil* called for grouping all the diversified services into a holding company with private capital, each being separately incorporated, with legal, physical, and accounting autonomy from the parent and each transfer between them, whether physical or financial, carefully traced, to verify that the affiliate achieves no particular benefit from the profits of the parent's monopoly. The parent should not certify or prescribe its affiliates' products or services. Extensive separations are needed, because the opportunity to support loss-making activities with the profits of the monopoly would overhang and distort the competitive market. The principles were applied in deciding disputes about services such as street lighting and maintenance. The *Conseil* found that low-ball bidding by an EDF subsidiary for long-term renewable municipal maintenance contracts was abusive, but it did not object to overhead support for another EDF contracting subsidiary during its start-up organisation. As precautions, the *Conseil* described how bundling energy and other services into one package could violate several aspects of the competition law, and warned that centralised purchasing, by EDF and its affiliates, could also disguise cross-subsidies.

When the same issues arose in considering how to implement the EU directive to liberalise the sector more widely, the focus shifted to financial considerations. As the sectoral structure was being set up, in 2000, the Government asked the *Conseil* for views about the boundaries between activities of the new entities in transmission, distribution, and generation. The *Conseil* found gaps in EDF's separation proposals. Clear protocols governing the financial relationships among the activities to be separated would be key; however, in the EDF proposal the listing of protocols lacked commentary or explanation. Only distribution was to be subject to separate accounting. Nonetheless, the *Conseil* offered some observations, about the need for adequate resources and authority in the transmission entity and for separating the distribution function, that is, delivery, from supply and sales. The financial foundation of restructuring would be critical. The opening balance sheets could be a principal source of cross subsidy. If the separation of accounts were done right, then it would not be possible to transfer the past monopoly profits to a new competitive firm, nor transfer future profits from the monopoly transmission function to benefit or subsidize generation. On the other hand, distortions affecting the balance of assets and liabilities could have a structural effect of raising costs and prices for transport and reducing the prices for generation. The balance sheet of the transmission entity should be strong enough to assure its independent management and financing. Accounts should state separately the costs of supplying the competitive customers and those still served by the monopoly. In connection with identifying and disciplining the costs of providing public services, the *Conseil* had reservations about EDF's plan, because it did not clearly define the internal tariffs that EDF would pay RTE for delivering power. CRE has been preoccupied since its start-up with auditing the RTE books and setting those tariffs.



The *Conseil* was consulted about the options for transposing the EU gas directive of June 1998. Its advice was published along with other contributions in the Ministry of economy's white paper about the future of the French gas industry in March 2001. Because the technical problems of transmission are much simpler than for electric power, the *Conseil* concluded that separating the transmission operation within each of the 3 firms, with separate accounts and management under constraint not to share commercially sensitive information about competing transmission customers with the firm's own supply business, would provide adequate assurance against anti-competitive discrimination. The *Conseil* advice also rejected claims that access to storage was necessary for third party firms to meet seasonal demand variations of industrial customers. Denying third parties access to storage means that they could not offer the same quality of service as the pipelines and their affiliates, and they could only serve customers with manageable, predictable demand profiles. As a commercial matter, it may be true, though, that competitive suppliers target large industrial or commercial accounts rather than households with less capability to manage seasonal variations. Rather than state a general rule prematurely, the *Conseil* was willing to see what actually happened in the market and deal with complaints about actual denial of access to storage case by case if they come up. Experience has evidently persuaded the regulator. CRE now recommends that transparent, non-discriminatory access to storage capacity (nearly all of which is now controlled by GDF) is a necessary complement to third party access to the network.

In telecoms, at the outset of regulation in 1997, the *Conseil* provided essentially the same analysis of the risks of combining competitive and monopoly operations that it has given about other infrastructure sectors facing the same problems. The means for financing the competitive services would have a determining influence on competitive markets, in this case principally the mobile phone market. The risks were magnified by the magnitude of investment needed in the network. The *Conseil* noted then that the absence of private investors in FT could relax profitability-based constraints on its actions. Because FT was operating in these sectors through integrated divisions or subsidiaries, it was not possible to rule out cross-subsidy. The *Conseil* acknowledged that separate accounting for competitive activities, which the minister imposed, was some assurance against transfers of funds or resources that could distort competition. But the *Conseil* also found it advisable to move to full legal separation.

The *Conseil* began giving advice to ART, once it was set up, about subjects such as identifying operators exercising a significant influence on the market. The government has asked for the views of the *Conseil* on, for example, the process for reviewing FT's retail prices for calls to other local loop operators. The analysis by the *Conseil* of FT's proposed combined services plan for multi-site clients shows that it would amount to exclusionary tying by a dominant firm. The *Conseil* underlined features that would discourage customers from looking to FT's competitors, such as indeterminate duration, a penalty for withdrawing early, and a loyalty discount. The *Conseil* recommended separating the rate packages for internal and external services and eliminating the loyalty discount.

The *Conseil* issued a report in 1996 about the postal service's financial operations, in response to a request from the French banking association. The deliberate decision to maintain a single entity for *La Poste*, combining the mail and financial services, made it difficult to identify and separate the common costs. The obligation imposed by law to cover the whole national territory, including sparsely settled rural areas and difficult urban neighbourhoods, might be analysed as a separate service, or might be factored out in analysing the costs of providing the mail and financial services. The treatment would have different implications in determining whether the financial services were being subsidised by the monopoly operation. The unitary structure makes any analysis of *pro forma* cost allocations difficult and contentious. But the *Conseil* report acknowledged that putting the financial operations into a separate affiliate would face difficulties, due chiefly to the status of the employees affected. And it noted that the looming pension liabilities of *La Poste* would be a handicap in a more competitive environment. That problem could be addressed by a formula similar to the one adopted for France Telecom when its status changed, from being part of a ministry to a corporate entity.

The consultations have been addressing the critical subjects for reform. The principal, constantly repeated message in the advice of the *Conseil* is that the surest protection against distortion is clear separation of monopoly functions from competitive market operations. France has followed that advice through administrative and accounting separation measures, rather than structural separation.

## **Conclusions and policy options**

Building on the “year of competition” 20 years ago, France has made solid progress. In enforcement, the successful challenge to an industry-wide horizontal restraint in the banking sector demonstrates what its institutions can do. This action required a complex and difficult process of proof to establish the basic fact of the restraint and to estimate its impact. The action led to a substantial fine, one that was in line with the level of fines being levied against horizontal cartels in other major jurisdictions in Europe and elsewhere. It was several orders of magnitude larger than anything done in France before then. France has taken steps to strengthen the enforcement system further since then, to make merger notification mandatory, provide for sharing confidential information with foreign competition enforcers, and support leniency by granting immunity.

The challenges of sectoral reform are well appreciated. The risk that cross-subsidy could distort competition is still the principal competition policy problem, and it is particularly acute because services are provided through integrated structures. The problem has gotten plenty of attention, at least at the level of theory and principle. The *Conseil* has frequently given well-considered advice about it in connection with restructuring and reform programs. Regulators are in place now for the key sectors of telecoms and energy, to monitor the accounting and management separation within the integrated structures of those sectors and to ensure non-discriminatory network access as competition develops there. Co-ordination of actions by these independent sectoral regulators with competition law enforcement through the *Conseil* has raised no problems to date. With respect to one of the regulators, CRE, the relevant statutes try to narrow the scope of potential overlap, so that in concept only one of the two bodies would be competent. With respect to the other regulator, ART, the statutes are not as clear. But the actions of the three independent agencies have been generally consistent. France’s experience implies that avoiding conflict among regulators is more a matter of sharing goals and perspectives than of setting formal protocols.

In public service sectors, there is more potential for competition now in France than many admit. But there is less than there could be or should be. EU reform directives have been implemented cautiously and sometimes indirectly. Electric power was done late. The scope of change there is more limited, and France is still the most concentrated, among the big markets in Europe. Gas was also late, and change has been similarly formal, as all the significant competitors are tied to the historic monopoly. Rail restructuring has concentrated on aggressively shifting responsibility for the inherited debt, in a way that will repel threats to the incumbent when competition becomes possible on a continental scale. Postal system change has amounted to accommodation of less demanding requirements while retaining auxiliary functions. A competent regulator is at least in place for energy and telecoms, but not for post or transport (although the telecom regulator is to get responsibility for postal services too). In France, structural reform typically traces the outlines of the relevant EU directives, but it is slow to incorporate the full program.

The strategy of indirection may nonetheless appear to work. Approximation and temporising appear in habits such as delay in adopting directives in law while approximating their objectives in practice, providing for separation of accounts and operations rather than structural separation of entities and incentives, and introducing some private capital while retaining public control. If the purpose is adaptation to more competitive market conditions in Europe, then a strategy reconciling various types of conflicting interests could build a constituency supporting more robust change. Public satisfaction with change in some sector could support change in others. And caution would insure against the risk that failure in some sector could undermine efforts to change others. Public reaction to conspicuous failure is

likely to be strong and contagious. Thus the wisdom, perhaps, of taking small steps. But small steps lead to only slow changes. The reform process in France has been much slower than in other countries in Europe, and France is still late in some areas. The EU directives' targets may have been ambitious, but many countries met or even beat them. It might be that France's administrative and business structures are unusually difficult to change, or that the French government is trying to learn by observing the experiences of others. But it is of some concern that this strategy of temporising could be interpreted otherwise. Some could see it as an effort to preserve the interests of incumbents.

No doubt there is also legitimate concern that moving too far or too fast could jeopardise benefits. There may be some dynamic efficiencies from being involved in complementary operations, as well as from maintaining a stable resource base that can direct and fund large-scale changes or positive externalities of technological spin-off from centralised operation. Ensuring security of supply may require a conservative approach, not upsetting systems which seem to have worked until it is sufficiently clear that alternatives will work at least as well. Special issues of supply security arise for services that rely heavily on imports, such as natural gas. The means of providing for maintenance and investment in physical infrastructure need to be planned carefully. The major reason of resistance to larger-scale change, particularly to structural separation and private capital, though, is preservation of the rights of labour in the sectors affected. Reluctance to move to formal separation, as well as introduction of private capital or even control, is explained by reluctance to threaten the special privileged status of the work force in these entities.

Commitment to a broad concept of the *service public* defends a cautious approach to change. France uses now-standard methods for supporting universal or "lifeline" services. For example, in electric power, hidden cross-subsidies related to that aspect of service are being eliminated. Instead, equalisation and compensation are funded by identified, industry-wide charges set by the regulator for that purpose. But because of widely shared public expectations about broad coverage and equal treatment, France typically adopts a generous definition of the service that is to be provided under conditions of nationwide uniformity. That breadth supports a concern that not all of the necessary cross-subsidies are transparent yet. The conviction that public service must be preserved is unshakeable, and reform cannot ignore the political imperative that follows from that. But public debate about the topic cannot be transparent unless the costs, as well as the benefits, are made clear.

Some of the costs and benefits are pertinent outside France. The *Conseil* assures that it considers effects on competition across Europe when applying the rules of the EU treaty, and the energy regulator emphasises that its perspective on regulation is European. Still, other countries that do not share France's views about the balance of costs and benefits from integrating competitive and monopoly operations resist the prospect that profits from a protected monopoly would support entry into other markets. Whether consumers or producers in those countries would have cause for concern might depend on whether entry was through acquisition or through direct competing sale of the service at issue. If subsidy supported paying a higher price for an acquisition, the former owners in the foreign market would be better off; if subsidy supported charging a lower price for services, consumers in the foreign market would be better off. Cross-border anxiety may simply be due to fear that in a crisis or shortage situation, the foreign owner would shift resources to favour the jurisdiction where the voters and hence the government can get the attention of its management, regardless of contract commitments. Some foreign governments have responded by erecting or threatening barriers, typically by demanding reciprocal treatment, that are aimed at repelling entry by firms that hold too many protective ties to a state.

Competition analysis of these regulatory issues in France is well done, but unfortunately it is not well known. None of the press releases on the website of the *Conseil* refers to a policy or regulatory analysis matter. Perhaps its apparently low profile in policy matters is related to the fact that it is not authorised to initiate studies and reports. Rather, it is authorised to respond to requests for views about

competition issues. To be sure, that limitation on its authorisation may not limit the scope of its work very much, because parties who are affected by a distortion due to official action can and do ask the *Conseil* for views about it. The report of the *Conseil* about the postal service's financial operations responded to a request from the bankers' association, for example. The *Conseil* is asked regularly for views about the big reform projects. Its responses are thorough, analytical, and carefully presented. Its role is advisory, though, and its consistent message, about the need for sufficient structural separation to reduce the incentive to distort competition, is not always followed. By implication, considerations other than competition policy are more significant in France's economic policy.

A strong enforcement reputation can enhance the credibility of policy advice. Recent successes will contribute to such a reputation. Delays in the process at the *Conseil* do not help it, though. The *Conseil* takes a very long time to reach a full decision. Conceivably, the *Conseil* is being cautious about procedural detail, to avoid reversal in court. If so, it is succeeding at that goal at least, as the rate of affirmance is quite high at about 80% (on the merits, at least). The courts are being asked to focus on aspect of the process, to ensure that they conform to the evolving due process demands of European law. One result is there is now a need to duplicate or repeat some effort so that investigation and decision are clearly separated within the *Conseil* itself.

Another factor could be the apparent lack of a clear and workable system for focusing resources on the most important matters. Because the role of the *Conseil* is akin to that of a court, to hear and decide the complaints that come to it, it has had difficulty setting priorities for applying its resources, including its time. Departure from an order-of-filing rule of priority invites criticism for prejudging. But a decision-making tribunal needs some discretion to address the more important cases first. This could be done through rules about early, summary decisions. The *Conseil* is making increasing use of faster procedures and interim measures, and the latest reports show a small but increasing number of matters being dismissed for procedural or jurisdictional defects at a relatively early stage. Private party complainants have the alternative of suing in court, but the remedies there are limited to damages. More often, parties are resorting to the alternative at the *Conseil* itself, the expedited process for interim measures.

There are some continuing tensions between the two competition enforcement bodies, which share some functions but which occupy different positions and may have different perspectives and priorities. Observers note that "concurrent authority has been a major factor in differing assessments on the part of the the *Conseil* and the central bureaucracy." (Gerber 1998) The strongest action yet taken under the French law against a complex industry-wide horizontal restraint was a case initiated by the *Conseil*. The Ministry is taking fewer cases to the *Conseil*, where many of its cases have been rejected or had to be abandoned because the time for decision expired. Under the NRE, there is now a more direct enforcement outlet for the other priorities of DGCCRF.

DGCCRF's priorities include the *loi Galland* about pricing and the complex of laws under Title IV about discrimination and unfair practices. The process involves numerous small-scale enforcement interventions to police supply-chain relationships. This is a process that is well-suited to the orientations of a bureaucracy that was once involved in price control and that still has other current responsibilities for market surveillance. The different treatment of this part of the law reveals a difference between the conception of competition at DGCCRF and the *Conseil*.<sup>1</sup> Economic dependence is described in terms of a buyer's ability to threaten or ruin its supplier, where the buyer represents more than a critical threshold of the supplier's business. Law based on this concept is designed to control consolidation in the distribution chain, to handicap large distributors and protect smaller retailers and suppliers. The relationship between this concept and now-standard conceptions of competition policy is uncertain, though. There is some risk that overly strict rules about unfair practices could dampen competition, not only by discouraging lower prices, but more generally by treating variations from a consensus focal point

as fraud or discrimination. Vigorous enforcement of rules requiring price uniformity and transparency provides strong insurance against anyone cheating on an agreement.

France contends that recent economic analysis places the problem of abuse of economic dependence within the law of competition. By assumption, the problem is not conventional market power. There may be a principled connection between concern over economic dependence and competition policy based on efficiency. It may be that policing market propriety facilitates competition by reducing transaction costs. This approach would present a stimulating counterpoint, by grounding an alternative viewpoint that seems to promote fairness in the same principles of economic analysis that are usually thought to promote only efficiency.

Divergence between DGCCRF and the *Conseil* about priorities and perhaps even principles demonstrates the risks, but also the promises, of integrating competition into the law that governs official action. There is some cost, from duplication and overlap and potentially from inconsistency, if both the *Conseil de la concurrence* and the administrative law claim competence to elaborate the meaning and content of competition law and policy. But there could be substantial benefit if the system of administrative law accommodates the concept of market competition.

Merger control is within the administrative law process. The *Conseil d'État* is increasingly called upon to consider competition policy as merger control decisions are challenged. One might ask whether the division of responsibilities in this area supports uniformity and coherence of the law.

### ***Policy options for consideration***

**Identify and weigh clearly the costs and benefits of the indirect path to structural reform.** France has insisted that its public service firms be able to diversify into competitive operations, and it has resorted to non-structural precautions to curb the incentive to distort competition there. The OECD Council recommendation about structural separation calls for clear appreciation of the relative costs and benefits of different reform paths. Maintaining structures that are integrated between competitive and non-competitive functions does not eliminate the incentive to distort the competitive market. Non-structural measures such as accounting and functional separation permit closer supervision of compliance with rules requiring non-discriminatory access, while leaving in place a structure that might achieve other efficiencies. But costly oversight is needed to make these pro forma separations work. This assessment should be compared to the often-repeated advice from the *Conseil* about the cross-subsidy problem and the steps taken in response to that advice.

**Ensure that decisions in merger control are clearly founded on competition principles.** There is some risk in systems like that of France, in which the minister makes the decision and has discretion whether or not to get the views of the independent competition policy body, that the reasons for decision will not be clearly founded on competition principles. The concern is greatest about mergers that are approved (or subjected to only voluntary commitments) without a referral for assessment by independent experts, yet which appear to present competition policy risks. In other jurisdictions, such as Ireland, the response to this concern has been to make the independent body's decision about mergers determinative. In the UK and Germany, the independent body's decision on competition policy grounds is determinative, while a separate, transparent process may also be invoked in the event some other policy interest would justify a different action. A similar change in responsibilities in France would also have the advantage of bringing merger matters into the domain of private law that already deals with anticompetitive restraints and abuse of dominance. Even without redesigning the entire decision process, the situation could be improved if the *Conseil* had an opportunity for involvement in any notified transaction. This would not oblige the *Conseil* to offer an opinion about every matter, but it could imply a substantial resource shift for the *Conseil* to be able to keep track of filings.

**Allocate enforcement resources better between the monitoring of supply-chain fairness and of bid rigging and other horizontal issues.** Most problems about discrimination could be worked out in private litigation, which seems healthier in France than in many countries. Claims that huge fines are needed because small firms cannot afford to risk retribution if they complain on their own may be overblown. Small firms can usually get together to take action under private laws about unfair competition, often through trade groups suing on their behalf. On the other hand, centralising the function at DGCCRF might suppress protectionist decisions, but only if the bureaucracy can better put these claims into a competition policy framework. More resources would be made available for cartel and bid rigging cases, including more criminal actions in appropriate cases. Fining business for practices that amount to price cutting, by contrast, sends an inconsistent signal about the value of competition.

**Speed up the process at the *Conseil*.** More resources would help reduce delays. A clear *de minimis* rule is a step toward improving docket control. A summary decision process, to weed out less significant matters without spending too many resources on them, that applied generally should be considered. Something akin to it may be evolving from the many proceedings at the *Conseil* seeking interim measures, and sometimes reaching negotiated resolutions in the process.

## NOTES

1. This report was the subject of a peer review at the Competition Committee's session of 16 October 2003. The introductory comments of Mr. B. Parlos, Director-General of the *Direction générale de la concurrence, de la consommation et de la répression des fraudes*, and of Mrs. Hagelsteen, President of the *Conseil de la concurrence*, are attached in annex to this report.
2. A table illustrating the extent of state ownership is included in Ch. 4 of this study.
3. The 1953 decree prohibited "all concerted actions, agreements, express or implied understandings, or coalitions, in whatever form and for whatever reason, which have as their object or may have as their effect restraint of the free exercise of competition by impeding the reduction of costs or prices or by encouraging an artificial increase in prices."
4. The terms about exemption, both for "official authorisation" and for economic benefits, also foreshadow provisions of later and current laws. The 1953 decree was reissued in 1958 under a new legislative authority to cure a constitutional defect. The system was based on criminal-law enforcement, and the 1953 decree had expanded the substantive prohibitions without there being a sufficient statutory basis for imposing criminal penalties to the newly prohibited conduct.
5. A framework for price control remains in the law. Language drawn from the previous legislation authorises the government to regulate prices (after consulting with the *Conseil de la concurrence*) in sectors or zones where price competition is limited. Art. L. 410-2. The objective is to give public authority the means to avoid prices changing too quickly because of market power of one or a few operators in a market or zone, such as the overseas departments.
6. Law of 15 May 2001. Other parts of the NRE dealt with company law reforms and monetary issues. Citations to France's competition statute here will be to the law as restated and codified by the NRE, the Code de Commerce, Livre 4.
7. A rule against setting resale prices below purchase cost, enforced by criminal process like other price regulation rules, has been in France's competition law since 1963.
8. The title is sometimes translated as the General Directorate for Competition, Consumer Affairs, and Trading Standards.
9. The role of the concept of *service public* is explained in detail in chapter 2 of this study, on regulatory quality.
10. The potential sanction was increased by the 2001 NRE, both by increasing the percentage from 5% to 10% and by expanding the basis from turnover in France to turnover worldwide.
11. The same factors that suspend the limitations applicable to actions before the *Conseil* leading to pecuniary sanctions now also apply to suspend the limitation on potential public charges before a judge leading to penal sanctions (see Art. L. 420-6, 462-6, and L. 462-7). Thus, if the *Conseil* refers the matter to the prosecutor, the prosecutor's process will begin at the same point in the running of the applicable statute of limitations.
12. For the separate prohibition of predatory pricing prohibition in Art. L. 420-5, there is no individual or penal sanction.
13. In the water and waste treatment industry, 2 firms formed joint subsidiaries to bid on projects, even though each parent had the means to undertake the project independently. The *Conseil* concluded that this method of avoiding competition with each other was joint dominance.

14. In the media sectors, the *Conseil* must get an opinion from the media regulator about the effects on viewpoint diversity to accompany its own report about competition issues.
15. EDF's partner in this venture, which has since been renamed Veolia, was once known as *Compagnie Générale des Eaux*.
16. Vivendi also agreed to spin off some common positions in Dalkia and Suez-Lyonnaise.
17. Consumer Code, L. 121-1.
18. Enforcement through the *Conseil* is possible, to the extent the practices are also prohibited by Art. L. 420.
19. The fine for illegal discount sales or resale price maintenance can be up to €15,000. The fine for nondisclosure on bills or sales below cost can be up to €75,000, and other penalties might also apply, such as exclusion from public purchasing for 5 years for inaccurate bills and criminal penalties against individuals for sales below cost.
20. They evidently concentrate on consumer product and contract issues, more than on competition. A principal outlet is the *Commission des clauses abusives*, another body attached to the Ministry of Economy, Finance, and Industry, which issues occasional recommendations about oppressive terms in contracts of adhesion. There is a process, which includes a reference to this commission, for judicial orders to reform contract terms, overcoming the provisions of the civil code that normally deny such power to a judge.
21. At [www.conseil-concurrence.fr](http://www.conseil-concurrence.fr), the DGCCRF website is at [www.finances.gouv.fr/dgccrf](http://www.finances.gouv.fr/dgccrf).
22. See Chapter 2, on Government Capacity to Produce High-Quality Regulations for further details.
23. At present, the president and another member of the *Conseil de la concurrence* are *Conseillers d'État*.
24. The NRE separated the investigative and adjudicatory functions more clearly, in part to prevent parties from taking advantage of procedural loopholes to escape liability. Several cases had been overturned on appeal because the rapporteur of the Conseil had been present at its deliberation.
25. By contrast, some other bodies, such as the *Commission des opérations de bourse*, are authorized to defend their own decisions before the *Cour d'appel*.
26. The number of appeals is explained in part by precautionary jurisdiction-preserving appeals, made necessary by a change in rules. In a number of cases arising before the NRE changed the processes, the court rejected an action of the *Conseil* for procedural reasons, notably the improper presence of the *rapporteur* at the its deliberations. The courts often then exercised their power to enter a new decision, though. The court need not return the matter to the *Conseil* for further proceedings to correct the defect. Often, the court's own order was substantively equivalent to the order of the *Conseil* that the court had quashed.
27. Another means of making an injured party whole is available in the criminal process. Criminal penalties can include restitution and indemnification of victims. (Code of criminal procedure, Art. L. 475-1). The party claiming damages has less ability to initiate and manage a criminal prosecution than a civil suit, though.
28. The *Conseil* focused on the market served by the acquired firm, aerial maps and navigation services, and decided that the risk of tying these auxiliary products to aircraft purchases was minimal, because barriers to entry into the auxiliary product market were low. Many airline customers, including Air France, had in-house operations doing the same thing. In addition, it reasoned that Boeing, facing an equal competitor in Airbus, would have little incentive to make its planes compatible only with its subsidiaries' equipment. But the DGCCRF, concerned about how a threat to competitor interests could affect competition in the global aircraft duopoly, approved the acquisition subject to an order preventing Jeppesen from communicating to Boeing any confidential information it might obtain from Airbus. This formalised a non-disclosure commitment that the parties had evidently contemplated entering anyway.
29. The DGCCRF report for 2002 for the first time itemizes separately its actions concerning restrictive agreements and abuse of dominance (taken together): 276 indications of anti-competitive practices, 138



inquiries opened, 187 reports of inquiries, and 15 references to the *Conseil*. The annual report of the *Conseil* shows there were 11 such references.

30. The draft of the *ordonnance* would exclude public procurement tenders from this special treatment.
31. Law no. 2000-108 (10 February 2000). The latest revision is law no. 2003-8 (3 January 2003).
32. The capacity of CNR, an affiliate of Electrabel, is 3000 MW, and its production is about 16 TWH. SNET, an affiliate of Endesa, has capacity of 2600 MW and production of about 8 TWH. By contrast, EDF has capacity of 103,000 MW and production of about 480 TWH.
33. Euronext Paris holds 34%, and RTE and the Dutch and Belgian network operators make up 17%, for the controlling share. The remaining 49% is held by generators and investors, such as Atel, BNP Paribas, Electrabel, EDF, Endesa, and TotalFinaElf.
34. Except for Luxembourg.
35. GDF and CFM offered “flexibility contracts,” permitting customers to deposit gas and withdraw it later. To preserve the formality of its import monopoly, GDF offered a formula for restitution of imports contracted in its name. Other countries in Europe were not persuaded that this device opened the market sufficiently, but France claimed this *de facto* deregulation was adequate.
36. The telecoms sector is discussed in detail in ch. 6 of this report.
37. Articles L. 36-7 (7°) and L. 36-10 of the *code des postes et telecommunications*.
38. The air service sectors are discussed in detail in ch. 5 of this report.
39. Treasury agents (about 4000 of them) have been selling insurance since the 19th century. As of 2001, the *Conseil d'État* ruled that they are not supposed to favour the policies of any particular firm, and the process must conform to the competition law. But private sector competitors observe that the basis for continuing to offer this service, which the private sector is more than willing and able to do now, is weak. The Treasury has recently stopped offering bank accounts; similar logic counsels getting it out of the insurance business.
40. Art. 89, law no. 84-46, 24 January 1984.
41. Art. L. 511-4 of the monetary and financial code.
42. Art. L. 41-4 of the communications law.
43. The rule of the *prix unique* does not apply to reissues or paperbacks.
44. The *Conseil d'État* has addressed some of these constraints, applying its administrative law doctrines about discrimination and freedom to compete. If it were to apply the principles of the general competition law in doing so, it would probably ask for the *Conseil's* advice.
45. In addition, DGCCRF is now participating in the ICN working group on advocacy, and it has many activities that are not advocacy in this sense, but publicity about competition policy issues and law enforcement.

## SOURCES

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## ANNEX I.

### **Introductory remarks by Mr. Benoît PARLOS, the Director General of Fair Trading, Consumer Affairs and Fraud Control – France, 16 October 2003:**

Mr. Chairman,  
Ladies and Gentlemen,

I should like to thank all the delegates for being here in Paris today, at the OECD headquarters. It shows their interest in this committee's work and especially their interest in the progress of regulatory reform in France.

This morning we will be discussing the draft report on the chapter on competition policy. Before handing over to Mrs Marie-Dominique Hagelsteen, chairman of the Competition Council, I should like to address some initial remarks about that text to your committee.

First, the draft report sets out a vision of France's economic situation and competition policy that in some respects seems to belie the facts. It highlights a number of statements that seem to be neither proven nor, in some cases, consistent with reality. It also contains a number of tendentious assertions that could be regarded as value judgments based on psycho-sociological preconceptions about France.

Our discussions will, I hope, provide an opportunity to inform the findings and consider the conclusions in a spirit of cooperation by which we set great store, so that no prejudice can distort the committee members' judgment.

I should like to make two general observations before our discussion begins.

#### **1. Contrary to the vision set out by your rapporteur, competition-driven regulation is one of the keys to our economic growth**

The draft report draws rather extensively on an analysis of factors inherited from our past which, in the rapporteur's view, explain why we find it difficult to embrace competition-driven regulation in a full and lasting way.

This quite simply ignores the reality of modern France. The public sector has been greatly slimmed down over the last 25 years, through two waves of privatisation and a succession of opening-up operations. France has extensive relations with other countries and is the world's fourth largest exporter. This could not have been possible without a certain degree of competitive pressure within the economy. Our performance in the matter of prices provides further evidence. Look at the figures for the European Union. For a European Union price level of 100 in 2001, France scores 98.84, right in the middle, the highest level being 125.7 (Denmark) and the lowest being 73.89 (Portugal).

At Community level, the deregulation of network industries is either well under way (telecommunications, power) or in progress (postal services). The draft report treats this as an exogenous process, initiated by the Commission, endured by France and, ultimately, ill-applied in our country. It is a view that ignores the realities of European construction. All the open-market directives were negotiated within the Council, i.e., by the Member States themselves, and their adoption by the ministers of the 15 Member States means that we are perfectly happy with them. We have therefore transposed them in their entirety. We may sometimes

have been a little slow in doing so, but certainly not because they posed us any sort of problem. There is criticism of the considerable room allowed for public service obligations – universal service in Community jargon – and of the fact that certain operators are state-owned. I would merely say that these criticisms seem to target the European model of liberalisation which, it is true, has a number of particularities, since it does indeed allow considerable room for universal service, for environmental concerns and for the safety and security of networks, and adopts a neutral stance with regard to the ownership of capital.

As far as competition is concerned, our basic legislation – especially the 1986 ordinance – has created the conditions for full-blown competition-driven regulation of the French economy. The rapporteur acknowledges the effectiveness of competition at several points in the draft report, though without giving the reader any factual data to support this positive assessment.

Furthermore, I would add that our legal arrangements have very helpfully informed the debate at Community level, for example during negotiations on the new Regulation 1/2003 on anti-competitive practices, or at the present time with the on-going discussions on the choice of the test for merger control.

**2. Some of the draft report's assessments of the place and role of the DGCCRF need to be corrected.**

Day to day, the DGCCRF is at the service of competition-driven regulation, with over 3,500 field staff and 500 central policy development staff. This "strike force" is there to monitor markets, in all sectors of the economy – farming, manufacturing and services – throughout the entire country.

The DGCCRF is a department of the Finance Ministry but that does not mean that, in the exercise of our missions relating to competition-driven regulation, we act like the minister's "armed wing", as is stated summarily in paragraph 51 of the draft report. Nor do we give any sort of priority to the fight against anti-competitive practices, another debatable assertion in the draft report which I imagine we will return to during our discussion.

The DGCCRF is a department that designs and develops an analytical framework to help prepare ministerial decisions, especially with regard to merger control, a subject about which I am willing to answer your questions. But it is also a department that monitors what is going on in the field, with its national investigation division, its network of departmental and regional divisions and its inter-regional investigation units.

Not all investigation reports – of which there were 187 in 2002 – are referred to the Competition Council, but I would like to make two remarks on this point.

- First, the investigations that the Minister refers to the Competition Council are in general thoroughly substantiated. The majority of the Competition Council's decisions to impose sanctions – 70% in the first eight months of 2003 – are taken on referrals from the minister rather than from other sources.
- Second, the DGCCRF also has a core mission to educate, by ensuring that information and regulations are properly circulated and well-known to the economic agents that must comply with them. Where necessary it also has a preventive role, ensuring that contracts and agreements that come to our attention in the course of our investigations comply with competition law. No doubt less spectacular than enforcement, such action nevertheless achieves good results, offering the advantages of flexibility and speed when it leads to the ending of a distortion in the workings of the market.

It is through this dual approach, combining prevention and enforcement that France has succeeded in making very significant progress along the path of ever stricter application of competition law. Any encouragement that will help us to make further progress along this path is welcome, including any that may emerge from your committee's review in a spirit of constructive cooperation. That at any rate is how I would like to see our discussions this morning.

**Presentation by Ms. Marie-Dominique Hagelsteen, Chair of the *Conseil de la Concurrence*  
Paris, 16 October 2003**

I should like to begin by paying tribute to the OECD Secretariat's important efforts to situate the role of competition policy as comprehensively as possible within the context of French regulatory reform.

Of course, we are here mainly to exchange ideas, establish a constructive dialogue with our peers and explore avenues that we could take to improve our regulatory provisions and move forward.

Before embarking on this discussion, however, I should like to make three general comments prompted by my reading of this report, and perhaps to clear up certain misunderstandings.

**1. Regulatory reform is underway in France; the movement is irreversible, and competition policy is making a large contribution to it.**

1. As noted in the report, France has a historical tradition of an interventionist and centralised economy. It is in the light of that tradition that we should assess the reforms undertaken over the past 20 years to move towards a profound liberalisation of the economy and disengagement by the State, and that we should measure the progress made. Given the French economy's degree of openness, this movement is irreversible, and it is plain to see that the reforms have been pursued continuously, irrespective of the political leanings of the governments in place in France over the past two decades. There has been no turning back.
2. Competition law is part and parcel of this movement, and it continues to progress.

It was in 1986 that the foundations of modern competition law were laid in France:

- In terms of basic rules, French competition law is very close to European law, and it will be even more so after the reform of European Regulation 1/2003.
- Regarding institutions, the Competition Council was set up as an independent administrative authority having full power to impose penalties for anticompetitive practices, subject solely to judicial review.

The Council is also invested with important advisory powers.

Since 1992, it has been able to apply Articles 81 and 82 of the Treaty of Rome directly.

In 2001, competition law was modernised once again, and new powers were attributed to the Council: stiffening penalties, creating a transaction and clemency procedure and paving the way for entering into international agreements.

Regulatory reform and competition law are therefore engaged in a dynamic process.

**2. Regarding the public sector in France**

The report rightly points to the size of the public sector in France. One can only acknowledge this, even though the sector's perimeter has been shrinking from year to year. But certain passages in the report would tend to suggest that the French public sector enjoys certain special protections or immunities vis-à-

vis competition law, and that some of these stem from the Competition Council. It is this notion that I should like to set straight at once.

- 1) Under our law, any public enterprise or any public service engaging in an industrial or commercial activity is subject to competition law, and to sanctions imposed by the Competition Council.

And we have imposed sanctions on public enterprises regularly—in some cases involving substantial fines, whether on Électricité de France, Gaz de France or France Télécom.

Similarly, the Council has taken emergency measures vis-à-vis these historical operators to put an immediate halt to practices intended to thwart the arrival of new competitors on the emerging or growing markets of mobile telephony and ADSL Internet.

- 2) The report's ambiguities regarding the role played by the Council of State must be rectified.

Some passages of the report would suggest that public operators can also be shielded from competition law by the Council of State.

It must be recalled that neither the Council of State nor administrative courts have any say over the economic activities of public operators. The powers of the Council of State and of administrative courts are limited strictly to the legality of administrative acts performed in connection with a public service mission with public power prerogatives.

This power-sharing poses few problems; each year, it involves four or five cases in which the Council states that it has no jurisdiction, and which for the most part involve unilateral regulatory actions taken by public authorities. Moreover, the Council of State consults with the Competition Council and follows its advice.

- 3) Lastly, the Competition Council is closely associated with the shift to liberalisation of markets that were once monopolies.
  - It has been consulted systematically by the Government and by Parliament on the conditions under which markets were to be opened, so as to introduce genuine competition (in telecoms, electricity, postal services and railways), and on legislation to be adopted to that end.
  - The law organises its institutional relations with industry regulators via systematic consultation mechanisms. This has enabled both the Council and industry regulators to maintain good relationships and to work coherently to open up markets to competition.

### **3. Regarding the constraints on the Council and the legitimacy of its action**

Lastly, the report portrays the Competition Council as a body having cumbersome procedures and endowed with insufficient resources, and in a sense it casts doubts as to the Council's effectiveness.

I cannot dispute certain aspects of that analysis, and it is true that for a long time the Council had lacked—and still does lack—the resources needed to operate most effectively, especially with regard to the time needed to deal with our cases. I should only wish to make two observations:



- If our procedures are cumbersome, it is due in fairly large part to the fact that the Council is considered a quasi-jurisdiction insofar as it can impose sanctions. The Paris Court of Appeal imposes a number of restrictions on us, pursuant to Article 6 of the European Convention on Human Rights, such as prohibiting us from constituting the same panel to impose protective measures as to rule on the merits of a case. Such a requirement assumes that the Council has a fairly large membership, but I should like to point out that the Council comprises four permanent members, the Chair and three Vice-Chairs, who are occupied full-time in the Council's action.

And let us not forget that these procedures ensure the rights of the defence and the rectitude of our decisions, which are upheld by the Paris Court of Appeal about 75% of the time.

- In addition, it should be noted that the legitimacy of the Competition Council and its decisions is not contested. In fact, I believe the Council's legitimacy has even been increasing from year to year.

In recent years, the Council has had to deal with some highly sensitive cases involving extremely powerful interests: for instance, it has imposed heavy sanctions on the leading national banks; it has also ruled against the farm unions and found that the two main water distribution companies, which are world leaders, held a joint dominant position; it suspended a call for tender by the National Football League in respect of TV broadcasting rights for first-division matches that would have meant revenue of €480 million per year, and it opposed France's two main television groups.

These decisions certainly did not please everyone. But at no point was there any criticism of the Council's legitimacy in taking them.

This I see as a tribute to the diligence of the work performed by the staff of 120 that it is my honour to head, and as evidence of the place that competition policy has taken in regulatory reform in France.