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PART II

Chapter 3

Competition Policy*

* For more information see: "Background report on The Role of Competition Policy in Regulatory Reform" available at *www.oecd.org/regreform/backgroundreports*.

Competition policy foundations

The emergence of more self-confident competition policy institutions over the last 20 years is changing the terms of debate in France. Partly in response to vigorous competition policy initiatives at the European level, liberalising reforms pursued by all governments over the last 20 years have made irreversible changes in France's traditional approach.

Public intervention has traditionally been a strong component of French economy policy. The state still owns most of the large infrastructure firms and also owns firms that manufacture defence products and aircraft engines, and it still has controlling interests in listed companies such as *Air France*, *France Télécom*, *Renault*, and *Thales*. Nevertheless, market competition is open and robust in most sectors. The political and cultural idea of public intervention 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 to compete within the 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. Over this long period, the law of unfair competition (*concurrence déloyale*) occupied much of the attention that might have gone toward developing public law about restraints on competition. 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. In the late 1970s, price controls were cut back and the competition law framework was strengthened.

In the mid-1980s, a consensus to promote competition and curtail controls formed in France as the government changed policy. By abandoning administered pricing the 1986 *ordonnance* on competition and freedom of prices marked a fundamental change. It 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.

In 2001, France's competition law was comprehensively restated and codified in the law about *nouvelles régulations économiques* (NRE). It improved processes and strengthened sanctions, and substantive parts added 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. The degree of attention to these subjects, particularly by the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* ("DGCCRF"), reveals the central importance of concepts from the traditional French jurisprudence of unfair competition.

The agencies that are responsible for applying the law say that it seeks to assure both free and fair competition. 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*.[1] 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. 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. 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. 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*. (The roles of the Minister, the *Conseil de la concurrence*, and the *Conseil d'État* in merger matters are described below). Applying principles from the competition law designed for the conduct of companies with activities 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. 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 thetradition of supporting the interests of national champions now paradoxically promotes the cause of competition.

Substantive issues: the 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 commercial code about anti-competitive practices and merger control also contains an entire title devoted to unfair market practices.

Agreements that have the purpose or the possible effect of preventing, restricting, or distorting competition are prohibited. 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. 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 go to customers and competition is not eliminated for a substantial part of the market. An amendment in 2001 made clear that "economic progress" can include creating or maintaining jobs. The *Conseil* tries to read 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.

Conventional conspiracies, especially bid-rigging, have been frequent targets. 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 – EUR 171 million (FF 1.14 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. Administrative fines were increased as of 2002. But a credible threat of penal sanctions against individuals could be even more effective. Technical impediments related to the statute of limitations were corrected in 2001, and the changes could make cartel prosecutions more feasible.

The same statutory language applies to vertical agreements. 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. Decisions of the *Conseil* recognise the realities and efficiencies of modern distribution networks. Even concerning resale prices, the *Conseil* has avoided a doctrinaire approach. 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.

In the general rule against abuse of dominance, the statute provides a non-exhaustive list of particular examples of abuse. The same section also prohibits abuse of economic dependence, either of a supplier or customer. 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. Predatory pricing is covered, in effect, by a separate article which prohibits prices that are excessively low with respect to costs and that have the purpose or possible effect of eliminating a firm or product from the market or of preventing entry.

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. 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. 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. 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*. 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. 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. The choice reflects the importance France places on other aspects of the *service public*. 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.

The substantive criterion for controlling mergers is eclectic and thus practical. Rather than choose between conceptions of merger law, the French law includes both a "substantial lessening of competition" test, like that used in the US and several other countries, and a "dominance" test, like that used by the EU, on the particular grounds that notably different tests address problems in different time perspectives. Decisions may consider such factors as improvements of production, economies of distribution costs, new products, environmental benefits, and international competitiveness, that is, what are generally called efficiency gains. Whether a merger must be notified depends only on the parties' turnover, since the NRE changes removed market share as a criterion. Thresholds are comparatively low, so France is likely to be examining and controlling a larger number of smaller mergers than its neighbours, although those thresholds are to be increased soon.

Decisions about merger control are made by the Minister of Economic Affairs, Finance, and Industry. Review may involve two phases. In phase I, the Minister has 5 weeks to approve the transaction or seek voluntary commitments, usually structural, to remedy possible problems. The Minister may decide during phase I that there are competition issues warranting a phase II procedure, which is necessary in order to prohibit a merger or impose conditions on it, and involves getting the advice of the *Conseil*. The *Conseil* is advisory. 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 on occasion differed with the *Conseil* about permitting mergers between suppliers in order to counterbalance the buying power of large retail chains.

In reviewing acquisitions involving France's traditional monopolies and firms in other industries or sectors, the principal concern has been the risk of abuse as a result of the creation or strengthening of a dominant position through cross-subsidies. 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 Vivendi. 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. 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.

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. 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. DGCCRF considers its responsibilities for restrictive practices and anticompetitive practices to be complementary and consistent with each other. Public enforcement 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 EUR 2 million. DGCCRF can also intervene to support private suits. The billing-transparency rules are enforced by criminal penalties. Despite the increased enforcement power, negotiated resolutions are preferred.

Strong consumer protections depend on regulation as much as on competition. DGCCRF has a number of direct consumer protection functions. 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. Consumer groups can bring complaints to the *Conseil*. Private consumer organisations are active and well organised to participate in cases and policy making.

Institutional issues: structures and enforcement

Two bodies are responsible for the 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 a judicial authority, the Court of Appeal of Paris. Of the 17 members of the college of the *Conseil*, nearly half (8) must be public magistrates. The "permanent commission" of the president and 3 vice-presidents of the *Conseil* are the only members who serve full time.

Decisions and official materials are accessible. 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 by the Economic Affairs Minister about mergers. It advises the government about the organisation of the State and public services, and it is the judicial authority over public officials and performance of public service functions. The *Conseil d'État* is now often called upon to consider appeals against decisions by the sectoral regulatory authorities, following claims about anti-competitive conditions and practices, both about mergers and in dealing with liberalisation in the public service sectors, as it can review some decisions. It may consult the *Conseil de la concurrence* about competition questions.

The enforcement method resembles the "modernised" EU process of *ex post* direct application. 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 the European Convention on Human Rights.

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. There is no clear *de minimis* rule or process for summary disposition. Accelerated procedures were introduced recently, in July 2003, but solely for small cases and they have not yet been tested. Cases may have to be dropped if they are not decided within the statutory period of limitations, which is 3 years. In order to get a decision more quickly, firms increasingly request interim relief. 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 potential fines were increased substantially in the 2001 amendments. For an enterprise, the cap is now 10% of global group turnover (after tax). For individuals, the fine that the *Conseil* can impose is capped at EUR 3 million. The maximum sanction is still theoretical, as the *Conseil* never imposed a maximum sanction even when the base for calculation was lower. A multifactor balance means sanctions may not be strictly proportional to gain or harm.

A leniency system is now in place. The offer of leniency in order to encourage violators to come forward, which was added in 2001 by the NRE, is an innovation in French law. 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.

Private lawsuits have been important. Parties can recover damages due to violations of the basic prohibitions by filing civil suits in court. Private suits in France are apparently at least as common as in Italy, where about 10 are filed each year. 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. 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. France claims the power to enforce its law against conduct abroad that affects competition in France. Where effects might come from beyond the border, the effective economic market might be wider than the national border, too. 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.

Resource levels 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*. DGCCRF devotes about 170 full-time equivalents to anti-competitive practices, and another 125 to restrictive practices. Measured by the number of cases, most of DGCCRF's enforcement output is about restrictive practices, with tens of thousands of actions every year, which are mostly simple infractions of formal clauses. With respect to anti-competitive practices, 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 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. Most strikingly, the number of matters submitted by the Minister for Economic Affairs dropped by two-thirds in 2002, 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, the Minister for Economic Affairs has looked for other means of resolving matters.

The limits of competition policy: exemptions and special regulatory regimes

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. 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. Public entities and firms that perform public services are covered by the law, but not always by the process of the *Conseil*. 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 public service missions 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 the missions in question.

The allocation of responsibilities has evolved quickly. In 1997, the *Conseil d'État* applied 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. Sensitive to the risks of divergence in interpretation, at least, the *Conseil d'État* has consulted with the *Conseil de la concurrence* when standard competition enforcement questions such as market definition have arisen in administrative law matters. 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.

In France, "regulatory reform" is virtually defined as bringing competition to the utility and other public service sectors. 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. The risk that cross-subsidy will distort competition is a constant concern. 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. 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. 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.

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. 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 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 represent only about 5% of national production. 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. 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 5th). In 2003, the extent declared open rose to 37%, and about 17% of eligible customers had changed suppliers.

The regulatory authority, CRE (originally the *Commission de Régulation de l'Électricité*, and now of *Énergie*) is responsible for ensuring non-discriminatory, transparent third-party access to the transmission system. 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. 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. CRE has the power to order interim protective measures and sanctions, but it does not have power to order construction of facilities. CRE powers are exercised in connection with the *Conseil*. If CRE encounters conduct that amounts to abuse of dominance or a restrictive agreement, it is to transmit that to the *Conseil*. Conversely, the *Conseil* is to refer disputes in the energy sectors that do not amount to competition law violations to CRE. 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*.

Natural gas has also historically been run as a *de facto* integrated, publicly owned monopoly. Until 2000, *Gaz de France* (GDF) had a monopoly on importation. GDF has 88% of France's pipelines. GDF and its affiliates operate 3 geographically-concentrated pipeline systems. Local distribution is controlled by local authorities. Most granted operating concessions to GDF. The 1998 EU gas 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. 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 may have inhibited customers from bringing their eligibility to bear or suppliers from entering the newly opened market, although the ministers had entrusted the president of CRE with a mission concerning network access tariffs and accounting separation. Operators were prompted to moderate their network access tariffs in January and then December 2002. The energy law of 2003 has resolved many of these uncertainties. CRE's jurisdiction was expanded 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 1 200 sites. 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. To enable GDF to expand beyond France, France has had to open its own markets.

The ***telecommunications***[2] 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. 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. 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.

The ***railway*** system is still a state-owned monopoly, SNCF. The expectation of continued monopoly is embedded in the basic labour arrangements. 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. 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.

Airlines and airport services are not subject to any formal exemption from the competition law.[3] 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. 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.

The monopoly in ***postal services*** is entrenched. *La Poste* was set up in 1991 to be an "independent public operator", taking over the assets of the government postal administration. A 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. A draft law submitted to Parliament in July 2003 would define universal service, transpose the May 2002 EU directive concerning the limits of the monopoly, and assign regulatory authority in the sector to ART. The draft law would also make 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. *La Poste* also has a significant insurance business, which it has considered expanding. *La Poste* enjoys several competitive advantages in providing these services.

The ***banking*** sector is not exempted from the competition law. The *Conseil* must co-ordinate its actions in this sector with the sectoral regulator. Bank mergers are now subject to the usual competition policy oversight. Before legislation adopted in August 2003, they were subject 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.

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.

Book publishers can set the retail price of first editions, and retailers cannot discount below that price more than 5% (with some exceptions, including schoolbooks). The rule amounts to an exemption from the otherwise *per se* prohibition of resale price maintenance. The French government will not consider revisiting the issue, but instead wants to assure the existing national system and avoid upsetting it. The rationale for the exemption is refusal to consider books as a market product like others. The objectives are to maintain a dense and diversified distribution system of independent, traditional bookstores, to support variety in authorship and publishing, and to have all citizens pay the same price throughout the country.

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. Analysis implies that this restraint could in theory produce some effects that are inconsistent with the objectives. If suppressing retail price competition contributes to raising average prices, that would tend to depress overall sales and thus reduce reading, rather than promote it. 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. 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, available data shows that overall sales in France have increased. Moreover, experience shows that the rule has not prevented the emergence of new distribution systems. The retail market has diversified. The *grandes surfaces* have advanced, while traditional bookstores have kept over 65% of sales and mail order sales have been stable.

Anomalous treatment of cultural goods calls for justification. 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. 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.

In some areas of ***professional services***, rules protect or require otherwise anti-competitive practices. 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. There are rules controlling advertising. 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. The *Conseil* has tried to keep professional societies to the limits of their authorised public interest mission. It has on numerous occasions taken action against the bodies responsible for overseeing professional associations, disciplining them for impeding market access for new entrants and seeking by the same token to unduly expand the scope of their legal monopoly.

Large-scale ***retailers*** are subject to some rules that 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. The rules designed to preserve smaller stores in the face of large-store competition have probably also had the unintended effect of reducing competition among *grandes surfaces* and protecting those that exist against any new competition. New large stores must be approved by departmental commissions, in which a majority are local elected officials (subject to an independent administrative authority). 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, in force since 1974, keeps the development of large stores under control and has, at the same time, allowed nearly 3 million m^2 of floor space to be opened every year. Another control prevents the large-scale distributors from advertising on TV. The French authorities have set a timetable for removing this prohibition.

Competition advocacy for regulatory reform

DGCCRF participates in inter-ministerial review of proposals of all kinds.[4] 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. 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. 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. 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. In connection with identifying and disciplining the costs of providing public services, the *Conseil* had reservations about EDF's plan, because 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. In telecoms, at the outset of regulation in 1997, 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 *Conseil* issued a report in 1996 about the postal service's financial operations, in response to a request from the French banking association. The *Conseil* report noted that the looming pension problem could be addressed by a formula similar to the one adopted for *France Télécom* when its status changed, from being part of a ministry to a corporate entity.

Conclusion

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. 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. 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.

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. Small steps lead to only slow changes. The reform process in France has been much slower than in other European countries and is still lagging behind in some areas. 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. There is a danger, however, of the strategy of temporising being misinterpreted and seen by some as an attempt to preserve existing interests, whereas it may in fact be no more than a means to prepare the public for the inevitable and to moderate the inevitable shocks on the way to greater competition and improved service and efficiency.

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. The major reason for resistance to larger-scale change, particularly to structural separation and private capital, though, is preservation of the rights of labour in the sectors affected. In telecoms and airlines, reforms called for imaginative ways to involve the employees in "owning" the process. Similar imagination will be required for progress in the other public service sectors, where slower growth may make change more difficult.

Commitment to a broad concept of the *service public* means that change is approached with caution. France uses now-standard methods for supporting universal or "lifeline" services. 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. 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. 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 it is not well known. The *Conseil* is asked regularly for views about the big reform projects. Its responses are thorough, analytical, and carefully presented. However, its message is advisory and is not always acted on.

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 those aspects of the process that are relevant to ensuring that they conform to the evolving due process demands of European law. One result is that 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.

There are some continuing tensions between these two competition enforcement bodies, which share some functions but have different responsibilities and may have different perspectives and priorities. 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 firmly rooted in the administrative law process and the *Conseil d'État* is being required more and more frequently to consider competition policy as merger control decisions are challenged. It may however be asked whether the duality of responsibilities in this area favours unicity and jurisprudential consistency.

Policy options for consideration

1. *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.

2. Ensure decisions on merger control that are clearly based 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 based on competition principles. This is particularly true about mergers that are approved (or subjected to only voluntary commitments) without a referral at all and with no assessment by independent experts. In other jurisdictions, such as the UK and Germany, the response to this concern has been to make the independent body's decision about mergers determinative, while perhaps providing for a separate, transparent process in the event some other policy interest would justify a different action. Such a 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. The French authorities could also reflect on the possible advantages of giving the *Conseil* an opportunity for involvement in any notified transaction that did not depend on the Ministry's discretion to request its views.

3. Ensure better distribution of enforcement resources between supply-chain fairness and the monitoring 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. It is possible that claims that huge fines are needed because small firms cannot afford to risk retribution if they complain on their own are over-blown. 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.

4. 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 increasing number of proceedings at the *Conseil* seeking interim measures, and sometimes reaching negotiated resolutions in the process.

Notes

1. The role of the concept of *service public* is explained in more detail in Chapter 2 on regulatory quality.
2. The telecoms sector is discussed in detail in Chapter 6 of this report.
3. The air service sectors are discussed in detail in Chapter 5 of this report.
4. 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.

Table of Contents

List of Boxes

List of Tables

List of Figures

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