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Harmonization of Competition Regulation of Infrastructure Service in Integrated Areas  
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**« Competition Law and Regulatory Framework of  
Infrastructure Service in Integrated Areas : some thoughts deriving from  
the European Experience »**

**by**

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**Speech version\*<sup>1</sup>**

**All the infrastructure service industries have undergone major technological changes in the last two decades which are characterized by the transition from a classical Industry-based Society to a New Age Information-based Society which is topped by the phenomenon of Globalization. Nevertheless, in most countries still in transition from an Industry-based Economy to an Information-based Economy, such as in Latin America, the allocation of resources in these infrastructure service industries is generally determined « not by autonomous market decisions but by political decisions » as Alfred Kahn has put it<sup>2</sup>. The organization and management of firms operating in these industries may be public or private but the central economic decisions are subject to direct governmental regulation. But despite of this governmental intervention, the last**

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<sup>1</sup> These talking notes represent only a personal view on the issues addressed in it and do not represent any official view of the French Government nor of its entities. Dr SOUTY is Counsel for multilateral affairs, French Competition Council, PARIS, Member of the groups of experts on competition law and policy of the OECD, UNCTAD and the WTO and Professor and director of the Post-graduate program on International Trade (Asia) at the University of LA ROCHELLE. Most footnotes do not appear in this version but are featured in the full paper version.

two decades have witnessed a generic process of promotion of more efficient infrastructure services industries aiming at improving the efficiency of national or regional Economies in light of the process of Globalization. This has been particularly the case within the European Union. The promotion of efficiency in infrastructure service industries has resulted chiefly in the opening of this activities to competition and opening to competition has led to three kinds of policy decisions, which have been evidenced in the OECD studies conducted during the recent years on regulatory reform in the most advanced countries<sup>3</sup>: industry restructuring, reforming regulations, reforming institutions and - where the State was directly involved in the performing of the activities in these regulated service industries - privatization of part or of all the operations.

As a supporter of Federal European integration I will deliver a message promoting subsidiarity, i.e. a system which promotes coordination between national competition authorities and regionally integrated authorities. To illustrate how efficiency can be promoted in infrastructure service industries as such has been the case in the European Union, we will first analyze the principles of integration imbedded in the treaty of Rome and introduce the system of control of anti-competitive practices which has been developed in Europe at the Community level and at the level of a Member State like France. Second, we will present the complex relationship between competition authorities and sectoral regulators in a European Community as well as in a French perspective. Thirdly the actual contribution of competition law to infrastructure industries in a process of deregulation will be analyzed.

## **1. Competition Institutions in the European Union and Member States**

To evidence the evolving nature of competition institutions either in an integrated area or in a national environment, the European Union and its Member States are clearly

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<sup>2</sup> A. KAHN (1988), vol. 1, p. 2/1

good examples, even though their experiences are incompletely transposable everywhere in the World.

Furthermore, the case study on developments in France illustrates the various institutional options available for the creation of a competition-driven economy with the objective of preserving a social order in a country with a strong tradition of Labor organization. At the same time, this helps understanding the evolving nature of institutions in a dynamic Economy.

## **1.1 Institutional development in the European Union**

The major European competition rules provisions were created by the Treaty of Rome of March 25, 1957, creating the European Economic Community, now a constituent part of the European Union. It was amended by the Maastricht Treaty in 1992, which was modified by the Treaty of Amsterdam of October 2, 1997 and which resulted in the recent renumbering of all the original provisions of the Treaty of Rome, including those related to competition.

### *1.1.a. Competition rules of the E.U.*

The competition rules of the E.U. are contained in the provisions of Articles 31 (ex-Article 37), 49 to 55 (ex-Articles 59 to 66 ) and 81 to 90 (ex-Articles 85 to 94). And we will see later that, as far as regulation and deregulation are concerned, one should pay a particular attention to Articles 86 and 95.

Articles 31 and 49 to 55 are often forgotten in the presentation of the Competition principles of the E.U.. But these articles dealing with market integration must be

considered as complementary to the actual provisions on competition included in Articles 81 to 90 to create a competitive environment within the European Single Market. Articles 31 and 49 to 55 relate respectively to national monopolies regulations and to the free movement of services and to national regulations which restrain the free movement of these services: a manufacturing or an infrastructure services firm may find that it cannot compete on a relevant market for numerous reasons quite apart from the actual anti-competitive behavior of private or public corporations, for instance because of a national regulation which discriminates or forecloses the national market to non-national operators. Furthermore, as public procurement represents as much as about 11% of the E.U. GDP, upon the initiative of the Commission, the Council of Ministers of the Union has also designed a series of « Directives » aimed at the public procurement policies of Member States which may discriminate against firms established in other Member States and designed to open these procurement policies to pan-European competitive tendering.

Articles 81 to 90 of the Treaty of Rome are more well-known than most of the other Articles of that Treaty although most people pay more attention to Articles 81 and 82 as they contain the antitrust provisions respectively prohibiting anti-competitive agreements and abuses of a dominant position. They are the European equivalent of Sections 1 and 2 of the U.S. Sherman Act. These Articles 81 and 82 are chiefly applied to anti-competitive behaviors of private firms. We will analyze below how Article 82 enforced in connection with Article 86 has been used to tackle anti-competitive behaviors of firms -- both privately and publicly owned -- which operate in infrastructure service industries. Article 86 can be seen as a key instrument for strengthening the Single Market integration in the infrastructure service industries. And finally, the fact that Articles 88 to 90 provide the Commission with powers to deal with State Aids that could distort competition in the European Single Market should be stressed. It is a unique feature in the World of Competition Agencies and Regulators to provide a body with such a powerful tool to prohibit States from distorting the rule of competition. Even if exceptions are acceptable, they are publicly and transparently monitored by the Commission which has developed an important case-law on the matter.

**Article 88 (1) provides that : « save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Common Market ». But Article 88(3) nevertheless provides the Commission with the discretion to analyze and authorize other aids, for instance to promote economic development of areas where the standard of living is abnormally low or where there is serious unemployment, or to promote the execution of an important project of Common European interest or to remedy a serious disturbance in the economy of a Member State, just as Article 88(2) specifies that aids having a social character granted to individual consumers, aids to make good the damage caused by national disasters or exceptional circumstances are compatible with the Common Market.**

**With regard to State aids, Article 89 is also of interest because it gives an insight into procedural matters which will be visited later in some details. Under this Article, the Commission may adopt a decision that a State Aid that is incompatible with the Common Market has to be abolished or altered. If the Member State does not comply with this decision within the stated time, the Commission, or another Member State may take the matter to the European Court of Justice following a simplified and accelerated procedure. Then repayments of unduly attributed aids can be demanded.**

**To come back to the general theme of this paper, competition policy, regulation and integration, it should be stressed here that the specific objective of competition rules within the E.U. has always been to promote the integration of the European Single Market : one of the basic distinctions to determine the applicability of the Community rules or the national rules lies precisely in the determination of whether the firms or States behaviors do have a bearing (an «affectation ») on the interstate trade. This is because a Single Market would be meaningless if anti-competitive behaviors, be they from a private or public nature, could limit competition among operators on the marketplace. For instance, agreements or monopolies which might have an effect of dividing the territory of one Member State from another are closely monitored by the Commission and may be severely punished.**

### *1.1.b. Roles of the main EU institutions and tools of enforcement of a Competition Law*

**Institutional issues are being examined by other speakers. Without going in too many details, a more systematic examination of the role of the main EU institutions and their tools is provided in order to understand how the integration of the relevant economic area is progressing.**

**At the Community level, the main institutions involved in issues raised by operations of Infrastructure Service industries are the Commission, the Council and the Court of Justice. Again, it should be stressed here that these three institutions' rôle would have been inconsistent without a resolution of the Member States to transfer a part of their sovereignty when they entered the Union to pursue the objective of market and economic integration.**

**The Commission is the main executive body of the European Union. As such it is the chief enforcer and developer of competition policy endowed with the tasks of fact-finding, taking actions against infringements of the law, imposing penalties and granting exceptions to prohibitions which are called « exemptions ». A collective body of 20 Commissioners, it delegates to one of them ordinary responsibilities for competition policy enforcement. But major decisions and amendments are agreed on a collective basis. The relevant Commissioner – nowadays Mr Mario Monti – supervises the Directorate general of Competition or « DG Comp. » responsible for managing all competition procedures. It is led by a director general with two deputies and it is divided into eight directorates specializing in different sectors or types of prohibitions (e.g. general policy matters, information technologies, merger control, services, State aids etc...).**

**The Council of Ministers is the actual and principal legislative body of the EU, despite the fact that it is constituted of heads or representatives heads of national executives (governments). It is not involved in EU competition policy on a regular basis although each ministerial member of the Council is normally assisted by its national service (s) in charge of national Competition Law enforcement as well as, for some minor cases**

especially in mergers, in charge of direct EU Competition Law enforcement.<sup>4</sup> The Council has delegated as early as 1962 major powers to the Commission through regulations to enforce the competition rules in the Treaty, as already mentioned and to grant block exemptions in respect of agreements caught by Article 81 (1) but worthy of exemption under the provisions or Article 81(3). These regulations have been undergoing an in-depth revision for the last three years. The Council of Ministers also conferred powers on the Commission to monitor mergers of a major dimension within the EU or affecting trade within the EU. Last but not least, Member States are also represented in the discussion of cases leading to competition law decisions from the Commission in the Advisory Committee on Agreements and Dominant Positions which deals also with Mergers. This Committee actually considers draft decisions of the Commission and makes appropriate comments upon them (by which the Commission is not bound however), and discusses draft legislation and the development of policy. In the recent years, this Advisory Committee's rôle has been completed by the Meeting of the Directors general which officially assembles twice a year all the heads of National Competition Agencies and Courts with the Commissioner in charge of Competition and executives of the DG Comp.

The European Court of Justice (ECJ) and the Court of First Instance (CFI) are the EU courts, the ECJ being the Appeal court from rulings of the CFI. They hear appeals from the Commission's decisions and deal with points of law referred to them by national courts. When matters concern the Member States, cases are brought to and dealt with only the ECJ. The Commission is always represented before these two courts by its Legal Service which is always consulted on formal decisions drafted by the DG Comp.

For the enforcement of the EU competition law provisions of the Treaty of Rome, the Commission can resort to three types of legislative instruments -- « Regulations », « Directives », « Recommendations » -- and one type of executive tool, the « Decisions ». The Regulations have a general scope of application, are compulsory in all their provisions and have direct effect in all Member States. Therefore, a regulation can be invoked before a national court by any person and do not require any transposition in national law for implementation. Unlike « Regulations », the « Directive » has not a

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general scope of application and do oblige only those Member States they mention. « Directives » instruct Member States to pass and implement national legislation in order to implement policy decisions of the Community incorporated in the « Directives ». And as a piece of Community legislation, « Directives » require transposition into national law in order to be effective but even if they are not transposed, they can be invoked before national courts and these courts have to set aside any piece of national legislation that might be contrary to the provisions of Directives in their rulings. Furthermore, the Commission can sue a Member State before the ECJ for having not transposed a « Directive » within the relevant period of time it sets. « Recommendations » in their turn belong to the type of soft law in that they are not mandatory but they are used by the Commission as a sort of Advisory Guidelines : in institutional and procedural terms, they are easier to draft by the Commission since they can be adopted by it and implemented by Member States in six months, compared to at least three years for « Directives ». Lastly, « Decisions » are mandatory in all their elements and for those whom they design. They impose the result to be achieved and the ways of action to that purpose. When « Decisions » design moral persons (firms or individuals), they create rights and obligations which must be sanctioned by national courts in national law. When « Decisions » are directed toward States, they normally grant an authorization or provide for a prohibition. : then Member States are compelled to adopt any prescribed measure in their national laws, regulations or administrative decisions.

1.2. As to what regards institutional development in Member States and namely the case of France, I will leave you for the biggest part with my paper

I would just say briefly that a legislative order was passed in 1986. It gave a leading role of enforcement of the antitrust provisions of the order to an independent administrative authority, thereby transferring the traditional ministerial powers to impose penalties to a new institution called the « Competition Council » (« Conseil de la concurrence »). The « Conseil » Board is now composed of seventeen members,

including a majority of judges (civil as well as administrative and financial law judges), with some members having a particular expertise in the area of competition, micro-economics or consumers affairs (distinguished scholars) and a few members coming from the business community (a.o. retired CEOs with a production or distribution background, Consumer associations representatives, Trade-Unions representatives...). Proceedings of the Conseil are managed by independent instructing magistrates or « *rapporteur* » .

Furthermore in 1986, a full standing merger and acquisition control was instituted, compelling the Minister of Economic Affairs to consult with the Competition council when he wants to block an anti-competitive merger or if he wants to impose conditions on the parties to such a merger. Lastly, a major advocacy power has been given to the Conseil which can give its opinion on any competition issue referred to it either by the Government, the two Parliamentary Houses, the Business Community, the Common Law (Civil and Administrative) Courts. This power has increasingly been used in the 1990s when monopolies have been privatized or opened to competition.

Then a law of December 11, 1992 has explicitly empowered the Competition Council to enforce articles 81 to 83 of the Revised Treaty of Rome. A law of July 1, 1996 extended the Competition Council's legal powers, and lastly a bill was introduced to further expand some of the Council's specific powers (dealing chiefly with international antitrust and corporate leniency programs) as well as to enhance the transparency process of the merger control.

Two basic features should be remembered about this short History: first, the shift of powers of enforcement of the competition law from the Executive to the Judicial sphere under the appeal and quashing control of the Civil Law judges; this is a process still in motion. Second, the progressive or evolving nature of the system which has not been created in France *ex-abrupto*. Surely, the evolution is not over.

### 1.3. Basic legal features of the French Competition Policy System

The *Conseil de la concurrence* has general jurisdiction in the field of competition : the jurisdiction is exercised in principle in all sectors of the economy and leads the *Conseil* to examine all legal and economic aspects of market operations in a behavioral perspective.

In fact, the hundred investigations and cases settled each year do result from referrals coming chiefly from the business community but also from the Antitrust Division of the Ministry of Economic Affairs in charge of competition matters (the « *DGCCRF* » or « *Direction générale de la concurrence, de la consommation et de la répression des fraudes* »). And owing to the success of these referrals, the *Conseil* has rarely used its *ex officio* jurisdiction powers. To investigate the cases, the *Conseil* can rely on about one hundred permanent staff and may request the *DGCCRF* manpower to investigate on cases brought before itself by the business community. It can impose fines of up to 5% of total sales in France to firms found guilty of anti-competitive practices and give them « injunctions ». The maximum of fines is soon to be raised to 10% of the total sales world-wide. The *Conseil's* decisions can be appealed to the Paris court of Appeals.

Parallel to the *Conseil's* powers, the civil courts are also competent to enforce the antitrust articles and can award damages to injured parties or nullify agreements which violate the competition law.<sup>5</sup> But plaintiffs in civil courts have to demonstrate the alleged violation of law, do not have the possibility of introducing class actions and can collect only single damages. Although there are proposals to strengthen civil actions procedures in the new 2000 amendment of the 1986 Order, so far, relatively few cases of violation of articles 7 and 8 have been adjudicated through the civil courts. As a matter of fact, over the fourteen-year period of the new full-competition regime, the *Conseil de la concurrence* has played a pivotal role in the enforcement of the provisions on cartels agreements and abuse of dominance.

In the merger area, the situation is more balanced, in that the French system has not yet reached the maturity level where the Competition authority could appraise mergers on its own. But before talking about control of mergers, let it be stressed that mergers are a

long standing and widespread phenomenon associated with technical and economic progress and economic strategy in all dynamic economy. However, economic analysis shows that, in a given market, a reduction in the number of sellers may have a restrictive effect on the conditions in which competition is being exercised especially with regard to some strategies of firms which try to erect barriers to entry or exit to the market for their actual or potential competitors. Thus, all modern legislation requires authorization for transactions involving mergers. In such cases, the *Conseil's* role is not to adjudicate on whether these practices are lawful but rather to determine if the transactions will engender a structural change likely to threaten or harm competition. But the determinant role here is played by the Minister of Economic Affairs and the *DGCCRF*. Mergers can be controlled by the Minister in two cases : when the combined market shares of the parties exceeds 25% of a domestic market or when their combined sales are larger than seven billions francs (one billion US Dollars) and two at least of the parties have sales of more than two billion francs (0.3 billions US Dollars). Notification of a merger to the Minister is voluntary, although it may become compulsory in a very near future. But, if notified, the merger is implicitly approved if no ministerial decision has occurred within six months of the notification. Whenever the Minister considers blocking an anti-competitive merger or imposing undertakings on the parties to such a merger, he must prior refer the case to the *Conseil* for its opinion.

## 2. The complex issue of relationships between competition and sectoral regulation

I want to introduce successively the European model of regulation and its adaptation to the French economic environment and traditions.

### 1.2. The European Union model of regulation for Infrastructure service industries

The European Union model of regulation for Infrastructure service industries lies on the combination of two basic principles referred to as the principles of « liberalization » and « harmonization » which are included in the E.U. Treaty. It should be stressed here that these two principles are of a constitutional nature as well as the right of E.U. citizens to enjoy the benefits of services performed in the « general economic interest ». But there is no division of labor among various agencies such as in the U.S. for instance : the Commission is the single Regulator under its duties to enforce the Treaty of Rome at the EU level, but the situation is quite different at the level of Member States as we will later see.

Within the European Union, the model of regulation is chiefly governed by the provisions of Article 86 (ex-Article 90) of the modified Rome Treaty which define the principle of liberalization. The Article 86 is enforced by the Commission. Its provisions extend the enforcement of the E.U. Competition law to public undertakings as well as undertakings enjoying special or exclusive rights i.e. enjoying a monopoly status to perform a service activity in the « general economic interest » : for these firms, be they public or private, Member States may not give rights or maintain regulations (« measures » in the E.U. legal formulation) which could impede the competition rules vested in the Treaty. The purpose of the competition-based Article 86 principle is to strengthen the European economic integration by removing the rights granted to monopolies as far as this removal does not run against Member States and the European Community commitments to services of a general economic interest.

Thereby, the E.U. Commission in charge of the Treaty enforcement has adopted in the last decade a number of Decisions and Regulations removing legal entry barriers across Member States for infrastructure service industries while extending competition rules enforcement to the firms operating in these sectors , as far as the general interests were not harmed.

To define what is meant by « general interest », the Commission has explained in its Guidelines from 1996, that this extension of competition rules would not run against obligations of public service that may be imposed by the public authorities on the entities - public or private - that perform the services for the sake of protection of

**economic and social cohesion, of the environment, of the planning and promotion of consumers interests and land use.**

**Furthermore, the principle of opening to competition or « liberalization » rooted in Article 86 is complemented by the principle of « harmonization » which lies in the long and complex procedural Article 95 (ex-Article 100-A) of the Treaty. The provisions of Article 95 aim at bringing together the Laws of the Member States or, in other words, to « harmonize » these Laws by setting out procedures by which both the Commission and the Council of Ministers of the E.U. can adopt « Directives » to impose to Member States the removal of barriers to the further construction and integration of the Internal Market.**

**More specifically, for infrastructure service industries, this principle of harmonization implies that the Commission can propose to the Council of Ministers the conditions by which Member States will have to align or « harmonize » their sector-specific regulatory regimes to further integrate the European Market. Whereas the enforcement of the Article 86 seems to be more reactive *ex-post* to individual behaviors of States or firms enjoying special or exclusive rights on a case-by-case basis, the enforcement of Article 95 is more proactive *ex-ante* : the use of Article 95 aims at organizing a harmonized framework of regulatory rules to ensure business and investors security within the Internal Market as well as to effectively unify the Single Market for firms operating in the field of infrastructure service industries.**

**One (three in my written paper) sector offers a useful insight of alternative or joint enforcement of Articles 86 and 95: the energy sector.**

**In the energy sector, the opening of markets to competition for electricity generation, transmission and distribution has started in 1996 but without accompanying harmonization measures. Energy liberalization has focused on markets sub-sectors (generation, transmission and distribution). Markets have been gradually opened over ten years up to 26% for electricity and up to 20% for gas. In the case of electricity, all the States have finally fulfilled their obligations to transpose the Electricity Directive by**

2001<sup>6</sup>. From a competition law enforcement perspective, the Commission has observed in a recent report that it has mainly dealt with network issues, cooperation and joint ventures between suppliers and stranded costs : « the application of the antitrust rules have focused on cross-border issues and cases in order to foster the emergence of trade between Member States. In one joint venture case, the Commission took the delay of one Member State in opening up its market to competitors from other Member states into account in its competition assessment. The parties had to give an undertaking to the effect that the venture would not become active in the Member State until the latter had fulfilled its obligations under the Electricity Directive» . Furthermore, since many Member States intend to grant financial aid to electricity companies to make up investments or commitments which can no longer be recovered or honored because of the introduction of competition, the Commission has decided to establish Guidelines for the treatment of such stranded costs under the State aid rules.

## 2.2. A member-State's situation : the French experience

To come back to the French experience, sectors in which the competition authorities have to share their powers with specific regulators include the audio-visual sector, the telecom sector, the banking, investment and insurance sectors, the electricity sector, etc. Here, we have to make a differentiation between different categories of sectoral regulators. A first category is made with classical technical Ministries or Departments such as the Departments respectively in charge of Transportation, Maritime activities, Environment, Public Health and Social Security etc... A second category is made by independent agencies which, in France, have appeared in the second half of the last decade.

Up to 1999, there have been only two independent agencies operating more or less jointly with the Competition council under provisions set out in their own statutes: the « *Conseil supérieur de l'audiovisuel* » (CSA in the Broadcasting Sector) and the « *Autorité de Régulation des Télécommunications* » (ART in the Telecom sector). A third

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independent agency has started operating in 2000, the « *Commission de Régulation de l'Electricité* » (CRE in the electricity sector). The latter has a relationship with the Conseil de la concurrence very similar to the CSA and ART.

In other sectors, where there are advisory bodies or executive departments as mentioned in the first category, these agencies report directly to the ministers without involvement of either the Conseil or the DGCCRF : such is the case for instance in the Banking industry with the « Conseil Economique et Financier » (CECEI), chaired by the Governor of the Bank de France, reporting to the Minister of the Economy and Finance on mergers in the banking sector. This system has been in the front pages of the newspapers two years ago. In June and July 1999, the BNP tried to take over the Société Générale. It was prohibited to do so by the Minister who followed the opinion of the CECEI, and in fact, the opinion of the Governor of the Central Bank who chairs this body.

What is then the philosophy underlying the role of competition agencies with respect to specific sectors in France ? The competition authorities try to monitor the conditions under which sectors are opened to competition, but they also focus on the conditions under which state-owned corporations - generally monopolies - diversify their activities. When sectors are opened to competition, it is commonly agreed that the following measures should be taken :

- firstly, clarify and, if necessary, reinforce, the rules governing the provision of a universal service, while complying with the requirements of equality, continuity, an affordable price, and the constant efforts to satisfy changing needs, and
- secondly, introduce a framework within which the competition process may make a positive contribution. In this connection, specific regulations should be reduced to a strict minimum, and the scope of application of common competition and consumer protection rules should be kept as broad as possible.

As regards the « regulation » of these sectors from an institutional perspective in France, there are three different roles :

- *comprehensive regulation* (conditions of entry, rules for the provision of a universal service, financing of the service), which must be the responsibility of Parliament and Government,
- *administrative and technical management* (examination of applications for licenses to provide services, allocation of scarce resources, ensuring that operators comply with legal and regulatory obligations, in particular those specified in their terms of reference), which can be entrusted to independent specialized administrative bodies,
- *monitoring of the markets*, in particular as regards competition and the competitive processes : this is the duty to the authorities which are usually and commonly responsible for anti-competitive activities on the markets.

### **3. The actual role of competition policy authorities for infrastructure Service Industries in a process of deregulation**

In infrastructure service industries recently opened to competition, both privately and publicly owned firms compete. Competition of both privately and publicly owned firms is all the more important in areas undergoing a process of regional integration since some countries have relied more or less to one or the other type of model of performance of public service activities. To fuel the process of integration, it is thus particularly important to avoid situations where a non-neutral regulation could advantage a firm on grounds unrelated to the underlying efficiency of the enterprises. In this respect a non-neutral regulation can be combined with public subsidization of operators.

In this respect, it should be stressed here that the fundamental difference between state-owned and privately owned enterprises, in most countries, is that state enterprises cannot go bankrupt but private companies can : this situation has been spectacularly demonstrated in the banking sector in the E.U. where investigations by the Commission have evidenced the degree to which the Crédit Lyonnais was subsidized by billions of Francs in a fashion even unknown to the French Parliament. Competition authorities

need not only pay attention to behaviors of operators or to conditions of neutrality of regulation enforcement but also to the conditions of State's direct supports to operators.

Through the case of electricity in France we can have a broad vision about the necessity to have national competition authorities to relay at a "sub-federal" level the integration principles which have been defined at the Community level. The role of the national competition authorities can be a double one: they can have a structural function and assist the legislators in shaping the legal framework to open up markets and they can have a monitoring role to assess anti-competitive practices and behaviors of firms on the market. If the electricity sector has been chosen as an illustration, cases involving other industries will be used.

### 3.1 The opening up of the electricity sector in France : the structural framework of deregulation and the rôle of the *Conseil de la concurrence* in shaping this framework

In this field, it should be first underlined that *the main concern for the French competition authorities is to support new entries in the electricity sector, to further integrate our national market within the European Union market.* Our problem is slightly different than the problem of other countries of the EU, for instance the Germans. In their case, they have to seek consolidation of their market structure to reach the point where scale economies can induce more price competitiveness for consumers and further support the competitive process at work within the Union. And so far in this country, the competition authorities have not been in the situation to exercise any merger control in the electricity sector, although there have been several references made to the Conseil de la concurrence regarding the activities of the Monopoly operator which is well known (Electricité de France or EDF).

To come to the new legislation opening up the electricity sector, in the first place we have to say that the Minister of the Economy has been deeply involved in the drafting of a law that has transposed the EU Directive adopted in December 1996 to further integrate the electricity generation and distribution within the EU. Secondly, the Minister also requested the opinion of the *Conseil de la concurrence* on this draft while

the *Conseil* expressed its opinion several times in the recent years on electricity questions. The examination of the new legislation itself and of the opinion of the *Conseil de la concurrence* give a broad view of how the sector has started operating under the scrutiny of both competition agencies and a new sectoral regulating agency. It is sure that the new system reflects by its complexity all the debates that have surrounded its preparation, including a strong involvement of the Labor Trade Unions.

First, the law has created a framework for effective competition and a new system of regulation. The main feature of this system has been the creation of a new institution, the Energy Regulatory Board (*Commission de Régulation de l'Énergie* or CRE). The CRE's administrative powers is to be centered on problems of grid access and dispute settlement between operators. But the CRE's powers do not extend to all of the sector's activities. For example, authorization to operate a power plant is issued by the Minister of the Energy. Ultimate authority over the pricing of activities that will still be monopolies is to be shared by the Ministers of Energy and the Minister of the Economy and Finances. In addition, *the law sets out in detail the interface between the sectoral powers of the CRE and those of the Conseil de la concurrence, maybe to avoid some of the problems that arose in the field of the audio-visual sector. The CRE Chairman refers to the Conseil de la concurrence those cases of abuse of a dominant position and practices in restraint of competition of which he may be aware in the electric power sector. Any other matter relevant to the Council's powers may also be referred to it for an opinion.*

In addition, transmission over the electric power grid of electricity generated by independent suppliers, like any other economic activity, may give rise to disputes that do not lend themselves to analyses in terms of abuse of dominance or anti-competitive agreements. To settle such routine disputes, involving straightforward individual interests and having no bearing on practices that affect the working of the market, the CRE has been vested with adjudicative powers. The CRE has to interpret the legislation on grid access. And it stipulates technical and financial conditions for dispute settlement in decisions that will state reasons and be notified to the parties.

Last but not least, the appeal on CRE's decisions will be introduced before the Paris Court of Appeal. It should be stressed that this Court already has appellate jurisdiction over decisions of the *Conseil de la concurrence* as well as the *Autorité de Régulation des Télécommunications*, the telecom sectoral regulator. This system aims therefore at

ensuring coherence between decisions of the regulatory authorities and those of the Competition Council in the electric power sector.

The *Conseil de la concurrence* was consulted by the Minister of the Economy in connection with the drafting of the new legislation, more specifically on the principles to be observed so as to ensure that the electricity market operates competitively pursuant to the European directive for a progressive opening of power supply to competition. The *Conseil* had to stress that the first need was to identify which utilities were assigned to public operators (EDF and private or non nationalized operators) and to define their particular functions clearly. This prior identification is essential in order to be able to establish a system of utility financing that is transparent and non discriminatory.

The *Conseil* has stressed the fact that EDF will still combine monopolized activities (supply to captive customers, transmission distribution) with competitive activities (eligible customers). This is liable to facilitate cross-subsidization practices that may keep potential competitors out of the market. For example, EDF could impose price increases on captive customers to finance artificial price cuts for eligible customers. In the *Conseil's* opinion, it is crucial that EDF has an accounting system that makes it possible to verify the absence of cross-subsidies and of predatory pricing strategies for the sale of electricity to eligible customers.

### 3.2 What can be the main anti-competitive practices in a recently deregulated sector ?

Drawing on the experience given from the opening up of the telecommunications sector as well as in other sector operating around essential facilities (e.g. airports, oil and gas stocking and transportation...) one can foresee that referrals to the *Conseil de la concurrence* in the energy sector could be numerous in a near future. New entrants on the electricity production market will face two major problems : they will have to compete with the incumbent operator which will hold a dominant position for a period of time and they will remain dependent of the same historical operator to transport their electricity on the EDF network, which is a true essential facility. Main problems

which can be expected to arise will then be posed by network access and also by situations resulting from the partial opening of the market, as already remarked above from a Community perspective.

Let's take these problems one after the other.

a. questions of network access

In 2000 the new challengers of EDF (the Germans RWE and HEW, the Belgian Electrabel, the Spanish Endesa and Snet a subsidiary of Charbonnages de France) have won about 40 distribution contracts representing 4.5% of the market opened to competition. The reality of the opening of the market for production rests on the actual capacity of independent producers to transportation and distribution networks which still are EDF Monopolies. From that point of view, concerns for competition could arise from refusal of access to networks, from technical conditions of connection or from transportation tariffs.

To sell electricity to a consumer under a selling contract, an independent operator has to ask to the network manager to transport its electricity on the EDF networks. And according to the new electricity law EDF is still the network manager : this manager can very well be in the position to discriminate against its competitors, especially in the periods of networks congestion : in these periods, the electricity selling contracts of independent producers can be voided because of a refusal of access from the network manager. In an earlier opinion, the Competition authority has already warned that about the necessity to set up an autonomous network manager whereas the actual law only mentions that this manager will be an EDF subsidiary with « independent management » and accountancy. However, the Conseil de la concurrence has made it clear in an earlier decision that a refusal or denial of access to an essential facility can be deemed as an anti-competitive practice resulting from an abuse of a dominant position.

Technical conditions of connection can also give rise to anti-competitive practices. In a decision from 1996, the Conseil de la concurrence has condemned behaviors which consisted in tightening conditions of connection to the network for autonomous

electricity producers, especially without advertising the new technical criteria. A change in the level of tension as well as an unjustified delay of connection could also be considered to block the development of competition in this sector.

Transportation tariffs could well give rise to another type of anti-competitive practice. The network manager could well propose higher transportation tariffs to independent producers to the EDF production unit thereby disadvantaging new entrants and preventing these competitors from selling their electricity at competitive prices. Such a practice could well be considered as an anti-competitive agreement between the network manager or even as an abuse of dominant position if the independence of the network manager is not ensured enough. Considering that high transportation costs could well inhibit the opening up of the market, the Conseil de la concurrence has advised for a flat transportation price (« *tarification au timbre poste* »), i.e. a tariff which would be independent from distance which would reflect only costs on an transparent and non discriminatory basis. In an earlier opinion on conditions of oil transportation, the Conseil has also specified that the basic transportation tariffs and eventual rebates must be objective, transparent and non discriminatory : any system conferring tariffs advantages related to the quantities transported would be of the nature to affect the play of competition, because this could unduly advantage some users with regard to others.

#### **b. problems resulting from the dominant position of the incumbent firm**

It can be reasonably expected that the dominant operator in the electricity sector in France will remain so for a certain period of time, as in every case of opened up sector in other industries like telecommunications for instance.

From that perspective of dominance, again in a decision of 1996 regarding this time the Yellow pages of the Telecommunication dominant operator, the Conseil de la concurrence has warned that «an undertaking holding a dominant position and confronted to the entry of a new competitor can defend or develop its market share provided that it remains within the limits of a fair and legitimate behavior ; however, the fact for a firm with such a dominant position to try and limit the market access for

its competitor by using tools others than those which derive from a competition on the merits has the character of an abuse ». The case-law in this sector is abundant and diversified to cope with any type of abuse of a dominant position which have been found in the field of telecommunications for instance.

To be more specific on the electricity sector, in an opinion of 1994 regarding activities of diversification of EDF-GDF, the Conseil has defined its extensive doctrine : the Conseil has underlined the fact that EDF enjoys a particular situation from which it can gain access to very favorable financing tools, that its access to end-consumers is facilitated the existence of a network covering the entirety of the national territory and that it benefits of the identity and image of the general interest attached to the public service. All these characters constitute unquestionable advantages. It has also been remarked that internal transfers of different forms between firms of a same group or legal entity, can very easily result in cross-subsidization and induce firms to adopt inefficient pricing policies

In 1999, 2000 and 2001, the Conseil de la concurrence has had some other occasions to sentence the incumbent operator, EDF for abuses of a dominant position: such has been for instance the case in thermal applications of energy where a.o. EDF had granted commercial aid to its client in combination with an exclusive long-term (20 years) supply agreement.

#### **c. sanctions without fines (structural orders)**

It should also be stressed that competition authorities can enforce the competition law not only through financial sentences but also with structural remedies including interim measures.

Sometimes the nature of the decision itself is more important for market efficiency than an ex-post sentence which can happen only after harm to competitors has causes irreparable damages, for instance by driving out new entrants. Leaving the electricity sector for the telecommunications sector, a recent decision provides a good example of the useful cohabitation between sectoral and competition regulators.

Such has been the case with the analysis of the conditions for Internet access offered to schools by France Telecom, this firm operating in a sector being monitored by a sectoral regulator (the ART, the Telecom regulatory authority). The French Association of Private Telecom Operators (« AFOPT »), whose member operators include Cegetel Entreprises and Bouygues Telecom, denounced the practices of France Telecom, which in their opinion prevented the members of the Association from competing with France Telecom on Internet access for schools, thereby excluding them from the market. For AFOPT, this exclusion resulted, first, from the fact that to compete with France Telecom private operators had to offer a package that for the vast majority of schools comprised interconnection with France Telecom's local telephone network, long-distance data transmission and Internet access, and, second, from the fact that France Telecom's charges for interconnection with the local network were higher than what the firm had offered the Government for all Internet access services for schools on a flat-rate basis of 1900 hours of connection per year and per school.

The Council, noting that the Telecommunications Regulatory Agency had itself issued an unfavourable opinion on France Telecom's offer, found AFOPT's referral admissible and stated that it could not be ruled out that France Telecom's package, as outlined above, might constitute an abuse of dominant position in local telephony covered by the 1986 Ordinance and the EU Treaty of Rome. In addition, the council held that the existence - if established - of practices apt to eliminate all competition in providing schools with Internet access would be a particularly serious matter. It also noted that the Minister of the Economy, Finance and Industry and the Secretary of State for Industry had expressed their willingness there to be competition.. In light of the fact that the Government's Programme of Action called for the initiation of a dialogue at Schools Board meetings before the summer 1998, the Council deemed that the situation was an emergency requiring the adoption of temporary measures : the Council therefore enjoined France Telecom to suspend the application of its proposed pricing until it offered long-distance telephone operators specific and non-discriminatory conditions for interconnection with its local telecommunications network for Internet access for schools. Since then, the various operators have reached a solution satisfying all the parties, including the Ministry of the Education which has retained its best offer prices.

#### **d. merger control**

**This is the last area where competition authorities may have an important and complementary role to sectoral regulatory authorities. In a very recent case, the Competition council has had an opportunity to advise EDF to follow a number of undertakings taking into account its peculiar position on the relevant market on which the absorbed company was operating.**

[ summary of the case ]

#### **Conclusion**

**The dominant system of gradual opening to competition in the EU is clearly a system where there is an overlap as well as a coordination in competencies from a competition policy enforcement point of view between sectoral regulators and independent competition agencies. At the Community level chiefly political decisions on the framework on deregulation and decisions on the enforcement control are being taken on structural aspects. It is also clear that matters of harmonizing national laws are determined by the Council rather than the European Commission but the Commission still has a major role: the Commission initiates proposed legislation and clearly needs to take very careful account of the desires and requirements of each member state's own particular regulatory environment. More generally speaking, the Commission tends to favor an approach where competition policy usually should be universal in scope and application and that any exceptions to that, and there have been some, should be carefully thought out. But it is ultimately the European legislator (i.e. the E.U. Council and the national governments and parliaments) which choose the most appropriate form of regulation. Whether or not the Member States choose to regulate certain industries by sector specific regulation or by enhancing or extending the powers of the competition authorities or by combining the two approaches is essentially a matter for them.**

**As we have seen in the French case, the mixed approach has been retained. One thing is certain though in an economic integration perspective: the Treaty of Rome has set a framework for competition policy applicable both to companies and public authorities and has been imposing a whole series of specific and general requirements on the latter. There is a general requirement that Member States and their subordinate authorities should do nothing which impedes the achievement of the Treaty objectives. This means, for example, that no national authority, at whatever level, can approve behavior which would be contrary to the competition rules of the Treaty of Rome.**