Updated in December 2006[†]

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France[*]

– Dr François Souty[†]

France is located in Western Europe bordering the Bay of Biscay and the English Channel, between Belgium and Spain, southeast of UK; bordering the Mediterranean Sea, between Italy and Spain.

Despite the fact that France emerged as a victor in World War I and II, it underwent widespread losses in term of its wealth, manpower and empire. Since 1958 France has built a presidential democracy, which was more resistant of instabilities experienced during parliamentary democracy.

From the 1990s to the 2000s, France has been at the forefront of efforts to develop economic integration in the EU in several industrial sectors, such as aircraft manufacturing and other high tech goods, some of which are said to have contributed to develop military capabilities to supplement progress toward a common EU foreign policy.

PROFILE	
Population:	59.8 million***
GDP (Current US$):	1.8 trillion***
Per Capita Income: (Current US$)	24,730 (Atlas method)*** 26,920 (at PPP)**
Surface Area:	551.5 thousand sq km
Life Expectancy:	78.9 years**
Literacy (%):	99 (of ages 15 and above)**
HDI Rank:	16***

Sources:
- World Development Indicators Database, World Bank, 2004
- Human Development Report Statistics, UNDP, 2004

(**) For the year 2002
(***) For the year 2003

Economy

Economy in France is in the stage of transformation from an economy characterised by extensive government control to one that relies more on market forces. While the Government has partially or fully privatised large companies and various sectors, such as banking and insurance, it retains controlling interests in listed companies such as Air France, France Telecom, Renault and Thales.

Also, the Government is dominant in some other sectors, particularly power generation, public transport and defence industries. The telecommunications sector is gradually being opened to competition. However, one should not discount the fact that some major global operators have always been private especially in service sectors, such as water and environmental utilities or banking (Veolia, Suez-Lyonnaise, *Société Générale*) and that they remain so.

Competition Evolution and Environment

The initial Competition Law foundation was laid down during Revolution to control cartels. The *Le Chapelier Law* of 1791 contained a provision that barred members from the same trade community to assemble for the purpose of promoting their 'common interest'.

In 1810, the Penal Code prohibited any concerted act to manipulate prices that could distort free competition. This prohibition, under Article 419, remained in force until the first half of the 19th century after which courts in France, like those elsewhere in Europe, distinguished between good and bad cartels and found few of the latter that deserved sanctions.

The law was amended in 1926 to incorporate the provision to weaken Article 419 prohibition. At the World Economic Conference in 1927, the French delegation presented a cartel control plan. However, France did not adopt competition legislation at that time.

Amendments to price control laws and the Napoleonic penal code were made in the post-war period. A 1945 Ordinance made refusal to deal, price discrimination, and some other practices unlawful. The parliament tried to pass a general Competition Law in 1953, but failed to agree on a text. Instead, the Government issued a decree, implementing the 1945 Ordinance. This decree applied

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only to joint action, not to a single-firm conduct, and it was still tied to effects on price.

In the wake of the adoption of Treaty of Rome, which created a competition law and policy for the European Economic Community, further additions to the decree were made in 1963 to cover abuse of dominance. However that power was not used until the late 1970s. The link to effects on prices was removed in 1967.

The ultimate decision-making authority rested with the Minister of Economic Affairs and Finance. An expert body '*Commission technique des ententes'* was formed under 1953 decree. This body was responsible for investigating alleged violations and advising the ministry about what ought to be done. This body had no power of judicial enforcement.

Major changes to strengthen the competition law framework began in the late 1970s. Price controls were cut back and changes were made to provide for fines and injunctions and most importantly, providing for merger control. Role and powers of the 'technical' Commission were expanded and it was renamed as *Commission de la concurrence* in 1977.

With an acceleration of market integration in EU in the mid-1980s, the Government changed its policies towards promotion of competition by curtailing controls. The Minister of Finance and Economy appointed a committee of experts to study and work out options to build a stronger Competition Law framework. The resulting legislation, the 1986 'ordinance' on competition and freedom of prices, abandoned administered pricing, marking a fundamental change.

The "ordinance" tried to make competition law enforcement independent, by upgrading the *Commission de la concurrence* to the *Conseil de la concurrence*, a quasi-judicial independent body, with powers to initiate proceedings, issue orders, and impose fines on its own. France's commitment to competition policy was mainly revealed through the 1986 legislation.[1] At the same time, an effective merger control regime was created but the powers still remained with the Minister of Finance and Economy.

Competition Law

On May 15, 2001, the French Parliament adopted the New Economic Regulations Law, which was designed to modernise French business law in several areas, including competition law. This reform strengthened the efficiency of French antitrust rules by introducing substantial amendments to the ordinance of December 01, 1986. It introduced the given measures:

- Powers to punish abuses in the relationship between suppliers and distributors;
- Heavier sanctions for cartels and abuses of dominance, combined with a leniency programme; and
- French merger control procedure was harmonised with the EU regime.

France's competition law more or less follows the EU model and principles about restrictive agreements, dominant firms, and mergers. There are some variations, though. For instance, until the early 2000s, exemption could be granted for dominant companies that could be seen as abusing such a position.

France's regime has somehow remained more prohibitive until 2001 on restrictive practices and vertical restraints e.g. on resale price maintenance issues, franchising networks have often faced stronger enforcement under national law than under EU Law. On May 01, 2004, EU Regulation No: 1/2003 entered into force bringing major changes in the way the French Law has been functioning. Among others, the *Conseil* is a member of the 'European Competition Network' or ECN.

The new system, *inter alia*, allows the EC to directly pre-empt, in principle, the treatment of a case if it thinks that it is not being properly treated by a national competition authority, such as the *Conseil*. The entry into force of the EU Regulation No. 1/2003 considerably modifies the evolution of the French system towards a strengthened integration in the EU system. In 2005, it can be said that French competition law is completely harmonised with EU law on substance, although it still differs on some technical, institutional, procedural and sentencing issues.

For instance, in case of leniency, French system is in line with the EC one but its scope of application is broader and its approach more flexible. A notice issued by France's Competition Council in April 2006 mentions that the French leniency system is not limited to secret cartels and could cover all horizontal restrictive agreements. Further, the council may ask a leniency applicant to continue its involvement in the alleged practice, in order to maintain confidentiality and not to jeopardise investigation measures. Before publication of this notice, only a law and an implementation decree provided for leniency in France, which was not detailed at all. This notice outlines detailed rules in the programme.

Institutions and its Competencies

Two bodies are responsible for application of competition law. One of them, The Directorate-General of Competition, Consumption and the Repression of Frauds (DGCCRF), is within the Ministry of Economy, Finance, and Industry, and thus is part of the system of public administration that is subject ultimately to the administrative law jurisdiction of the *Conseil d'Etat* (Administrative Supreme Court). The DGCCRF can be seen as the main preliminary investigating body as well as the chief advisor to the Minister on merger issues. The other, the *Conseil de la concurrence*, is a collegial decision-maker, judging on cases, with the status of an independent administrative authority, that is subject

1 www.conseil-concurrence.fr

ultimately to the civil law jurisdiction at the *Cour de cassation* (Civil Supreme Court).

Anticompetitive Practices

Horizontal Agreements: Agreements that have the purpose or the possible effect of preventing, restricting, or distorting competition are prohibited. The general prohibition does not distinguish between horizontal and vertical agreements, nor does it prescribe in its own terms any rules of *per se* illegality. The Law sets out four characterisations of the prohibited tendencies: limiting access to a market or free competition by others; creating obstacles to setting prices by market forces (making them higher or lower), limiting or controlling output, outlets, investment, or technical progress; and dividing markets or suppliers.

The law does not prohibit an agreement (or other conduct) that has the effect of ensuring 'economic progress', provided that a fair share of benefits must go to customers and competition must not be eliminated for a substantial part of the market.

***Vertical Agreements*:** The same statutory language applies to vertical agreements. The intent and effect of agreements among parties at different stages of the distribution system is often to support competition rather than hinder it. Thus, for some years, the *Conseil* has been taking a more tolerant approach to vertical restraints such as selective or exclusive distribution or franchising, being concerned principally about the extent of market foreclosure and cumulative effects. If competition persists, the *Conseil* is likely to find that there is no restraint.

***Abuse of Dominance*:** In addition to the general rule against abuse of dominance, abuses related to price are also treated separately. Abusive exploitation of a dominant position, in the French market or a substantial part of it, is prohibited. The statute provides a non-exhaustive list of particular examples of abuse: refusal to deal, tied sales, discrimination, and imposition of unreasonable commercial conditions. Another part of the competition law reserves the power to control monopoly prices by decree, after consulting the *Conseil* but without the need to go through the enforcement process.

A separate article prohibits predatory pricing *per se* through prohibition of prices that are excessively low with respect to costs of production, processing and marketing and that have the purpose of eliminating a firm or product from the market or of preventing entry.

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

Sectoral Regulation

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

Box 73.1: Council's Unusual Order Overturned

The Paris Court of Appeal has suspended an unusual remedy employed by the Competition Council. It means the advertising firm Decaux will no longer have to send a letter apologizing to customers.

Earlier in the year the council found Decaux in breach of various remedies imposed in 1998. It ordered the firm, among other things, to write to its clients - mainly local authorities - informing them of the council's findings. It also fined Decaux the hefty sum of €50 million.

Afterwards Decaux asked the appeal court to relieve it from aspects of the ruling. The court has now agreed, at least on the mailing point. It said such a mailing would have "manifestly excessive adverse effects" on the company's reputation and would threaten its ability to create long-term contractual relationships with its clients.

Source: Global Competition Review, September 2005

Telecommunications Sector

Creation of an independent administrative authority to regulate entry and competition in the telecommunications sector was the consequence of opening up to competition a sector that was previously a legal monopoly. Opening up this market with its very high entry barriers required specific regulation to supplement common competition law, in order to encourage the entry of new players and further competition. In addition, the technological factors and cost structures that led naturally to a monopoly situation did not disappear with the opening of the market.

Box 73.2: Heavy Fines Imposed for Price-fixing

Thomson, a manufacturer of electrical household appliances and its distributors (Fnac, Darty, Euromarche, Connexion, Camif and Conforama), were found guilty of price-fixing practices. The prices of Thomson products sold by Camif (a mail-order business) were fixed between the parties prior to the printing and shipment of the Camif catalogue. Similar practices were followed by Akai.

Further, a close investigation showed that vertical agreements had been concluded between Akai and distributors Fnac, Darty, Connexion and Conforama on retail sale prices, leading to identical pricing.

The Competition Council penalised Thomson by imposing a fine of €34mn. Since Akai was declared bankrupt, no penalty was imposed.

Source: www.internationallawoffice.com

Hence, the Telecommunications Act dated July 26, 1996 created the Telecommunication Regulatory Authority (ART) with an independent five-member executive board, whose task is to:

- foster competitive entry of new operators for the benefit of users;
- monitor the provision and financing of universal service in the framework of a public telecommunications service;
- monitor development of employment, innovation and competitiveness in the telecommunications sector; and
- take into account the interests of regions and users in terms of access to service and equipment.

Consultation between ART and the *Conseil* about competition issues and cases is mandatory in both the telecom and the competition laws. There is no formal protocol or agreement between ART and the Council about allocating jurisdiction, because the telecom law envisions a clear distinction between their powers. Some types of industry disputes might be taken to either body for decision. In principle, access and structural matters are handled by ART and behavioural aspects fall within the *Conseil*'s sphere.

Electricity Sector

Electric power in France was until recently an integrated, state-owned monopoly. The opening of the monopoly of electricity in France results from the application of the law of February 10, 2000 relating to the modernisation and the development of the public utility of electricity. It was modified by the law of January 3, 2003 relating to the markets of gas and electricity and the public utility of energy.

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, towards open, competitive electric power markets. In 2002, the extent of France's market that was declared open, at 30 percent, was the lowest in Europe. Despite the non-competitive market structure, though, power prices in France have not been unusually high, nor low, compared with other European countries, and the estimated network charges appeared to be about average.

The regulatory authority, the *Commission de Regulation de l'energie* (CRE) is an independent administrative body, governed by the laws of February 10, 2000 and January 03, 2003. It is the regulatory body for opening up the gas and electricity markets to competition. It is responsible for ensuring non-discriminatory, transparent third-party access to the transmission system.

CRE powers are exercised in conjunction with the *Conseil*. If CRE encounters conduct that amounts to abuse of dominance or a restrictive agreement, it is to transmit that to the Council, because CRE is not competent to decide such behavioural matters itself. Conversely, the Council is to refer disputes concerning access or structure in the energy sectors that do not amount to competition law violations to CRE.

Banking and other Financial Services

The banking sector is not exempted from the competition law as far as behavioural issues are concerned. But on structural matters the *Conseil* must coordinate its actions

Box 73.3: France Telecom and SFR Fined by Competition Council

France Telecom (FT) and SFR are integrated operators in the French fixed and mobile telephony markets. They were found to have used price scissoring practices between 1999 and 2001.

The Competition Council ruled that where an operator which sets both the retail price on a market and intermediary service price paid for access to the market does not include sufficient difference in prices to cover additional costs incurred in supplying the retail service, other operators may be excluded from the market. Criticising both operators for making price cuts between 1999 and 2001, which were aimed at medium and large companies that could not cover the costs of providing such services, the Council considered that the practices had hindered market competition.

FT and SFR set tariffs for landline to mobile calls between April 1999 and January 2001 that did not cover the variable costs incurred for benefits, including the call termination charges, practised by their respective mobile telephony divisions. Therefore, FT and SFR were found to have distorted competition on the downstream market for calls from fixed networks to mobiles. This practice is prohibited under Article L420-2 of the French Commercial Code.

Given that France's Telecom's 2003 turnover was over €19.2bn, the Competition Council fined it €18 mm. SFR's 2003 turnover in France was almost €6.6bn and the Council fined it €2mn.

Source: www.internationallawoffice.com

in this sector with the sectoral regulator. Complaints must be communicated to the Banking Commission and to the *Comité des établissement de credit et des enteprises d'investissement* (CECEI). If the Competition Council decides to impose sanctions, and in doing so it does not follow the advice of the Banking Commission, it must explain its reasons for departing from that advice.

Bank mergers are now subject to the usual competition policy review (Minister of the Economy's review). Before August 2003, they were not subject to control by the Minister, but instead only to the review of the banking regulator.

Consumer Protection

The Directorate-General of Competition, the Consumption and the Repression of Frauds

The Directorate-General of Competition, the Consumption and the Repression of Frauds (DGCCRF) exerts, within the Ministry for the Economy, of Finances and Industry, an essential mission of regulation with regard to the whole of the economic spectrum: companies, consumers and local councils. DGCCRF has a number of direct consumer protection functions, covering fraud, deception, distance sales, door-to-door sales, pricing and discounts.

The safety of the consumers is one of the constant concerns of the authorities and an essential mission of the DGCCRF, which often acts in this field in partnership with other service and organisations of the State. The creation of specialised agencies, such as the French Agency of Medical Safety of Food (AFSSA) and the French Agency of Medical Safety of the Products of Health (AFSSAPS) makes it possible to appreciably improve the evaluation of risks.

DGCCRF has the policy of constant interaction with public through physical meetings, telephone, Internet and mails.

The Competition Council does not have direct consumer protection functions, but there has always been a representative of a consumer organisation among its members, and cases motivated by consumer-level concerns are welcomed. Consumer groups can bring complaints to the Council. Private consumer organisations are active and well organised to participate in cases and policy-making.

Consumer Safety Commission

The CSC is an independent organisation in France. It was set up in 1983 to improve consumer safety. The 'Commission de la Sécurité des Consommateurs' captures the number of accidents and collects reports on dangerous products. Its objective is a reduction of accidents in everyday life.

Institute of Health Protection

The Institute of Health Protection was founded in July 1998 as a public institute, reporting to the Ministry of Health. It performs research and interventions in the field of epidemiology and risk evaluation. The mission of the organisation is constant surveillance of the population to safeguard its health.

Concluding Observations and Future Scenario

After the entry into force of the EC Regulation No: 1/2003 revolutionising antitrust enforcement within the EU notably by the creation of the ECN, the *Conseil de la concurrence* as well as EC will focus on the prosecution of infringements on the basis of complaints, leniency applications and *suo moto* investigations.

It is, therefore, particularly important to be increasingly aware of market dynamics and performance, sector peculiarities and obstacles to competition. The recent EC Communication: 'A pro-active competition policy for a competitive Europe' already portrays what the future may bring as regards sectoral studies, sectoral inquiries and market investigations.

Another challenge is to ensure the determined and consistent implementation of the reforms. The *Conseil de la concurrence* as well as the EC should remain vigilant to the need to constantly ensure the objectivity of their investigation process, and of the need to re-assure the outside world that they are indeed regulators of unimpeachable integrity and objectivity. In this regard, the French competition law system is being driven into an increased harmonisation with the EU Law, although national legal features have not yet disappeared, mainly with respect to regular institutional enforcement, procedural or sentencing matters.

Suggested Readings

1. www.internationallawoffice.com
2. OECD paper on Regulatory Reform, *2004*
3. France Competition Policy Newsletter, *Number 3 – Autumn 2004*

French Court upholds Record Fine

Paris's Court of Appeal has rejected an appeal by three mobile telephone operators against a record fine imposed on them by French Competition Council.

The Court agreed that Orange France, SFR and Bouygues Télécom were guilty of cartel activity, and supported the level of penalty imposed. They were fined a total of €534 million by the council in 2005 for exchanging confidential client information, and forming non-competitive agreements to maintain their market shares. The fines were: Orange France, €256mn; SFR, €220mn; and Bouygues Télécom, €58mn.

An investigation was launched after consumer groups drew attention to similarities in the companies' pricing policies, and to their market shares, which had remained almost unchanged between 1997 and 2003.

(Source: Global Competition Review, 12.12.06)

Follow Germany, Lawyers tell French Enforcers

Competition specialists have responded to a report by French Finance Committee by calling for a complete restructuring of the country's enforcement machinery. In a review of the financial challenges facing France's Competition Council, the committee proposed emulating Germany's system, where all competition enforcement functions fall to one authority.

Competition law enforcement powers in France are split between the Competition Council, which oversees litigation and delivers antitrust rulings, and the Directorate for Competition, Consumer Affairs and Fraud Prevention, which handles investigations. The Ministry of Finance has the final say on mergers. Although such reforms would create a more independent and cohesive authority, the subject is a sensitive one in France. According to the sources, not only would the merger lead to job losses, but it would also result in a struggle for supremacy between France's two authorities to decide which one remains. The Committee published its report on October 12, 2006.

(Source: Global Competition Review, 22.11.06)

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(Source: Global Competition Review, 22.11.06)

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