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**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Contribution by the French Autorité de la Concurrence --

**17-18 December 2014**

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*Other documents related to this discussion can be found at [www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm](http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm)*

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## CONTRIBUTION BY THE FRENCH AUTORITÉ DE LA CONCURRENCE <sup>1</sup>

1. The process of institutional evolution of competition regulation in France has undergone some decisive advances in recent times, extending the range of its remits and establishing its independence. The implementation of this system of regulation in France has progressed effectively over a period of time which, while maybe longer than in other States with comparable economies, has allowed time for age-old scepticism to abate on the part of both public authorities and French citizens as to the advantages of competition. For all that, it is noteworthy to observe that this evolution has undergone a continuous evolution, with no u-turns or backward steps: successive governments, whatever their political colours, have step by step slowly increased the powers devolved to the competition regulator, as well as its autonomy in determining its actions.

### **1. Overview of institutional changes that have occurred since the start of competition regulation in France, from the point of view of the regulator's relations with the public authorities.**

#### ***1.1 Identification by the government of the need for expertise on competition regulations***

2. The first movement towards autonomy in competition regulation came in response to the awareness of a need for specific expertise, justifying the creation of a "specialist unit" of experts in competition law.

3. The emergence of competition as an issue distinct from economic regulation, even within the context of an administered economy in the immediate post-war years that was characterised by the maintenance of price controls, led to the establishment in 1953 of a *Commission technique des ententes* ("Concerted Practices Commission").

4. Decree no. 53-704 of 9 August 1953 on the maintenance or reestablishment of free industrial and commercial competition, sometimes known as the "anti-trust decree", added further provisions on unlawful concerted practices to Ordinance no. 45-1483 of 30 June 1945 on prices and created the Concerted Practices Commission. It set out a statutory ban on "*concerted actions [...] aimed at, or which might have the effect of, hindering competition by creating obstacles to any decrease in retail or sale prices or encouraging artificially inflated prices.*" Cases identified by the *Direction générale des prix* ("Directorate General of Prices") and economic surveys would give rise to an administrative enquiry, as part of which the Minister of the Economy could refer to the Commission. The latter would draw up an opinion for the Minister's attention and he in turn, would decide whether to fine the parties involved or pass the file on to the criminal courts.

5. A 1963<sup>2</sup> law then extended the Commission's remit to cover abuse of dominant position, and renamed it the *Commission technique des ententes et des positions dominantes* ("Concerted Practices and Dominant Practices Commission"). Although full independence for the commission had not yet even been

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<sup>1</sup> The Autorité de la concurrence is an independent authority and the opinions expressed in this contribution are its own personal ones.

<sup>2</sup> The Amended Finance Law (*Loi de finances rectificative*) 63-628 of 2 July 1963 on maintaining economic and financial stability.

discussed, the notion of making competition regulation autonomous was beginning to take shape in the institutional landscape, with requirement for informed recommendations to be drawn up by a specialist, collegiate body.

6. Acknowledgement of this expertise was again affirmed by the 1977<sup>3</sup> law which replaced the previous body with the *Commission de la concurrence* (“Competition Commission”), and asserted its double advisory capacity with the executive: advising government on all competition-related matters and, for the first time, expressing opinions on mergers and planned mergers – although all these consultative powers were exercised without publicity.

## **1.2 The competition regulator became autonomous under the Ordinance of 1 December 1986**

7. The next, particularly decisive step in this process was the gradual acquisition of real independence on the part of the competition regulator; the result of a conceptual breakthrough leading to liberalisation of prices and adoption of the principle of freedom of competition.

8. In the context of the transition to a real market economy, Ordinance no. 86-1243 of 1 December 1986 on freedom of prices and competition brought an end to price regulation and also saw the establishment of an independent body for competition regulation with decision-making powers: the *Conseil de la concurrence* (“Competition Council”). Companies could refer directly to this body and it could take legal action on its own initiative, impose injunctions and fines and make recommendations to the public authorities – including with regard to draft legislative or regulatory texts. Its recommendations were now of a public nature. In order to highlight the institution’s independence from the executive and the desire, for the sake of consistency, to acknowledge the competence of the court with the greatest interest in this matter, monitoring of the *Conseil*’s decisions was entrusted to the civil and commercial court (Paris Court of Appeal) and not the *Conseil d’État* (French administrative supreme court), the natural judge of the administrative authorities.

9. Fifteen years later, over which time jurisprudence had incorporated competition law into the regulations governing administrative acts<sup>4</sup>, Law 2001-420 on New Economic Regulations (“*Loi NRE*”) of 15 May 2001, marked a further advance; increasing the *Conseil de la concurrence*’s powers, its budgetary autonomy (essential if it was to be genuinely independent) and its internal expertise.

10. As regards its powers and responsibilities in antitrust matters, the ceiling for sanctions for anti-competitive practices was raised and both a leniency programme and a settlement programme introduced. The fundamental institutional evolution lay in the fact that a clear separation was made between the functions of the investigation department on one hand and the decision-making body (the Board) on the other. This took place following jurisprudence from the *Cour de Cassation*<sup>5</sup> which, demonstrating far-reaching acceptance of the requirements of Article 6.1 of the ECHR in matters of the right to a fair trial, held that a rapporteur working for the *Conseil de la concurrence*’s investigation departments could not participate in the discussions of the Board members. The *Conseil de la concurrence* took further action in the form of a reorganisation of its departments. At the same time the *Loi NRE*, by incorporating this separation of roles into positive law and requiring all investigation to be carried out under the authority of the General Rapporteur, went well beyond the approach recommended by the *Cour de cassation*.

<sup>3</sup> Law no. 77-806 of 19 July 1977 on Control of Economic Concentration, the Repression of Concerted Practices and Abuses of a Dominant Position

<sup>4</sup> *Conseil d’État, société Million et Marais*, 3 November 1997

<sup>5</sup> *Cour de Cassation - Commercial*, 9 October 1999, SNC Campenon Bernard et al.

11. In the area of merger control, a very substantial change took place resulting in what has now become the norm: the obligation to give prior notification to the Minister of the Economy. The Conseil de la concurrence's role in control consists of carrying out an in-depth examination: when it considers that the commitments proposed by the parties are insufficient to satisfy the identified competition concerns, the Minister has an obligation to refer to the Conseil for its opinion. *Ex ante* systematic control has gone hand in hand with a significant lowering of notification thresholds: these combined measures are powerful innovations in terms of introducing greater transparency about the evolution of players' positions on the market and providing the competent authorities with the means to take timely action in relation to operations that are liable to restrict competition. These measures also highlight the dividing line in the examination process, between the roles of the executive and the regulator respectively. The French merger control system has thus come closer to the model that predominates in continental Europe, based on obligatory *ex ante* notification of merger operations providing control with suspensive effect.

12. As regards budgetary autonomy, along with "*Loi NRE*" of 2001, reform was carried out over several years, enabling the clear identification of the human resources available to the Conseil and conferring management of the latter to its President. Budgetary posts are no longer entered against the credit of the central administration, since they fall within the scope of the Conseil de la concurrence's own budget chapter.

13. Finally, over the same period, the Conseil de la concurrence strengthened its internal expertise by creating specialist departments: the "legal unit", "economic unit" and communications department. It was now in a good position to assume more extended competences.

### ***1.3 The profound institutional reform brought by the Modernisation of the Economy Act of 4 August 2008***

14. The last stage of this progression in terms of achieving the full unification and independence of competition regulation consisted in the major reform implemented by the Modernisation of the Economy Act 2008-776 ("*LME*") of 4 August 2008, a short time later supplemented by Ordinance no. 2008-1161 of 13 November 2008 on the modernisation of competition regulation. This was greatly inspired by the conclusions of the Commission for the Liberation of French Growth, chaired by Jacques Attali, with other notable members including Mario Monti, the former European Commissioner for Competition, and the President of the Conseil de la concurrence, Bruno Lasserre.

15. This radical rethink was pushed through at top speed, with the Commission submitting its report to the President of the Republic in January 2008, the law containing the main changes to the organisation enacted in August 2008, and the Ordinance that supplemented it some three months later. As a result, the Conseil's successor, the new Autorité de la concurrence, was in operation on 2 March 2009.

16. This new body brought an end to the two-pillar system that had prevailed since the origin of competition regulation in France and led to a major improvement in quality in terms of independence, extending the Autorité's powers while also strengthening its responsibility. Merger control was transferred from the government to the independent regulator, and in doing so brought France into line with the systems in place across almost all the European Union Member States. The Autorité de la concurrence was awarded powers of investigation with autonomy from the central authorities and became responsible for dealing with the whole chain of anti-competitive practice, from detection to the investigation of specific cases. Investigation would either be carried out through the direct monitoring of competition and examination of evidence by the Autorité's investigation service, or the General Rapporteur would take on investigation projects submitted to it by the French Directorate General for Competition, Consumer Affairs and Repression of Fraud ("*DGCCRF*") or take legal action on the basis of the results of its investigations up to and including the decision.

17. The Autorité was already able to self-refer in litigation matters, but it now had the power to decide for itself whether to use its advisory power, allowing it to establish its own priorities for action and provide diagnoses and recommendations in the areas it could decide were the most useful.

18. This short overview likewise highlights that in contrast with the problems of “multifunctional” authorities which in recent times have been given the task of regulating one or several sectors of the economy in addition to their competence in the area of competition, the Autorité’s role has always been focused exclusively on the defence of competition rules, gradually becoming a hub where all expertise on this subject, and this subject alone, is gathered, quite separately from the consumer protection role exercised by the government.

## **2. Consolidation of the Autorité’s independence has enabled the deployment and enhancement of its expertise.**

### ***2.1 The control of merger operations by the Autorité de la concurrence***

19. With regard to this aspect of competition policy, the LME’s main objective was to establish a clearer and more effective distribution of powers and responsibilities between the independent authority (to whom merger control had been entirely devolved on the basis of its track-record in competition matters) and the executive power, for whom a coordination mechanism was implemented so that policy makers could resume control if the strategic interests of the country were ever at stake.

20. In practice, the LME transferred all stages of merger control to the Autorité – from notification of planned merger operations to the monitoring of the implementation of commitments, including in-depth or fast-track substantive examination and the adoption of a final decision, subject if relevant to oversight by the courts. At the end of the process, the Minister of the Economy has the power to transfer to itself any cases that may have a strategic dimension, and having heard the parties, may replace the Autorité’s decision with its own, made publicly and with the provision of due grounds. However, the latter scenario would only arise where reasons of general interest were at stake (national security, public health, etc.) and would not call into question the competition analysis carried out by the Autorité. To date this power has never been used.

21. The achievements of this reform are evident; by concentrating resources and skills in the regulator’s hands, it succeeded in detaching the examination carried out from any political interference.

22. At the time when it was enacted, this evolution demonstrated little originality in terms of the landscape of merger control within the European Union; indeed, the dual organisation that had predominated until then had become the exception – by 2008 France, along with Malta, was the last State where it existed. At the time this structure meant that a competition review, followed by an economic and social review, were carried out successively by the Minister of the Economy. In simple cases, the Minister would act alone, but for cases deemed more complex the Conseil de la concurrence would in principle provide him with clarification. The practice “*did not however reflect the sharing of roles envisaged by law*”<sup>6</sup> since the number of files submitted to the Conseil decreased over time, from 12 in 1993 to 2 in 2007. In fact, the examination of the general process of merger review was affected by this blurring of roles and, as a result, its credibility tainted by suspicion; the Minister’s analysis was perceived as liable in part to having a basis in non-competition related considerations – a difficulty that had been expressly highlighted by the Commission for the Liberation of French Growth<sup>7</sup>.

<sup>6</sup> Report of the Commission sur la libération de la croissance française (Commission on French Economic Growth), p.140

<sup>7</sup> Ib.

23. This unification of merger control in the hands of a single independent regulator also kick-started the practice of the referral cases from the European Commission to the national competent authority, on the basis of Article 5, paragraphs 4 and 9 of Regulation no. 139/2004 on Mergers. The number of files referred each year by the Commission to the French authority has grown considerably from 2009 with a total of 17 referrals since then, including five in 2014 alone, when prior to this only 3 cases had been referred for the five years preceding the transfer of powers to the Autorité.

24. The Autorité has even greater independence in the control of merger and acquisition operations in terms of the commitments that companies make. Creativity in defining these remedies and the rigorous enforcement of their execution have been a central aspect of the system's credibility and effectiveness. This is an area where the Autorité can really use its power to prioritise its activity: designing the corrective measures required to address the competition concerns identified, and ensuring that they are respected, using sanctions if necessary.

25. Since the start, the Autorité has been open to the possibility of accepting behavioural commitments, but at the same time has paid close attention to a clear definition of how such commitments will be implemented, in order to guarantee the effective and verifiable nature of their execution. Indeed, three quarters of the 45 decisions made by the Autorité since 2009 have granted authorisation subject to the implementation of commitments involving, exclusively or predominantly, changes of conduct.

26. The competence now devolved to the Autorité to monitor commitments allows it to ensure that they are effectively implemented. This is a cornerstone of ensuring the full lawfulness of a merger operation and the Autorité has the power to take action ex officio in case of failure to comply. The credibility of the control exercised by the Autorité is thus backed by its rigorous application of sanctions, as authorised by law, for any breach of obligations related to merger control.

27. As a result, the Autorité has imposed fines for the breach of the obligation to notify an operation<sup>8</sup>, or for failure to respect commitments to which a merger operation was subject<sup>9</sup>.

28. The acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus provided a particularly good illustration of the Autorité's vigilance; in a decision of 20 September 2011, it withdrew the authorisation granted by the Minister of the Economy on 30 August 2006, because the parties had failed to respect the full set of commitments to which it was subject. The operation was notified again on 24 October 2011, and the Autorité authorised it on 23 July 2012, subject to the respect of measures aimed at restoring sufficient competition on the pay-TV markets<sup>10</sup>.

## **2.2 Practice of the advisory function, at the heart of the range of instruments available for competition regulation:**

29. Affirmation of the independence of the Conseil, then the Autorité, has always gone hand in hand with its advisory role; the 1977 law allowed the Concerted Practices Commission to advise the government on any question related to competition, while the 1986 Ordinance marked the advent of the Conseil de la concurrence's power to make recommendations to the public authorities. This includes recommendations

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8 Decisions 12-D-12 of 11 May 2012, 13-D-01 of 31 January 2013 and 13-D-22 20 December 2013 on the situation in relation to section I, Article L. 430-8 of the French Commercial Code of the Colruyt group, the Castel group and Réunica and Arpège groups

9 Decision 12-D-15 of 9 July 2012 regarding respect of the commitments set out in the decision authorising the takeover of Socopa Viandes by Groupe Bigard

<sup>10</sup> Decision 12-DCC-100 of 23 July 2012 regarding the acquisition of sole control of TPS and CanalSatellite by Vivendi and Groupe Canal Plus

on draft laws and regulations. The *Loi LME* of 2008 completed this trend by granting the new Autorité de la concurrence the power of self-referral in advisory matters.

30. The advisory role is an instrument that acquires its full scope in conjunction with the implementation of other components of competition regulation, as part of a continuum from ‘soft power’ to the imposition of sanctions. As far as companies are concerned, the Autorité’s recommendations are all the more credible as they know it has at its disposal a range of tough decision-making power. From the point of view of the public authorities, the Autorité’s role as competition advocate has likewise been strengthened by its adjudicative role because its decisions, on numerous subjects, for example the pricing policies of incumbent operators or access to essential facilities, have set the bar for subsequent recommendations.

31. The advisory role becomes more credible when, entrusted to an independent regulator, it forms part of the combined exercise of the full gamut of instruments of competition regulation.

32. The cumulative exercise of these different prerogatives leads to cross-fertilisation, allowing the competition regulator, in a one-tier system, to maximise the effectiveness of competition policy implementation. In this way relevant, credible means for addressing merger concerns can be designed on the basis of knowledge acquired during the procedure of defining commitments for areas such as abuse of dominant position, and vice versa. This is even more evident when it comes to the in-depth expertise and knowledge of a sector acquired from both exercising merger control and acting in an advisory capacity: opinions given at the request of the Ville de Paris on food distribution<sup>11</sup> in 2012 cast a light on the extraordinarily high level of concentration in the sector as well as the entry barriers that were structurally preventing new stores from entering the market at a local level. The same finding was made and subsequently investigated in more depth during analysis of the planned acquisition of sole control of Monoprix by Casino and the definition of suitable commitments<sup>12</sup>. Likewise, examination of the merger of the activities of the transport subsidiaries of the Veolia and Caisse des dépôts, Veolia Transport and Transdev groups<sup>13</sup>, was enhanced by what had been learnt during the sectoral investigation into public transport by road carried out by the Autorité at its own initiative, in particular with reference to the multi-modal aspect of urban and inter-city public transport<sup>14</sup>.

33. As an entity separate from the executive and not subject to its instructions, the Autorité has succeeded in becoming a government advisor perceived as being as trustworthy as it is independent; its opinion viewed based on no criteria other than its own analysis. The proof of this lies in the fact that its relationship with the public authorities in the exercise of its advisory role, five years on from the “Loi LME”, is particularly profound. The Autorité gives its recommendations to the public authorities in response to obligatory, or, in the vast majority of cases, voluntary referral. This attests to the trust the authorities place in the Autorité, and the interest of the public authorities of being able to turn to an independent expert. These opinions are an opportunity for the government to obtain an upstream analysis of the specific way a market operates and its effects on consumers (series of opinions in relation to the overseas territories<sup>15</sup>), to test interest in regulating a sector in light of an assessment of existing commercial

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<sup>11</sup> Opinion 12-A-01 of 11 January 2012 on the competition situation in the food distribution sector in Paris.

<sup>12</sup> Opinion of 11 July 2013 on the acquisition of sole control of the company Monoprix by the company Casino Guichard-Perrachon

<sup>13</sup> Decision 10-DCC-198 of 30 December 2010 on the creation of a joint undertaking by Veolia Environnement et la Caisse des dépôts et consignations.

<sup>14</sup> Opinion 09-A-55 of 4 November 2009 on the passenger land-based public transport sector

<sup>15</sup> Opinion 09-A-21 of 24 June 2009 on the competition situation in the fuel markets in the overseas *départements*; Opinion 09-A-45 of 8 September 2009 on the mechanisms for the import and distribution of

practices (e-books<sup>16</sup>), include expertise in competition matters at the stage of drafting laws (reform of the rail sector<sup>17</sup>), and draw up an appraisal of the competition situation in existing legislation (commercial planning).

34. The type of assistance and clarification provided to the public authorities is no different when the Autorité self-refers, however in this case the Autorité establishes its priorities and designates to the government the measures to be taken to improve market operation. This is generally in a sector that is of consumer interest or where it has significant weight in terms of the economy. Examples have arisen recently with two sectoral inquiries; one into the distribution of medicines<sup>18</sup> and the other into inter-city coach transport<sup>19</sup>. Both resulted in recommendations, some of which had specific outcomes in recent or current draft reforms: in the health sector, the sale in supermarkets or parapharmacies of “borderline” products (pregnancy tests, contact lenses products) and the development of the on-line sale of medications; in the transport sector, the end of restraints imposed by international cabotage and bill for the reform of the system of authorisation for regular interregional lines of transport by coach, etc.

35. Thus the government benefits immediately from the affirmation of the independence of the competition regulator, the enlargement of the range of its instruments and the subsequent expansion of its expertise.

### **3. The independence and expanded powers of the competition regulator required the establishment of stronger safeguards:**

36. The strengthened independence acquired and exercised by the Autorité in the course of the various institutional evolutions and in particular since *Loi LME* of 2008, accompanied by the deployment of its powers, has brought with it more demanding requirements in terms of its responsibility for accounting for its actions and guaranteeing the impartial treatment of the companies in relation to which its powers are being exercised.

#### **3.1 Independence from the executive and accountability to Parliament**

37. An immediate corollary of independence from the executive is the duty of accountability to the government.

38. This distancing from the executive is particularly reflected in how appointments are made. The President, the four Vice-presidents and the twelve non-permanent members of the board are appointed by decree of the President of the Republic, and the mandate for all members of the board is five years; these appointments cannot be revoked, except in exceptional cases strictly defined in the Commercial Code. The general rapporteur is still, as previously, appointed by decree of the Minister for the Economy however this is on recommendation from the board and no longer by proposal of the President of the Autorité.

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mass retail products in the overseas *départements*; Opinion of 3 February 2010 and 28 July 2010 on two draft decrees regulating the prices of oil and liquid petroleum gas products in the overseas *départements*

<sup>16</sup> Opinion 09-A-56 of 18 December 2009 on a request for an opinion from the Minister of Culture and Communication on digital books

<sup>17</sup> Opinion 13-A-14 of 4 October 2013 on the bill on railway reform

<sup>18</sup> Opinion of 19 December 2013 on the operation of competition in the sector of distribution of medicinal products for human use in private practices

<sup>19</sup> Opinion of 27 February 2014 on the operation of competition in the regular inter-regional market for transport by coach

39. In this area, the 2008 institutional reform was followed by the implementation of a radically new practice in France: under the terms of the new provision on the method of appointment of the President of the Autorité (organic law no. 2010-837 and law no. 2010-838 of 23 July 2010 on the application of Article 13.5 of the Constitution), his or her appointment by decree of the President of the Republic would only take place after a hearing before the economic affairs committees of the two parliamentary assemblies – the Senate and National Assembly – which could block it with votes against representing at least 3/5 of votes cast within the two committees. This appearance before the committees by the candidate whose appointment has been put forward for the role of President is when the draft mandate for the new period is formalised, and – without impinging on the Board’s powers in this matter – the institution’s priorities set out. It is also an occasion to educate the senators and deputies concerned in the role that the Autorité can play in ensuring public policies are in line with competition regulations. This outstandingly original procedure in the French institutional landscape attests to both the institution’s degree of independence and the extent of confidence required in order for the mission that its President commits to accomplishing to be useful.

40. More classically, the Autorité is required to submit an annual activity report to Parliament – an *ex post* assessment exercise that is public and accessible to everyone. However these legal and moral obligations are part of a broader framework of an ongoing dialogue: thus the Autorité reports to Parliament on average at least once a month. Parliamentary committees likewise refer to the Autorité for its opinion in the context of its advisory role (dairy sector<sup>20</sup>, *loi NOME*<sup>21</sup>, optical fibre network roll-out<sup>22</sup>, motorway sector<sup>23</sup>...).

41. It is again a counterpart of the independence acquired by the Autorité that it should provide its expertise to different branches of public authorities, both executive and legislative (and occasionally judicial) and in doing so carry out its role to educate on competition at the very start of the regulatory process.

### **3.2 Solid guarantees of independence and impartiality in relation to economic players**

42. This independence not only extends to political interference but also to lobbying and pressure exerted by economic players. In this area, the institutional reforms have made it possible to establish independence and impartiality as a dimension of the exercise of all the Autorité’s powers, whether contentious or otherwise.

43. The fact that the Autorité can exercise all the instruments of competition regulation, and only these, without being given the powers of a sectoral regulator by extension, has contributed to allowing it to remain at a distance from market players, and in return has provided them with a guarantee that they will be dealt with equitably. For the latter, additional assurance is implicit in the fact that the Autorité defends competition, rather than competitors, or even new entrants.

44. The strict separation of functions between the advisory and decision-making roles in procedures likely to lead to the imposition of a sanction is an essential characteristic of the way the Autorité is organised and provides parties with very strong guarantees of impartiality.

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<sup>20</sup> Opinion of 2 October 2009 on the operation of the dairy sector

<sup>21</sup> Opinion 10-A-08 of 17 May 2010 on the draft law on the new organisation of the electricity market

<sup>22</sup> Opinion 12-A-02 of 17 January 2012 on the framework of the participation of public authorities in the roll-out of very high speed broadband networks.

<sup>23</sup> Opinion 14-A-13 of 17 September 2014 on the motorway sector after privatisation of concession-holders

45. The decision to make it an administrative body is a historic one, affirmed in 1986 and made official in 1987 by the constitutional judge – who held that the Conseil de la concurrence is an “*administrative body*” and “*by nature non jurisdictional*”<sup>24</sup>. It is in this context that a set of guarantees was developed to safeguard the parties to the proceedings before the Autorité, based on a functional separation between the advisory and decision-making roles, within a single administrative authority.

46. It was essential for this administrative model of competition regulation to be in line with the criteria of equitable process defined in Article 6.1 of the CEDH. The national courts (both judicial and administrative) recognised that an administrative authority, while not constituting a jurisdiction, should be subject to the respect of guarantees that are attached to the jurisdictional role under the terms of this Article<sup>25</sup>.

47. The current organisation of the Autorité has, however, arisen from supplementary requirements established by French jurisprudence; the *Cour de cassation* made a more extensive reading of Article 6.1 CEDH than the Strasbourg Court with regard to the Conseil de la concurrence, holding that the rapporteur of the Conseil de la concurrence’s investigation services could not participate in the Board’s deliberations, even without the entitlement to vote<sup>26</sup>. The legislature, following the lead of the Conseil, brought in changes that took these consequences into account and, on the occasion of the 2001 *loi NRE* imported the principles of equitable process from the administrative arena – and not only at the time of judicial review. At the time of the reform brought in by the 2008 *loi LME*, at the end of a wide-ranging parliamentary debate, the legislature took the opportunity to reinforce the functional separation device – at the same time that this law brought in the status of independent administrative authority for the competition regulator for the first time in positive law. While the functional dissociation between investigation and decision-making did not constitute a guarantee required by the judge as being indispensable in terms of impartiality<sup>27</sup> this method of organisation was nevertheless chosen in order to make the equitable character of the procedure absolutely clear.

48. Full validation of the institutional structure’s compliance with the rules at the heart of constitutionality was given by the *Conseil constitutionnel* on the occasion of a double preliminary ruling on the question of the constitutionality of Autorité de la concurrence decisions within the framework of the merger between CanalSat and TPS (cf. supra), a challenge having been brought by these companies against the impartiality of the Autorité’s decision-making process. The *Conseil constitutionnel* found the legal provisions setting out the Autorité de la concurrence’s powers to be in accordance with the Constitution and held that its rules of deliberation and means of referral were in respect of the principles of independence and impartiality as applicable to the sanctioning power of independent administrative authorities, and confirmed the absence of “*confusion between the functions of prosecution and investigation and sanctioning-powers*”<sup>28</sup>.

49. This functional separation is embodied, in tangible form, in the Autorité’s actual operation: the President is responsible for authorising the Autorité’s expenses and the Autorité has a specific budget line, without fungibility in the budget of the Ministry for the Economy, while the general rapporteur is in charge of authorising the expenses of the investigation departments, on obligatory delegation from the President.

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<sup>24</sup> Decision no. 86-224 DC of 23 January 1987

<sup>25</sup> *Cour de Cassation* - Commercial, COB v. Oury, 5 February 1999; CE Didier, 3 December 1999

<sup>26</sup> *Cour de Cassation* - Commercial, 5 October 1999, above

<sup>27</sup> CE Didier, 3 December 1999, idem

<sup>28</sup> Conseil. Constitutionnel, decision 2012-280 QPC of 12 October 2012.

It is furthermore up to the general rapporteur to appoint the general deputy rapporteurs, the permanent and non-permanent rapporteurs and the investigators.

50. In procedural matters, while the Conseil de la concurrence had the possibility of making *ex officio* referrals, it is now the general rapporteur who makes such proposals to the Autorité. The general rapporteur oversees the progress of the investigations, manages any extensions to deadlines that may be granted, initiates simplified procedures and oversees respect of business confidentiality, among other things.

51. In more material terms, this means of organisation, combined with the collegiality that marks the functioning of the board, is a factor in the robustness of the Autorité's decisions. It allows fresh eyes to be cast on the case at the decision-making stage; the fact that there have been several dismissals and orders for further investigation attests to the tangible reality of functional separation. In terms of independence, this configuration is likewise likely to discourage attempts to apply pressure.

52. All in all, it seems that effective functional separation, within a single administrative authority covering the whole of the chain of competition regulation, under the control of a court with power of reform, is an appropriate way of ensuring that the parties concerned are guaranteed impartiality throughout the process, just as well as organic separation based on the transfer of files to a third-party judicial or quasi-judicial forum.

53. In this new framework, the institution of the Government commissioner, far from encroaching on the Autorité's independence, has only strengthened it in the eyes of businesses. The government was thus represented at the Autorité's sessions by the Directorate General for Competition, of Consumer Affairs and Repression of Fraud, its representative being appointed to this role by the Minister for the Economy, as "government commissioner" (Art. L461-2 *in fine* of the Commercial Code). He is sent the file distributed to members of the board after investigation is complete and makes observations, on all matters related to anti-competitive practices which are referred to the Autorité, on the circumstances arising from the case in question and the applicable rules of law, as well as giving an opinion on possible solutions. Needless to say, he does not take part in the ensuing deliberation. This means of publicly expressing the government's position in antitrust matters, in a way that is transparent, duly grounded and in the presence of all parties, removes any suspicion of influence or hidden pressure being exerted by the executive on the Autorité's decision.

54. The combination of the increase in its powers and the achievement of its independence has required the Autorité to make progress in terms of duty of transparency and predictability of its practice. Thus since 2009, acquisition of competence in merger control matters has been accompanied by the adoption of guidelines, increased fines for anti-competitive practices led in 2011 to the publication of a notice, enforceable against the Autorité, related to its method of calculating fines – major developments being furthermore consecrated at this point in its decision – and development of the advisory role, in particular in the form of sectoral investigations based on the frequent use of public consultations, in order to take into account a plurality of points of view, interests and the objectives of the public policies involved and to guarantee the transparency of the material on which the Autorité's analysis is based.

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55. Institutional reform is a gradual and continuous process. Competition regulation must adapt to evolution in the behaviour of economic operators, the emergence or reshaping of certain markets, and the expectations of both public authorities and consumers. A bill is even now being drawn up in France, that could lead to an extension of the Autorité's powers – particularly in the distribution sector, so that competition concerns that have come to light can be more effectively handled – or a modernisation of how they are exercised, pertaining for example to the settlement procedure, the effectiveness of which could be strengthened.