3

France: 1987–94

FRÉDÉRIC JENNY

In 1986 a newly elected conservative administration under French Premier Jacques Chirac set out to abolish a 1945 ordinance that allowed the government to control prices and to rewrite the competition law. It did so partly for a technical reason: various provisions of the competition law had been integrated into the 1945 ordinance. There was also an economic reason: fearing that lifting price controls would fuel inflation, the new administration wanted to strengthen French competition law. Thus the 1945 ordinance on prices and the 1977 competition law were replaced by a 1986 ordinance on the freedom of prices and competition.

The 1986 Ordinance

The leading role in enforcing the antitrust provisions of the new ordinance was entrusted to a new independent administrative authority: le Conseil de la Concurrence, or Competition Council. This council comprises 16 members, made up mostly of civil as well as administrative law judges, though some members have a particular expertise in consumer affairs or competition policy, and some members come from the business community.

Contrary to its predecessor, la Commission de la concurrence, the council is not merely an advisory body. It is first and foremost a quasi-judicial

Frédéric Jenny is professor of economics at ESSEC and vice chairman of Conseil de la Concurrence, Paris.

decision-making body, which can on its own decide to open investigations to enforce Articles 7 and 8 of the ordinance of 1986, which prohibit anticompetitive, concerted actions and abuses of dominant position. The council can impose fines of up to 5 percent of total sales on firms found guilty of anticompetitive practices and give them injunctions. Its decisions can be appealed to the Paris Court of Appeals. Thus, a significant aspect of the 1986 reform lies in the fact that the minister for economic affairs has relinquished his powers to decide how to enforce the prohibition of anticompetitive practices.

The civil courts are also competent to enforce Articles 7 and 8 of the ordinance and can award damages to injured parties or nullify agreements that violate the law, which the Competition Council cannot do. Plaintiffs in civil courts bear the burden of proof and must demonstrate the existence of the violation they allege. They can collect only single damages and cannot introduce class-action suits. As a result, relatively few cases of alleged violations of Articles 7 and 8 are adjudicated through the civil courts, and the council plays a major role in enforcing these provisions.

Article 7 of the 1986 ordinance prohibits "concerted actions, conventions, explicit or tacit understandings or coalitions which are designed for or may have the effect of curbing, restraining or distorting competition in a given market." Article 8 prohibits abuse by a firm (or a group of firms) or abuses of the dependency in which a firm holds another firm (supplier or customer) when these abuses have the object or may have the effect of restraining competition.

Although such practices in principle are prohibited unless the firm in question qualifies for a legal or an economic exemption, the scope of the exemptions was significantly reduced in 1986. The legal exemption applies henceforth only if a law imposes the anticompetitive practice. For example, in the agricultural sector some interprofessional agreements imposing quotas or restricting price freedom for certain crops are allowed if the French minister of agriculture approved them or the EU commission imposed them.

In addition, the right to refer cases to the council—previously open only to the minister of economic affairs, trade organizations, certain consumer organizations, and local governments—was extended to firms.

The law with respect to anticompetitive concerted actions, coalitions, and abuses of dominant position was not substantially modified in 1986. A few new provisions regarding the substantive law on anticompetitive practices are, however, worth mentioning.

In 1983 and 1984 several large supermarket chains and common buying agencies of smaller distributors triggered a debate on how to curb "abuses of buying power" when they demanded additional discounts from their suppliers, either because they believed they deserved better terms or because they thought the suppliers were granting better terms to their competitors. They threatened to not carry products of manufacturers failing to meet their conditions. In each case, the name-brand products involved accounted for a minute proportion of the total sales of the distributors but for a significant part (between 10 and 20 percent) of the total sales of the supplying manufacturers. The manufacturers claimed they had no choice but to grant the discounts requested by these distributors (or by the common buying agencies) and then face additional demands by other distributors.

With this recent controversy in mind, and because it wanted to alleviate what it considered to be a growing imbalance in the economic relationship between manufacturers and large distributors, the new administration introduced a provision in the 1986 ordinance making it illegal for firms (even those without a dominant position in the market) to abuse their economic bargaining power vis-à-vis other firms (suppliers or customers) when those firms depend on them and when the abuse constitutes a restraint of competition. The ordinance states, among other things, that the discontinuation by a firm of an established commercial relationship with a dependent firm because the latter refuses unjustified commercial demands could be considered such an abuse.

A 1977 competition law already applied to both public or private firms (and several state-owned firms had been sanctioned between 1977 and 1986 for engaging in prohibited practices). Yet until 1986 it had remained a hotly debated question whether competition law should also apply to divisions of government ministries engaged in commercial ventures—such as the General Directorate for Telecommunications or the Ministry of Post and Telecommunications, which was running the French telephone system without having the status of a public firm.

A comment is in order regarding the council's enforcement of Articles 85-1 and 86 of the EU treaty. Until 1992, French law did not allow plaintiffs to bring a case to the Competition Council solely on the basis of European law, and the council neither had powers to investigate alleged infringement of the European law nor did it have powers to sanction such infringements when they were established. Thus the council could handle Article 85-1 and 86 cases only if the allegedly anticompetitive practices were simultaneously denounced as illegal under domestic law. In 1992 an amendment to the 1986 ordinance made it possible for the council to use its powers of investigation and sanction for the enforcement of European law.

Besides its role as a decision-making body for anticompetitive practices, the council also has specific advisory roles. First, Article 1 of the 1986 ordinance enables the administration to reinstate price controls in a few sectors in which competition is limited either because there is a monopoly or because specific laws prevent it. However, before the administration can impose price controls in these sectors, it must first ask the council whether price competition is indeed limited. Although the council's opinion is not binding on the minister of economic affairs, it must be published with the decree establishing the price control. Sectors in which the administration has reestablished price controls since 1986 include taxis, public transportation, distribution of gas or electricity (through a publicly owned monopoly), and some medical services. Second, whenever the administration considers issuing an administrative order (*décret*) limiting competition in a sector by establishing quantitative barriers to entry, by giving exclusive rights to some operators in certain areas, or by imposing uniform prices or sales conditions, it must first seek the council's opinion. Third, local governments, trade organizations, trade unions, consumer organizations, and chambers of commerce or of agriculture, as well as permanent parliamentary commissions and the administration, can seek the council's opinion on general questions concerning competition.

The minister of economic affairs must also seek the council's opinion whenever he considers blocking a merger or imposing conditions on the parties to such a merger. The council's opinion, which must include assessments of the merger's potential harm to competition and of its potential contribution to economic progress, is not binding, but the minister must publish it with his decision. The minister of economic affairs controls mergers in two cases: when the combined market share of the parties exceeds 25 percent of a domestic market or when their combined sales total more than 7 billion francs and two (or more) of the parties have sales of more than 2 billion francs each. Notification of a merger to the minister is voluntary, but if notified the merger is implicitly approved if there is no ministerial decision within six months of notification. Merger control thus in practice remains almost solely in the hands of the minister for economic affairs because he alone can decide or refuse to open an investigation and is free to allow or prohibit the merger.

The impetus for enlarging the scope of merger control to include mergers involving firms that did not meet the market-share threshold but were large in absolute terms came, once again, as a result of the hot debate over merger control of the retail sector.

Despite the fact that the merger control law of 1977 was not vigorously enforced before 1985, manufacturers had consistently denounced it as unfair, arguing that different market-share criteria should be used to determine which mergers could be controlled in the distribution and manufacturing sectors. They pointed out that manufacturers typically compete at the national level while competition among retailers is mostly local and that a merger between two chains of supermarkets could well limit competition in many local areas even if the firms or groups of firms involved did not have a significant national market share. They further argued that although a large manufacturer might easily have a market share greater than 25 percent of the national market, not even the largest distributors, who enjoyed considerable buying power, accounted for 25 percent of the retail sales of any given category of goods at the national level and that therefore mergers in the retail sector were "unfairly" immune from controls.

The clamor of manufacturers was thus based on their fear of the growing concentration in the distribution system or, in other words, on the fact that while the merger legislation could prevent manufacturers from gaining "too much selling power," it could not in fact be used to prevent large distributors from gaining "too much buying power."

It is worth noting that the law was significantly changed in the area of individual restraints of trade (i.e., restraints of trade that a firm can impose when it does not have a dominant position or when it does not collude with other firms).

The 1945 ordinance on prices prohibited per se four types of individual restraints of trade: refusal to deal, price discrimination, resale price maintenance, and reselling at a loss. Two of these prohibitions—refusal to deal and price discrimination—were abolished by the 1986 ordinance. It was finally recognized that price discrimination can have procompetitive effects. Regarding refusal to deal, the government came to feel that this per se prohibition—established in the 1960s and deemed necessary at that time to prevent manufacturers, under the pressure of their traditional retailers, from refusing to sell to the emerging large-scale, low-margin retailers—was no longer necessary. While price discrimination and refusal to sell ceased to be per se criminal offenses, they remained civil offenses administered through a rule-of-reason approach.

The 1986 ordinance did maintain as criminal offenses two other individual restraints of trade: resale price maintenance and reselling at a loss. At a time when it was relinquishing its ability to control prices, the administration did not want resale price maintenance to slow the development of discounters. As far as reselling at a loss was concerned, the administration did not want to displease the large constituency of small retailers and name-brand products manufacturers, who had been complaining loudly for years about the "unfair" practices of large-scale retailers and discount stores, which used the most well-known name-brand products as loss leaders to attract customers.

Enforcement

To assess the intensity of enforcement since 1986, it is worth looking at the number of cases the Competition Council has examined since its creation. Between February 1987 and December 1994, 175 out of a total of 551 council decisions were appealed to the Paris Court of Appeals. During the same period, the court examined 166 appeals, reforming 15 decisions and nullifying 13. In the case of the nullifications, the court

Table 1 France: Cases referred to Competition Council, 1987-94

Year	Article 7 and 8 cases	Decisions	Preliminary investigation suggested a violation	Sanctions imposed	Merger cases
1987	86	53	14	5	2
1988	81	50	22	18	1
1989	82	44	17	14	2
1990	84	52	19	19	8
1991	101	60	32	21	1
1992	98	69	38	27	7
1993	91	72	29	22	12
1994	79	75	35	24	10

considered that the council had not followed proper procedures. The court reformed decisions when it found the evidence the council had used to establish violations unpersuasive. In the remaining 138 decisions, the court confirmed the council's reasoning, although in some instances it decreased or increased the fines the council had set.

As far as Article 7 and 8 cases are concerned—that is, cases about cartels or abuses of dominant positions—the minister of economic affairs initiated about half. The remaining half were initiated mostly by firms alleging that they were victims of anticompetitive practices. Trade organizations, chambers of commerce, consumer organizations, or local governments initiated few cases, and most of these concerned horizontal or vertical agreements. Although a large proportion of total cases involved price-fixing or market-sharing agreements between potential competitors, a significant number related to allegedly anticompetitive selective or exclusive distribution arrangements. In contrast, cases involving abuses of market power by firms holding a dominant position (thereby falling under Article 8 of the 1986 ordinance) or abuses of dependency have more rarely been referred to the council. Explicit price-fixing and market-sharing agreements represent roughly 30 percent of all the established violations of French antitrust provisions under the ordinance. Collusions-in-tender offers represent roughly 20 percent of all cases submitted to the council.

Table 1 clearly reflects the council's increased enforcement activity regarding concerted actions (Article 7) and abuse of dominant positions and dependency (Article 8). The pivotal year for this increase appears to be 1990. The fact that the Paris Appeals Court supported the council's analysis in 83 percent of the cases brought to appeal from 1987 through 1994 has contributed to the credibility of the enforcement system and to the establishment of the council's authority.

As far as merger control is concerned, the 1986 ordinance states that the council's opinions should balance the potential adverse consequences on competition of the mergers it examines and their potential contribution to economic progress. The council's analysis therefore differs from that of the EU Merger Task Force on two grounds. The council can recommend that corrective action be taken or that a merger be blocked because it creates a serious threat to competition even if the merger does not lead to the creation or strengthening of a dominant position for the merging firms, and the council can take an efficiency defense into consideration.

Until 1990 the merger control provision of the 1986 ordinance was rarely used, but merger control activity increased when the EU merger regulation went into effect in 1990 (table 1). However, the number of cases referred to the council for formal review may underestimate the importance of merger control in France. Indeed, as was mentioned previously, the minister of economic affairs does not refer all the mergers the ministry examines, but only those he considers to be problematic from the point of view of competition. What is more, some mergers that may hinder competition do not undergo formal review because the parties to the merger agree to meet the minister of economic affairs's demands for corrections during the informal review stage.

Substantive Issues

Scope of the 1986 Ordinance

Because the actions of public authorities were believed to be, directly or indirectly, a major obstacle to competition in many sectors, the scope of applicability of the French antitrust provisions was enlarged in 1986. Article 53 of the 1986 ordinance states that the prohibition of anticompetitive cartels and of abuse of dominant positions applies "to all activities of production, distribution, or service, including those undertaken by public authorities." The courts have held that this provision means that competition law applies to ministries and to local authorities whenever they act as commercial suppliers of goods or services.

Thus, for example, in 1993 the Paris Court of Appeals decided that the National Weather Bureau, which is part of the ministry of equipment and housing and which operates a commercial phone-in service available to the general public, abused its dominant position by refusing to provide a potential competitor with some of the meteorological data that the bureau was required by law to gather and make available for aircraft navigation.[1]

1. Decision of the Paris Court of Appeals, 18 March 1993, regarding a 13 May 1992 Competition Council decision (no. 92-D-35). The council had previously considered that the ordinance of 1986 applied to the National Weather Bureau but that its refusal to supply

Similarly, the Post Office, which is a division of the Ministry of Post and Telecommunications and which operates a commercial express mail service as well as banking services that are not part of the ministry's public universal service obligations, is under attack from some of its competitors for abusing its dominant position by using its public service facilities (such as post offices) or public service workers to provide its commercial services without taking into account their full cost. Article 53 of the ordinance also means that municipal governments, which often provide public local services such as water distribution and undertakers could also be found guilty of engaging in anticompetitive practices.

Although the scope of French antitrust law was expanded in 1986, there is still a fair amount of controversy about the extent to which it applies to the public sector. This comes as no surprise in a country in which the public sector remains quite extensive (although shrinking), universal public service obligations are defined broadly, and public services are increasingly supplied by private concerns operating under a concession from public authorities.

One of the problems raised by the interpretation of Article 53, as given by the Conflicts Tribunal (Tribunal des conflits),[2] is that it holds that the ordinance of 1986 applies to administrative bodies only to the extent to which they act as commercial suppliers on the market in which an anticompetitive practice is alleged. The same does not hold true for private firms or organizations. Indeed, a firm holding a dominant position in one market can abuse its dominant position by engaging in an anticompetitive practice in a related market even if it is not present in this related market (for example, by refusing to deal with certain downstream operators). Similarly, a trade organization, which does not usually operate in a market directly, can be found to have violated competition law by organizing price-fixing among its members to restrain competition in the market in which they operate. Thus, although the wording of Article 53 does not distinguish between private and public bodies, case law has restrictively interpreted this provision when public bodies were involved.

However, administrative bodies can help shape competition in commercial markets in which they are not commercial operators via the adjudication of contracts or concessions. French competition law does

---

the specific information requested was not an abuse of its dominant position both because the competitor could have obtained the same information through other means and because it was not established that the weather bureau used this information for its own phone-in service. The case was pending before the French Supreme Court (Cour de cassation) when this was written.

2. This tribunal adjudicates potential conflicts between administrative and civil law. It comprises magistrates belonging to the administrative supreme court (Conseil d'etat) and the civil supreme court (Cour de cassation).

not apply to public authorities in these cases. Although the public procurement code (Code des Marchés Publics) may require public authorities to consult with several potential suppliers when awarding contracts, they are not usually required to consult all potential suppliers or operators or to choose the lowest bidder for the contract or the highest bidder for the concession. Thus administrative bodies enjoy considerable discretion when it comes to deciding which potential suppliers or operators of a public service will compete and which will be chosen. Consequently, personal relationships between suppliers and administrative body officials may determine who gets contracts and concessions rather than the suppliers' or operators' economic performance.

A second problem stems from the fact that public service obligations that are delegated to private bodies are often not precisely defined, making it unclear whether the ordinance of 1986 applies to particular practices. For example, the Ministry for Sports has entrusted sports promotion (which in France is a public service) and the organization of national competitions to sporting federations, which are private bodies. These federations often seek additional revenues either through forcing commercial services on their members or through the selling of exclusive rights to suppliers. The federations then argue that some of the practices, because they are a means to acquire the revenue needed to fulfill their public service obligations, are outside the law's scope—for example, forcing practitioners of a sport who want to join a club to subscribe to federation-selected personal liability insurance or choosing suppliers to equip club players. Competitors of the selected insurance companies or equipment suppliers counter that these commercial activities are distinct from the promotion of the sport and that they are concerted actions (among federation members and the selected insurance companies or equipment suppliers) that restrict competition.

A 1994 amendment to Article 53 has extended the scope of the ordinance to include the concession of public services by public authorities. No cases have yet been referred to the Competition Council under this provision.

Per Se versus Rule of Reason

Articles 7 and 8 of the ordinance of 1986 state that agreements, whether explicit or tacit, and abuses of dominant position are prohibited if their objective is to impair or restrain competition or if they had or could have such an effect. In the antitrust area, the ordinance does not explicitly define practices that should be considered per se violations.

In applying this provision, the council follows a rule-of-reason approach. However, in cases in which the authors of the practice declare that they intended to restrict competition, the council uses a per se approach—that is, it forgoes detailed analysis of how the practice restrained competition, merely stating that the practice had the objective of restraining competition and is therefore illegal.

Although most price-fixing or market-sharing schemes are considered to be illegal anticompetitive practices (and some, such as price-fixing in procurement markets, are per se prohibited), case law provides examples in which such agreements were examined under a rule of reason and were not considered to violate the ordinance.

For example, in its decision on herbicidal products and pesticides (no. 92-D-29), the council decided that minimum price-fixing clauses in co-distribution agreements between chemical manufacturers did not restrain competition (*Rapport du Conseil de la Concurrence pour l'année 1992*, Annexe 36, 260). Herbicidal products and pesticides are typically obtained through the blending of chemical elements. A large number of manufacturers each produce a wide range of products, but practically none of them offers products for all possible uses. Some manufacturers have entered into co-distribution agreements with a competitor, allowing this competitor to add one or several of their products to its product line. In such instances, the manufacturer and its co-distributor market the same product (although under different brand names).

The council found no evidence that the co-distribution agreements it examined in this sector contained ancillary clauses limiting the ability of the co-distributors to engage in research to independently develop products similar to those that were the object of the agreements. However, such agreements typically had a clause whereby both parties agreed to sell the product above a minimum price.

In its decision on herbicidal products and pesticides, the council first determined that the manufacturer in question would enter a co-distribution agreement only to develop its own sales through the marketing efforts of its co-distributor and that it could thereby offer a wider range of products to its traditional clientele. Second, since each product covered by a co-distribution agreement faced competition from products offered by many other manufacturers, the parties' attempt to develop their sales intensified rather than decreased product competition.

Having found that the co-distribution agreements had a pro-competitive effect, the council also considered that without the minimum price clause, both parties to such an agreement could face a free-rider problem. Such a problem would arise for the manufacturer if the co-distributor did not expand the customer base for the product but simply drew customers away from the manufacturer by offering the product more cheaply, or, vice versa, the co-distributor might fear the manufacturer's undercutting *its* price and customer base. Thus, the council held that, given the structure of the industry and the multiplicity of competing products, the price agreements between co-distributors were not illegal because they were necessary to avoid the free-rider problem inherent in co-distribution agreements and because such agreements increased competition.

Defining Competition

From the substantive standpoint, the creation of an independent quasi-judicial body whose decisions could be appealed to the Paris Court of Appeals had important consequences. As with the comparable US and EU laws, the wording of the 1986 provisions prohibiting anticompetitive concerted actions or abuses of dominant positions represents a synthesis of ideas rather than a clear definition of competition and how it is to be achieved. Because of this lack of definition in the ordinance, the enforcement of competition statutes crucially depends on the Competition Council's interpretation.

The council's approach to competition in its area of jurisdiction—which is limited to a narrow definition of antitrust covering cartels, abuses of dominant positions, and mergers—is markedly different from that which permeated some of the debates in French government circles in the 1950s and the 1960s and is much closer to an economic concept of competition.

For example, the council has stated in various annual reports that the following questions should guide its determination of whether a concerted action was anticompetitive:

- Does the concerted practice interfere with the independent decision making of firms in the market?
- Does the concerted practice lessen the uncertainty that each firm should face regarding the strategy other firms will likely follow?
- Does the practice in any way impede the ability of other firms to enter the market or to expand in the market?

These are pragmatic translations of the theoretical conditions for perfect competition suggested by economic theory (atomicity and independence of decision making, lack of barriers to entry). By defining competition in this manner, the council emphasizes the process through which prices and quantities are determined rather than the result of the adjustment process or the fairness of the mechanism. In other words, the council does not think that antitrust law can or should be used to regulate prices or to protect one competitor from another.

For example, in a 1987 decision concerning bakers (no. 87-D-33, *Rapport du Conseil de la Concurrence pour l'année 1987*, annexe 42, 6), the council found that in one geographical area the professional organization of bakers had urged its members to increase the price of bread by a certain amount in January and July 1986 and that most bakers had indeed followed the organization's recommendation. In finding that the organization had initiated an anticompetitive agreement among its member firms, the council refused to consider the organization's claim that in other geographical areas (in which there was no evidence of an agreement among bakers) the price of bread was higher (or increased faster). The council reasoned that the level or rate of increase of bread prices elsewhere was irrelevant because the price in the area in question was not arrived at through independent decision making.

Exemptions to Promote Efficiency

Article 10 of the 1986 ordinance allows exemption of anticompetitive practices when they contribute to economic progress. However, the admissibility of an efficiency defense is restricted to cases in which the authors of the practice "reserved an equitable share of the resulting profits to the buyers" and did not "enable the businesses concerned to eliminate competition on a substantial portion of the markets involved." Additionally, the burden of proof that the exemption conditions are met lies with the authors of the anticompetitive practice.

The wording of Article 10 is thus similar to the wording of Article 85-3 of the EU treaty, but contrary to EU law, economic exemptions can also apply in cases of abuse of dominant position.

Regarding merger control, the 1986 ordinance states that, in its opinions to the minister of economic affairs, the council must weigh both the potential weakening of competition due to the merger and the potential benefits. Thus an efficiency defense of otherwise anticompetitive mergers is allowed in French law, whereas Article 2 of the EU merger regulation does not allow such a defense.

The possibility of an exemption of anticompetitive practices or mergers that contribute to economic progress suggests prima facie that the underlying goal of French competition law is to maximize net welfare rather than consumer welfare. However, this appraisal must be qualified by two considerations. First, because the efficiency defense is admissible only if a substantial part of the efficiency gains have been passed on to consumers, a practice that would entail relatively modest consumer surplus losses and large producer surplus gains cannot be automatically exempted. Second, as was indicated earlier, the council's opinion in merger cases does not bind the minister of economic affairs nor the minister in charge of the sector in which the merger takes place, who together have the ultimate decision-making power.

In interpreting Article 10-2 (or the merger provision of the 1986 ordinance), the council has stuck to a narrow definition of the concept of economic progress by restricting it to cost reductions for the economy as a whole (due, for example, to a reduction in transaction costs) or to innovations that could not be obtained without the otherwise anticompetitive practice or merger. Thus, positive effects on employment, exports, or regional development that could be considered in the public interest are not included in the council's definition of "economic progress."

One case in which the efficiency defense succeeded concerned Interflora, an association of French florists (*Rapport de la Commission de la Concurrence pour l'année 1985*, annexe 18, 123). The council's predecessor, Commission de la concurrence, initially determined that Interflora restricted competition among its affiliates in the same locales when it made an agreement with its independent affiliates on charges for standardized flower arrangements. The commission reasoned that a customer from one city who used the Interflora system to order flowers for delivery in another town was quoted a price that was higher than it would have been had the several local affiliates available to fill the order been free to compete. Subsequently, the commission considered that striking down the price agreement would significantly raise transaction costs for consumers, who without Interflora would have to contact each florist in the town of delivery to find the best price and arrange a transaction. This increased transaction cost would in turn decrease demand for the service. So in the end the commission ruled that Interflora's restriction to competition was in fact a necessary condition for providing this service.

Article 10 also allows the minister of economic affairs to seek a class exemption for certain agreements among small or medium-size firms. Such exemptions can be granted only after the minister has sought the opinion of the Conseil de la concurrence and this opinion is binding on the minister. However, so far, the minister has never proposed granting a class exemption to agreements among small firms. Barring such formal exemptions, the question of whether some anticompetitive agreements could be exempted from competition law depends on whether the Conseil or the Paris Court of Appeals accepts the argument that anticom-petitive agreements violate the prohibition of article 7 only if they have an appreciable impact on competition.

Exemptions Based on Magnitude of Market Effect

A second type of potential exemption, besides that for efficiency's sake, has raised a legal controversy: whether concerted practices or abuses of dominant position with only a minor effect on the market should be exempted.

Because Articles 85 and 86 of the EU Treaty inspired the 1986 ordinance (which is similar but not identical to them), the council simultaneously enforces the European and French law. Hence, differences of approach between the council and the European Commission on agreements with minor effect may cause some difficulty. In its notice on minor agreements,[3] the Commission indicated that it would not investi-

3. First published in 1970 and revised in 1977, 1984, 1986, and 1994.

gate concerted practices of firms with less than 5 percent of the EU market or very small firms (less than 300 million ECUs). This does not mean that Article 85 could not apply to anticompetitive agreements of such firms , but only that the Commission, which shares the task of enforcing Articles 85-1 and 86 with the national competition authorities, decided to focus on cases with a larger impact on the European market. The Commission's statement also did not mean that minor anticompetitive agreements are exempt, as has been frequently misinterpreted. In addition, the European Commission and the EU Court of Justice have determined that anticompetitive agreements that do not qualify as minor agreements or abuses of dominant position violate the EU law only if they have an appreciable effect on intra-Community trade and on competition in the European market (or a substantial part of this market).

With these considerations in mind, some legal commentators have argued that anticompetitive agreements among firms with a share of the French domestic market below the Commission's threshold for agreements of minor importance should be exempted because they cannot have an appreciable impact on the domestic market. Furthermore, they argue that other agreements can be found to be Article 7 violations only if the council or the courts establish that they significantly restrain or distort competition.

While the Paris Court of Appeals and the French Supreme Court have occasionally thrown out decisions sanctioning anticompetitive agreements because these agreements had not been shown to appreciably reduce competition, the Competition Council has rarely exempted agreements on such a basis.

The council's position reflects a semantic difference with the courts. When impairing competition has not been established as the agreement's objective, the council examines whether the agreement had an actual or potential effect on competition and thus whether it violated Article 7. But the council holds that an effect, actual or potential, can be established only if the agreement had or could have had an appreciable consequence on the market. In other words, it applies a test of magnitude of market effect in order to determine the actual or potential consequences of an agreement but not as a separate test.

Case Law

Horizontal Agreements

A wide array of practices fall into this category: for example, the exchange of information among competitors, price recommendations by trade organizations, price-fixing and market sharing, collusion in procurement markets, and coordinated attempts to exclude competitors or importers.

Explicit Agreements

Explicit horizontal market-sharing and price-fixing agreements are in most cases considered violations of Article 7 of the 1986 ordinance.

The council has examined several types of explicit price agreements: agreements among competitors to fix prices actually charged or price increases or profit margins, agreements among competitors to determine tariffs (when substantial rebates from the tariff price are common); publication of recommended or suggested tariffs by trade or professional organizations, and the exchange among competitors of information on future prices.

Regarding explicit agreements to fix prices actually charged, price increases, or profit margins, the council in its 1987 annual report stressed its "strong attachment to independent decision making in the price area. Indeed, this independence is a necessary condition for the existence of price competition, which—although it is but one form of competition—is nevertheless a determining factor in forcing firms to be as efficient as possible."

As far as concerted actions among potential competitors to determine tariffs are concerned, the council finds such actions violate the competition law irrespective of whether the prices actually charged consumers were equal to those mentioned on the tariff. Thus, in a decision on thread manufacturers (no. 88-D-50, *Rapport du Conseil de la Concurrence pour l'année 1988*, annexe 54, 111), the council reviewed a concerted tariff that was applied to small customers (representing only 2 percent of total demand), whereas the suppliers granted large rebates to other buyers. There was no evidence that the amount of the rebates had been jointly determined. The council found the tariff agreement to be a violation, noting that it had had an effect on some customers. But it also went on to say that if, as the parties claim, there were differences between the tariffs and the actual prices charged by each firm to other customers, it remains that the concerted tariffs could be used as a common basis for negotiations between suppliers and customers (and therefore could have had an anticompetitive effect).

The council's reasoning regarding trade organizations' publication of recommended prices is quite clear in a 1987 decision concerning architects (no. 87-D-53, *Rapport du Conseil de la Concurrence pour l'année 1987*, annexe 62, 80). In it, the council explained that "besides their purpose, such tariffs may have an anticompetitive effect, . . . in that they may decrease the incentive [of architects] to compute their costs individually [and to determine their prices]. This potentiality is independent of the number of [firms] that actually apply the tariffs."

On a more general level, the council wrote in its 1987 report:

> [T]he publication by trade organizations of price lists, price recommendations or indications on prices to be charged, is prohibited, even in the absence of pressure on the professionals involved to follow the recommendations, because by giving an indication to all firms about the level of what is considered by the profession as a "normal" price or price increase, the trade organizations may give an incentive to some or all of those firms to actually adopt those prices or price increases.

Tacit Agreements and Parallel Behavior

Both the council and its predecessor, the Commission de la concurrence, have repeatedly stated that evidence of parallel behavior among competitors (e.g., simultaneous increases in prices, simultaneous refusal to sell to a discounter, or absolute stability of market shares) is not sufficient to demonstrate the existence of a tacit agreement. A "meeting of the minds" that lies behind and explains the parallel behavior must also be observed (*Rapport annuel du Conseil de la Concurrence pour l'année 1987, XIV*). Thus the ordinance does not prohibit parallel behavior resulting from oligopolistic interdependence. The standard applied in France to cases of parallel behavior is thus similar to the standard applied at the EU level for Article 85.

For example, in its 1992 decision on the distribution of automobile gasoline (no. 92-D-56, *Rapport du Conseil de la Concurrence pour l'année 1992*, annexe 63, 401), the council refused to consider the parallel behavior of major oil companies when unleaded gas was introduced in France as an anticompetitive tacit agreement to reduce price competition in the French market.

When in 1989 the French government decided to grant a special tax exemption for unleaded gas to facilitate its introduction to the French market, each of the major oil companies started selling not only unleaded gas that met the European Commission's minimum standard specifications (called SP 95) but also an unleaded gas with superior specifications (SP 98), which was deemed better adapted to the French market because a much larger proportion of French cars could use it (only 5 percent of French cars could then use SP 95).

Up to that point, the major oil companies had distributed the unleaded gas they produced either through their own gas stations or through supermarket chains, which bought gas from the oil companies on favorable terms because of the huge quantities they distributed (their total share of the retail gas market was about 50 percent). By reselling the gas as a generic product practically at cost, the supermarkets could undersell the gas stations, which was an irritating problem for the oil companies.

When SP 98 was launched, each oil company argued that its product differed from that of its competitors by virtue of its unique mix of additives and therefore could only be sold as a name-brand product.

Between 1990 and 1992, the supermarket chains' access to SP 98 (the sales of which grew very rapidly) was restricted. Some oil companies argued that they did not have enough product for their own gas station networks. Others claimed they had name-brand products they intended to sell only in their own gas stations. The others conditioned delivery of SP 98 to supermarket chains, for instance, building a special tank for stocking their product so that it would not be mixed with other oil companies' SP 98 or affixing company name and brand names to the gas pumps.

In referring the case to the council, the minister of economic affairs and some distributors argued that the de facto refusal to deal was the result of a tacit collusion, the object of which was to prevent large distributors from selling an important gas product and which had the effect of restraining competition.

Doubtless each oil company wanted to decrease the competitive pressure that large distributors represented at the retail level. However, because none of them had a dominant position on the market, the council addressed only the question of whether their parallel behavior could qualify as an illegal tacit agreement.

In its decision, the council first stated that an oil company's wanting to differentiate one (or several) of its products from the products of its competitors (by including additives in its gas and by selling it under a brand name) could not be considered per se anticompetitive. It then said that there was insufficient evidence of a tacit agreement to refuse to deal. Their behaviors had not been sufficiently identical (and simultaneous) to consider them parallel, and, more importantly, each oil company could reserve the sale of its new unleaded gas to its own network, irrespective of what its competitors did, because it was in its interest to do so. Even if other oil companies had decided to market a generic SP 98 both through their gas stations and through large distributors, another oil company could have reasonably sought a more profitable niche market for a higher priced, differentiated, name-brand fuel.

Vertical Agreements

Because Article 7 does not distinguish between horizontal and other types of contracts, this provision may also be applied to restrictive distribution agreements between manufacturers and their retailers, whether explicit or tacit, if they have the object or the effect of restraining competition.

The council examines both exclusive and selective distribution agreements under the same rule-of-reason standard because it recognizes that such agreements may simultaneously restrict competition at the retail level and increase competition among manufacturers. The council further recognizes that the efficiency effect of exclusive or selective distribution contracts (or other vertical restrictions of trade) depends on how much marginal and inframarginal value consumers place on the services distributors provide.

The council's approach to restrictive exclusive distribution contracts is thus more permissive than that of the European Union. Indeed, under European law, exclusive distribution agreements automatically fall under the prohibition of Article 85-1 but can be exempted under Article 85-3 if they meet certain criteria laid down by the Commission in 1967 and regularly revised since then.

The European authorities' reasoning is based on administrative considerations rather than economic analysis. Article 4 of European Commission ruling no. 17 states that the parties to an agreement found to be prohibited by Article 85-1 cannot claim an exemption under Article 85-3 unless they had notified their agreement. Because firms could not foresee what stance the Commission would take on their particular exclusive distribution agreements, thousands of such agreements were notified, and the Commission found it impossible to examine each one. To bring its work load back to manageable proportions, the Commission found it expedient to issue a general ruling on the conditions under which such agreements would be exempted. But since an Article 85-3 exemption can only apply to agreements that fall under the prohibitions of Article 85-1, the effect of the class exemption was to make all exclusive distribution agreements *a priori* illegal.

Under the French ordinance, there is no notification procedure, and the Competition Council investigates only exclusive (or selective) distribution agreements in which either the minister of economic affairs or a private party (for example, an excluded retailer) has lodged a complaint. As a result, the council's work load in this area is lighter than that of the Commission, and cases are adjudicated individually.

The council does not necessarily consider that an exclusive (or selective) distribution arrangement is *a priori* anticompetitive. But when it is convinced that a particular agreement had an anticompetitive object or effect, it will refuse to grant it an exemption on the basis of Article 10 of the 1986 ordinance if the agreement does not meet the standards set for the European Article 85-3 class exemption for exclusive distribution contracts.

As the council has examined many more cases of selective distribution agreements than of exclusive distribution, the following discussion will center on the former.

In its appraisal of the applicability of Article 7 of the 1986 ordinance to vertical restrictive distribution agreements, the council has focused on the market structure for the relevant products, on whether such agreements limit distributors' ability to independently determine pricing, as well as on whether such agreements had the object or the direct or indirect effect of allowing discrimination among retailers or of unjustified exclusion of certain types of retailers.

In line with the per se ban on resale price maintenance (which applies to all manufacturers irrespective of whether they sell through selected distributors and which is enforced through the courts), and in line with European case law, selective distribution agreements imposing resale prices are considered per se anticompetitive and therefore are prohibited. Manufacturers remain free to suggest resale prices to their retailers as long as these retailers do not risk being excluded from the distribution network if they do not follow these suggestions.

Except in the case of resale price maintenance, a selective distribution system is considered potentially anticompetitive if the manufacturer has a dominant position or if a large number of competing manufacturers must distribute their products through a similar distribution arrangement. Thus, for example, the council's predecessor, the Competition Commission, which applied the same principles as the council, ruled that selective distribution had not impaired competition in the tennis racket (*Rapport de la Commission de la Concurrence pour l'année 1984*, annexe 13, 112) or in the wind-sail sectors (*Rapport de la Commission de la Concurrence pour l'année 1984*, annexe 14, 114) because only a few manufacturers representing a small market share distributed their products through selective distribution systems.

However, when the manufacturer has market power (or when restrictive distribution agreements are widespread among competing manufacturers) a selective distribution agreement that does not impose resale prices will be considered a violation of Article 7 if the requirements the manufacturer sets for accepting a distributor are not explicit, objective, and verifiable, or if the manufacturer excludes *a priori* some type of retailers (such as large retailers or mail-order houses) irrespective of whether they meet its requirements, or if the manufacturer discriminates among retailers of the same category (for example, by refusing to deal with some and accepting others in its network regardless of whether they meet its requirements).

The council first examined selective distribution agreements in a case on the distribution of cosmetics by pharmacists (no. 87-D-15, *Rapport du Conseil de la Concurrence pour l'année 1987*, annexe 24, 43). A number of French pharmaceutical firms sell their most successful and well-known brands of cosmetics only in pharmacies. Pharmacies are highly regulated in France (e.g., on the price of prescription drugs and the creation of new pharmacies), and pharmacists are subject to a rigidly enforced code of ethics, which bans behavior that could be considered as discrediting the profession or a fellow pharmacist. Consequently, price competition among pharmacists is nonexistent.

For a number of years large retail chains have tried to gain access to cosmetics sold through pharmacies and have denounced the selective distribution systems as anticompetitive on the grounds that they unnecessarily suppressed intrabrand competition at the retail level.

Although it is likely that the manufacturers refused to sell their well-known name-brand cosmetics to large distributors because they knew that pharmacists would then refuse to carry them, there was no evidence the pharmacists ever threatened a concerted boycott.

The manufacturers defended the distribution arrangement before the council by arguing that cosmetics were dangerous products requiring counseling that only licensed pharmacists could provide. The manufacturers claimed that interbrand competition was strong and that their distribution arrangements did not significantly restrain competition. Finally, the manufacturers pointed out that the cosmetics they sold through pharmacists were competing with cosmetics from other manufacturers who had chosen not to sell through pharmacists but through large retail stores.

The distributors claimed that they were willing to abide by any condition the manufacturers imposed (such as hiring competent salesmen with a degree in pharmacy).

The council concluded that the cosmetics sold only through pharmacists were not close substitutes for other cosmetics distributed through large-scale retailers, as evidenced by the persistent, wide price differentials. The council then ruled that the distribution contracts violated Article 7 because they completely eliminated intrabrand competition since pharmacists did not compete on prices and they prevented distributors who were not pharmacists from carrying such goods even if they were technically able to provide the services (such as counseling) that the manufacturers desired.

The council ordered the manufacturers to spell out the technical, objective, and verifiable requirements necessary to be accepted into their distribution networks and also ordered them to sell to any distributor (whether or not a pharmacist) that met these requirements.

General Sales Conditions and Price Differentiation

Beyond selective or exclusive distribution agreements, general sales conditions of firms that do not have a restrictive retail network have also come under the council's scrutiny, even for firms without a dominant position. Such general sales conditions (which each firm must provide to retailers on request) are considered to be tacit agreements between the firm and the distributors carrying its goods and therefore may be examined under Article 7. The government and distributors have tried repeatedly to bring price discrimination cases under council review. They have argued that differences in buying conditions granted to different retailers—either because the manufacturers' general sales conditions were discriminatory or there were special discounts, not mentioned in their general sales conditions, to selected distributors—prevented retailers that were buying on less favorable terms from competing.

The council has tended to reject these claims, arguing, first, that price differentiation is not necessarily indicative of price discrimination and, second, that price discrimination, when it is established, is not necessarily anticompetitive. The council believes that the government (wrongly) tends to equate competition at the retail level with absolute transparency of general sales conditions and with strict equality of treatment of all competing retailers. Thus the government considers a special discount to a distributor as in itself constituting an agreement restrictive of competition.

The council, on the other hand, expects that some distributors will be able to negotiate more favorable terms and that this is an intrinsic part of the competitive process among retailers. Further, the situation of a particular distributor relative to that of its competitors is in not in itself relevant in assessing the intensity of competition in the market when many retailers are competing. Thus, for the council, the government's position on this issue confuses the distinction between protection of individual competitors and the protection of the competitive process.

Abuse of Dominant Position

Article 10 of the 1986 ordinance prohibits "the abusive exploitation by a firm or a group of firms of its dominant position in the domestic market or a substantial part of the domestic market when it is designed for or may have the effect of curbing, restraining, or distorting competition." As was mentioned earlier, the council has looked at comparatively few cases of potential infringements of Article 10.

The boundaries of the relevant market or markets being considered must be established to determine whether a firm actually holds a dominant position, but they are rarely defined solely on statistical evidence (even if data on cross-price elasticities between various goods or services are available). This reflects the council's and the Court of Appeals's difficulties in assessing the validity of econometrics studies. The council often takes a more qualitative approach to the market definition problem, examining factors such as the extent to which a specific need can technically be met by various products or services, comparison of the prices of these products or services, determinants of their demand over time, product differentiation, brand differentiation, or comparisons of distribution channels.

The overall goal of the council's approach is to establish the extent of demand substitutability. Supply substitutability is generally not used to establish market boundaries but is considered at a later stage of the analysis to establish whether the firm has a dominant market position.

The council has tended to define markets narrowly. For example, in a case involving the possible abuse of dominance of a book club (no. 89-D-41, *Rapport du Conseil de la Concurrence pour l'année 1989*, annexe 48, 139), the council said book clubs and bookstores were different markets because they provided different services. That is, book clubs do not sell to nonmembers: They impose minimum yearly purchases of books on their members, they sell only through mail order, they sell only the books that they have selected (and which have been available in bookstores for a certain time), they provide information on their selections to subscribers, and they can discount books nine months after the books' first editions have been released (which bookstores cannot do, due to a 1981 law allowing resale price maintenance by book publishers).

The courts have sometimes resisted the council's narrow definition. In the book club case, although the Paris Court of Appeals sustained the council's market definition, the French Supreme Court overturned the appellate court, finding the above-mentioned factors insufficient to establish that there was a separate market for book clubs. The case returned to the Paris Court of Appeals, which reiterated its analysis, adding further considerations to buttress its first opinion.

The wording of Article 10, in particular its reference to "a domestic market" or a substantial part of such a market, has led some to question whether the prohibition on abuse of dominant position could be applied to local monopolies such as cable TV, water distribution, undertakers, waste disposal, public lighting, and other sectors where local authorities grant private firms an exclusive license to operate. The council holds that each such local market should be considered to be a specific domestic market (because consumers cannot substitute between the services offered locally and similar services offered elsewhere when an operator has an exclusive concession). In contrast, the courts have wavered in their interpretation of the law and have occasionally used a rather confusing approach, in which they first establish the existence of separate "local" markets in which a firm enjoys a dominant position and then aggregating its dominance in local markets into an assessment of "domestic" market dominance.

In line with the European Court of Justice's interpretation of Article 86 of the EU treaty, in order to establish whether a firm has a dominant position the council assesses whether the firm can to an appreciable degree act independently of its competitors. It takes into account a variety of factors: the firm's market share, distribution of market shares of its competitors, its degree of vertical integration compared with its competitors, the level of differentiation of its product, the ease or difficulty of entry into the industry as well as the history of entry.

Firms belonging to prosperous financial groups will ceteris paribus more likely be considered dominant if their competitors do not belong to similar groups because capital markets are assumed to discriminate in favor of large financial groups, which can offer their affiliates easier and less-costly access to funds than independent firms enjoy.

Article 8 of the 1986 ordinance prohibits anticompetitive abuses by firms “or group of firms” holding a dominant position in a market; this wording raises the question of whether a tight oligopoly could be considered a group of firms collectively holding a dominant position. In such instances, the anticompetitive abuse of each member could be considered as an Article 8 violation and sanctioned even if none of the firms involved had an individual dominant position and even if no tacit agreement existed among them.

The minister of economic affairs has urged the council to adopt this wide interpretation of the scope of Article 10. However, the council and the Paris Court of Appeals have both resisted such attempts, limiting the interpretation of “group of firms” to cases in which the firm under scrutiny had a financial link with some of its competitors (and in which they together had a dominant position on the relevant market).

When it deals with potential abuses of dominant position, the council refrains from taking a normative approach to prices or profit margins. Thus, low output, high absolute price levels, price increases, and large profit margins are not regarded as evidence of an abusive practice by a dominant firm. Practices that may qualify as abuses of dominant position are for the most part limited to attempts to prevent market entry (e.g., no. 92-D-26, *Rapport du Conseil de la Concurrence pour l'année 1992*, annexe 33, 248) or to drive a small competitor out of the market—for example, through predatory pricing (defined as prices below the variable costs of production) or tie-in sales, in which the dominant firm tries to use its monopoly power in one market to acquire a dominant position in a related competitive market.

The only case in which the council made an exception to this rule concerned the French musical authors' guild (SACEM), which has a de facto monopoly on the collection of royalties due to composers and lyricists. In this case the Paris Court of Appeals asked the council not only to deliver a nonbinding opinion on whether SACEM, by overcharging French discothèques, had violated Article 86 of the EU treaty but also to do so following the methodology laid down in a previous opinion of the European Court of Justice. In it, the EU Court of Justice had held that a royalty-collecting agency could be found to have abused its dominant position in a substantial part of the common market (for example, in one member state) if its gross collection per discothèque (including part of its administrative costs and the royalties due to the composers) was significantly higher than the gross collection per discothèque of similar organizations in other European member states. Having found that SACEM charged significantly higher gross royalties to French discos than similar monopolistic collecting agencies did in other member states, the council ruled that it had indeed violated Article 86.

As with its position on general sales conditions cited earlier, the council does not hold that price differentiation is necessarily price discrimination nor that price discrimination by a dominant firm is necessarily an anticompetitive abuse of that position, even if the victims of the discrimination see it as unfair (e.g., no. 91-D-50, *Rapport du Conseil de la Concurrence pour l'année 1991*, annexe 57). Along the same line, the council has stated that manufacturers, even if they have dominant positions, have the right to organize their distribution networks as they see fit (and in particular to dispense with intermediaries or retailers if they decide to sell directly to final consumers). Thus, it has rejected complaints by discontinued distributors or retailers that their elimination from the market violated Article 8 in cases involving the distribution of petroleum products (no. 89-D-44, *Rapport du Conseil de la Concurrence pour l'année 1989*, annexe 51, 164) and games (no. 89-D-39, *Rapport du Conseil de la Concurrence pour l'année 1989*, annexe 46, 136).

However, the council has cited as violations of Article 10 a variety of strategies to prevent entry of competitors or to limit their development (either in the market in which the firm is dominant or in a downstream market if the dominant firm is vertically integrated)—these include predatory pricing or tie-in sales and refusals to deal.

For example, in a case concerning calcium used in foundries, the council established that the dominant supplier had attempted to stifle the development of another firm, which had invented a process for transforming calcium that improved its quality and permitted new uses, by refusing to supply this firm with the raw material it needed until it could come up with a competing process (no. 92-D-26, *Rapport du Conseil de la Concurrence pour l'année 1992*, annexe 33, 248).

In another case, concerning the market for pig-iron water mains, the council held that Pont-à-Mousson, a very well-established and influential firm in France, had a dominant position; its only competitor, a newly established subsidiary of a British firm, had less than 2 percent of the French market. Pont-à-Mousson violated Article 10 by circulating unfounded rumors among local authorities about the quality of its competitor's mains and by systematically lowering its original bids when contracts were awarded to its competitor in order to get the competitor's contract canceled (no. 92-D-62, *Rapport du Conseil de la Concurrence pour l'année 1992*, annexe 69, 429).

Also, when dominant firms practice price discrimination (in some instances) and resale price maintenance (in all instances), these are also considered to be Article 10 violations.

Abuse of Dependency

Article 10-2 also prohibits anticompetitive abuses by firms that do not have a dominant position but hold another firm (whether a supplier or a customer) in their dependency. As was mentioned earlier, this provision was mainly designed to protect manufacturers from the (supposedly abusive) demands of large retail chains, although several cases referred to the council were introduced by small retailers that complained of having lost their contracts as selected distributors of well-known products or of having lost their franchises.

The enforcement of Article 10-2 of this ordinance raises difficult questions. The concept of dependency has no basis in economic analysis and is therefore hard to define. In its most important decision to date on the issue (no. 93-D-21, *Rapport du Conseil de la Concurrence pour l'année 199*3, annexe 28, 206), the council indicated that it considers a number of factors to determine a manufacturer's dependency on a retailer: the retailer's share of total sales of the manufacturer, the importance of the distributor in the sales of the relevant category of products, the notoriety of the manufacturer's brand name or of the retailer, whether the retailer is distributor of the product because of the manufacturer's strategic choice or of technical necessity, and whether the manufacturer has equivalent alternatives. This list suggests that the council will limit its qualification of a manufacturer's dependency vis-à-vis a retailer to cases in which the dependency is the result of objective (structural or technical) reasons but will refuse to find dependency when the manufacturer has deliberately chosen to concentrate its sales with one retailer.

The question remains as to what constitutes an "equivalent alternative." If, for example, a large retailer refuses to carry the products of a manufacturer whose products are sold through all other large retailers, can the manufacturer be considered to have distribution alternatives or should one distributor's refusal to carry the product be characterized as leaving the manufacturer no alternative for selling in all retail shops? (See, e.g., no. 94-D-60, *Rapport du Conseil de la Concurrence pour l'année 1994*, annexe 67, 495).

"Abuse of dependency" is equally difficult to define. Presumably, it refers to large distributors' unjustified (or unfair) demands for discounts on a manufacturer's goods as a condition of carrying them. But economic analysis cannot determine what is a justified (or fair) demand in a vertical negotiation between a manufacturer and a distributor, both of which are interested in dealing with each other and each trying to secure the largest part of the common advantage).

Article 10-2 limits the prohibition of abuses of dependency to cases in which these abuses had the object or may have had the effect of restraining competition. However, unfair dealings between a manufacturer and a distributor do not necessarily restrain competition among the manufacturers or among the distributors. Even in the major cases in which it determined that some manufacturers were dependent on a retailer and that the retailers had made abusive demands, the council remained unconvinced that competition had been restrained (See, e.g., no. 93-D-21, *Rapport du Conseil de la Concurrence pour l'année 1993*, annexe 28, 204).

Merger Control

As was mentioned earlier, the council's task when a merger is referred to it is to assess whether the merger's potential to further economic progress outweighs the potential anticompetitive effect.

Merger control in France can be applied to all mergers that do not have an EU dimension, that meet the thresholds set in the 1986 ordinance, and that may restrain competition even if such mergers will not create a dominant position. Thus the scope of the council's control is in principle larger than the scope for EU merger control, because at the Community level only mergers that create or reinforce a dominant position can be declared incompatible with the Common Market. However, this difference of scope is not as important as it would seem, for two reasons. First, case law at the European level (in particular, the Nestlé/Perrier case) reveals that the Commission broadened the scope of Article 2 of the EU merger regulation by considering that mergers that reinforce an oligopoly can be prohibited on the basis of the fact that they reinforce a collective dominant position for the members of the oligopoly even if they do not confer a dominant position to the merging parties. Second, most of the cases that the French minister of economic affairs has referred to the council have involved firms with substantial market shares. In these mergers, the central question is whether the change in industry concentration is likely to confer or reinforce a dominant position for the merging firms (that is, the ability for these firms to behave independently of their competitors).

In its appraisal of the potential effect of the merger on competition, the council not only takes into account the structural changes to the industry at the time of the merger on French territory but it also considers the international environment of the industry concerned and examines the dynamics of the market.

For example, when it examined a proposed joint venture between Metaleurop and Heubach & Lindgens (no. 94-A-18, 17 May 1994, *Rapport du Conseil de la Concurrence pour l'année 1994*, annexe 95, 671), which both produce lead oxide (used in batteries, glass, and paint), the council did not object, even though in France the combined market share of the parties was close to 90 percent. The council first remarked that it could be economically profitable for major industrial users to produce lead oxide themselves if their level of consumption exceeded a few thousand tons per year. Equipment and know-how were readily available from a number of sources in the world, and the major European industrial users were in fact vertically integrated and ready to sell their excess production, since transportation costs were reasonably low and rarely exceeded 10 percent of production costs for shipment in the European Union. (At the time of the merger, integrated manufacturers accounted for about 20 percent of the commercial supply of lead oxide in the Union.)

The council also noted a high degree of concentration on the demand side; in France the 15 largest customers of the parties to the merger accounted for 95 percent of their total sales, and their 15 largest EU customers accounted for 55 percent of total sales. The council also took into account the fact that concern about the environmental hazards associated with the use of lead or of lead-based products had contributed to the development of substitute products, which were expected to replace lead oxide in the medium term. For all these reasons, the council decided that the joint venture posed limited risks to competition.

When an examined merger is unlikely to lead to the creation of a unified dominant position for the parties but could conceivably lead to the reinforcement of an oligopoly, the council, following the lead of the Merger Task Force of the European Commission, usually focuses on a structural analysis of the industry in which the merger is taking place—including supply-side substitutability, the height of entry barriers, actual or potential vertical integration, concentration on the demand side and the distribution of market shares among the suppliers—to assess whether the mergers are likely to weaken competition. Theories of oligopolistic rivalries (focusing on market transparency, distribution of excess capacity, and game-theoretic considerations) have not so far significantly influenced the council's approach to mergers in oligopolistic markets.

Thus, for example, when it examined a proposed merger between two manufacturers of PET (polyethylène teraphtalate) plastic bottles for soft drinks and sparkling mineral waters, the council first established that nonplastic containers (metal or cardboard) or other plastic containers (such as PVC bottles) were not substitutes for PET bottles, at least for some producers of carbonated drinks (no. 93-A-17, 16 November 1993, *Rapport du Conseil de la Concurrence pour l'année 1993*, annexe 82, 535). Indeed, PET can retain gas better than other materials, and firms such as Perrier and Coca-Cola cannot easily replace PET bottles with PVC bottles. The council then observed that after the merger there would be two major suppliers of PET bottles in the French market: the parties to the merger, with a market share of 35 percent, and Millet PET Packaging, a subsidiary of the American firm Johnson Controls, with an equivalent market share. It also noted that if the price of PET bottles were to increase significantly as a result of the merger, nothing would prevent either carbonated drink producers from making their own PET bottles or new PET manufacturers from entering the market. Entry barriers seemed low, as evidenced by the fact that during the five years preceding the proposed merger three manufacturers had entered the French market, and two of these increased their production capacity during that period. The council also observed that buyer concentration was high; for example, Coca-Cola accounted for more than 82 percent of the total sales of the acquiring firm. Thus the council held that the merger did not threaten competition.

A second difference between EU and French merger control lies in the fact that the possibility of an efficiency defense for anticompetitive mergers is written into the French ordinance, whereas the EU merger control does not formally allow for such a defense. Again, this difference in approach may seem more important than it really is when one considers case law. The Commission has in fact occasionally considered efficiency in assessing whether a particular merger created or strengthened a dominant position. On the other hand, from 1990 on, France's Competition Council has insisted that an efficiency defense for an otherwise anticompetitive merger is admissible only if the parties to it demonstrate that alleged efficiency gains could not be obtained without the merger. The council has thereby aligned its analysis in the merger area with its analysis in the area of anticompetitive practices.

Thus, for example, in its 1990 opinion on the proposed merger between advertising firms Eurocom and Carat Espace (no. 90-A-10, *Rapport du Conseil de la Concurrence pour l'année 1990*, annexe 80, 180), the council indicated that the parties had argued that their merger would allow them to develop synergies—Eurocom being primarily an advertising agency, Carat a media planning specialist, and both of them being major wholesale traders of advertising space. But the council said the firms had failed to establish that, in the French market, Eurocom could not independently develop a media planning capability equal (or superior) to that of Carat or that Carat (which was already the largest wholesale trader of advertising space in France and considered to be the best media planner) could not further develop its business without the support of Eurocom. The council thus argued that the firms involved should be allowed to merge their international networks but not their operations on French territory. Ultimately, the merger was abandoned.

Thus, overall, the council's conditions for admissibility of the efficiency defense mean that such a defense will rarely be successful.