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January, 1995

# Dirigisme and the Challenge of Competition Law in France (with R. Azarnia)

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# DIRIGISME AND THE CHALLENGE OF COMPETITION LAW IN FRANCE

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## I. INTRODUCTION

The French word “*dirigisme*,” or a derivative of it, is used in several languages to refer to the practice of large-scale government direction of private economic activity. The source of this usage is France’s long and close association with this type of supervision of the economy. During the last decade and a half the French government has attempted to move away from this tradition. One step in this direction was the enactment in 1986 of a competition statute based on a quite different understanding of the relationship between the state and the economy in which the state’s primary role is to protect the process of competition. This statute represents a bold confrontation with existing traditions.

For the French, a matter of fundamental choices about the relationship between the government and the economy is at stake. In the *dirigiste* tradition, government administrators maintain broad discretion to utilize laws to achieve political objectives. Here the administrator is in charge; the law’s role is, in essence, to assure that administrators follow authoritative directions and procedures in making their decisions. In contrast, the new competition statute establishes legal principles intended to protect the competitive process. The administrator’s role is to apply and enforce these principles rather than to make political decisions.

Long-standing traditions do not fade easily, however, and many in France remain sympathetic toward *dirigiste* practices and their concomitant promise of order and control of economic developments by the government. They resist what they perceive to be

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the maddeningly uncontrollable regime of competition.<sup>1</sup> As a consequence, those seeking a relationship between government and the economy based on competition and economic freedom often find little support for their goals.

There is also a European dimension to this story. French competition law was enacted as part of the process of European integration.<sup>2</sup> It was designed to bring both French law closer to European Community competition law and French economic policy closer to the market-based policies on which the Community (now the European Union) operates.<sup>3</sup> Community competition law has been a key factor in European integration, and the continued expansion of the scope and effectiveness of competition law is seen by many as critical to the future of that process.<sup>4</sup> Consequently, if France is ineffective in achieving its goal, it could have serious consequences for the future of European integration.

Here, we examine two aspects of the confrontation between *dirigisme* and competition law. We look first at how the tradition of state administration hampers the practical effectiveness of the French competition law system. We then examine the impact of this clash on the jurisdictional scope of the competition system. In both contexts *dirigiste* traditions continue to impede the development of competition law.

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<sup>1</sup> For example, Philippe Seguin, President of the French Parliament, has been campaigning against neo-liberalism and its associated Community influences in France, preferring instead a return to more protection of French industry. See, e.g., Jacques Michel Tondre, *Les clivages apparus lors du référendum de Maastricht rythment toujours la vie politique française*, AGENCE FRANCE PRESSE, Sept. 17, 1993 available in LEXIS, Presse Library, AFP File.

<sup>2</sup> Other countries such as Spain, Portugal, Italy and Belgium that have pursued *dirigiste* economic policies in the past have recently enacted analogous competition laws for similar reasons. See, e.g., 1991 RAPPORT D'ACTIVITÉ DU CONSEIL DE LA CONCURRENCE VII [hereinafter 1991 RAPPORT].

<sup>3</sup> "The 1986 reform is the product of liberal thinking and is inspired by the European model: the idea was to eliminate the administrative control of economic activity and to institute an independent body capable of monitoring and regulating the workings of the market." Judgment of January 28, 1988, Cour d'appel de Paris, 1989 Dalloz-Sirey Jurisprudence 505 note Christian Bolze, at 507 [hereinafter Bolze] (Fr.). See also, 1987 RAPPORT D'ACTIVITÉ DU CONSEIL DE LA CONCURRENCE III [hereinafter 1987 RAPPORT].

<sup>4</sup> See generally, David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L. L. J. 97 (1994).

## II. THE DIRIGISTE TRADITION

French *dirigiste* traditions were firmly established by the eighteenth century, although they have deeper roots.<sup>5</sup> The idea that the government should largely control the economy is frequently associated with Colbert, the famous Finance Minister of Louis XIV. Colbert sought to organize the French economy in the service of the state and established a bureaucratic apparatus for “managing” it. Colbert’s policies epitomized European mercantilism.<sup>6</sup>

Patterns of state control of the economy survived the French Revolution, though in attenuated form and with a limited scope.<sup>7</sup> France industrialized more slowly than its main rivals, England and Germany, and there was relatively little perceived need for governmental control of industry until after the First World War. The administrative state was firmly in place, but it intervened little in industrial markets.

During the depression of the 1930s, however, the French government greatly increased administrative intervention in the industrial sectors of the economy. In 1936, for example, it imposed extensive price controls which were to provide a key vehicle for government control of industry (these controls remained in effect until 1986).<sup>8</sup>

After World War II, patterns of government control received new impulses from the perceived need to both modernize and industrialize more rapidly. The French recognized how much their economic weakness had contributed to their recent military defeat, and they placed great emphasis on regaining their economic strength.<sup>9</sup> It was generally believed that government leadership was necessary for economic progress, and thus the French developed the concept of *planification*. In *planification*, the government established economic plans to serve as coordinating mechanisms

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<sup>5</sup> See generally CHARLES WOOLSEY COLE, FRENCH MERCANTILIST DOCTRINES BEFORE COLBERT (1931) and JOHN SHEAHAN, PROMOTION AND CONTROL OF INDUSTRY IN POSTWAR FRANCE 29 (1963).

<sup>6</sup> For a leading description of mercantilism, see ELI F. HECKSCHER, MERCANTILISM 128-30 (E. Söderlund ed. & Mendel Shapiro trans., 2d ed. 1955).

<sup>7</sup> See, e.g., FRANCOIS CARON, AN ECONOMIC HISTORY OF MODERN FRANCE 31-44 (Barbara Bray trans., 1979).

<sup>8</sup> See generally HERVÉ DUMEZ & ALAIN JEUNEMAITRE, DIRIGER L'ÉCONOMIE: L'ÉTAT ET LES PRIX EN FRANCE (1936-1986)(1989).

<sup>9</sup> WILLIAM JAMES ADAMS, RESTRUCTURING THE FRENCH ECONOMY 47 (1989).

for the private sector. The focus was not on mandatory regulation, but on governmental coordination of the efforts of private firms.<sup>10</sup>

Despite halting, uncertain moves away from this level of government involvement in the economy during the last two decades, many components of the tradition it represents remain intact. According to a 1990-91 report of the OECD:

The state's direct intervention in market mechanisms is still significant, the process of privatization remains incomplete, and the share of public enterprises in sectors normally in private hands continues to be important. In addition, much is as yet unfinished in the deregulation of sectors which are not, at least any longer, natural monopolies, such as air transport. Finally, regulation continues to respond excessively to the interests of the few to the detriment of overall consumer welfare, as was seen again recently in the increased protection granted to small shopkeepers.<sup>11</sup>

Thus, market conditions are often closely supervised by the bureaucracy, and elements of the control structure of state *planification* remain.

Moreover, the government continues its propensity to provide high levels of direct subsidies to industry,<sup>12</sup> despite efforts by the European Commission to reduce state aids.<sup>13</sup> For instance, in 1991 the Commission condemned the French government's extensive subsidies to three large French multi-nationals (Cie. des Machines Bull, Thomson CSF, and Air France),<sup>14</sup> but two years later France was again providing subsidies to these same firms.<sup>15</sup>

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<sup>10</sup> See generally, SHEAHAN, *supra* note 5, at 42, and MICHEL FROMONT, *RAPPORT SUR LE DROIT ÉCONOMIQUE FRANÇAIS* § 5(2) 59 (1973).

<sup>11</sup> OECD, 1990-1991 ECONOMIC SURVEYS — FRANCE 95 [hereinafter 1990-1991 OECD SURVEY].

<sup>12</sup> According to the most recent OECD report on France, of all components of the government's current expenditure account only subsidies grew from 1992 to 1993. Table 5. Consolidated general-government account. OECD, 1991-1992 ECONOMIC SURVEYS — FRANCE 41 [hereinafter 1991-1992 OECD SURVEY].

<sup>13</sup> Such aid may violate Article 92 of the Rome Treaty (Treaty Establishing the European Economic Community [EEC Treaty], Mar. 25, 1957, 298 U.N.T.S. 11) which, together with articles 93 and 94, regulates the degree to which Member States may grant aid to business enterprises. See, e.g., ALAN CAMPBELL, *EC COMPETITION LAW* 236-39 (1980).

<sup>14</sup> See *Inquiry is Set on Aid for Bull*, N.Y. TIMES, Jul. 11, 1991, at D19, col.1; and Charles Fleming & Julie Wolf, *EC Official says Paris Will Drop Subsidies Plan*, WALL ST. J., Jun. 20, 1991, at A11, col. 1.

<sup>15</sup> *Competition Policy: Air France, Bull, DAF. When Does Recapitalisation Constitute State Aid?*, EUROPEAN REPORT, Feb. 20, 1993, § III (Business Brief), No. 1837 available in LEXIS, Europe Library, EURRPT File.

Finally, state-owned firms still control large portions of the French market, and they are often protected from competition by the state. In sectors such as banking and transportation, for example, high levels of protection and government ownership exist, even though the European Commission is making progress in "liberalizing" them.<sup>16</sup>

The French interventionist tradition is linked to the strength and independence of the central bureaucracy in France. During the last two centuries there have been numerous changes in the political and constitutional structure (including five republics). However, the administrative structure has remained largely intact, gaining in strength as successive constitutions have failed and been replaced.

An important element of the independence of the French administrative apparatus is France's administrative law tradition.<sup>17</sup> Under French law, administrative decisions can only be reviewed by administrative courts which are officially part of the executive branch. These courts apply principles of administrative law, a separate body of law which they have developed. This insulates ad-

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<sup>16</sup> These enterprises not only benefit from the State's financial support, but "because of their status they are at least in part protected from the normal mechanisms of the market place, and they thereby modify the competitive conditions in the market." 1990-91 OECD SURVEY, *supra* note 11, at 77-78.

In France, just as in most other European countries, the least competitive markets are banking and finance, air transports market, and telecommunications. OECD, 1988-1989 ECONOMIC SURVEYS — FRANCE 72 [hereinafter 1988-89 OECD SURVEY]. However, France is the only member of the Community where six key sectors of the economy remain in the hands of state-owned monopolies (post office, telecommunications, electricity, gas, coal, and railways). France also has the second highest average percentage of state control of key economic sectors. The sectors in question are: post office, telecommunications, electricity, gas, oil, coal, railways, air transport, road transport, steel, and shipbuilding. The overall average control of these fields in some EC countries is as follows:

1. Italy	: 83%
2. France	: 80%
3. Netherlands	: 67%
4. Belgium	: 60%
5. Spain	: 60%
6. West Germany	: 59%
7. Great Britain	: 52%

See Table 16. Distribution of public enterprises by industry, 1989. 1990-91 OECD SURVEY, *supra* note 11, at 79.

<sup>17</sup> For an historical introduction, see Louis Fougere, *1790-1990, Deux siècles de dualisme juridictionnel*, 1990 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF [A.J.D.A.] 579. available in LEXIS, Revues Library, AJDA File.

ministrative actions from the regular court system in a broad spectrum of cases.<sup>18</sup>

### III. FRENCH COMPETITION LAW AS PROTAGONIST

#### A. *Pre-1986 Competition Law*

Prior to 1986, competition law in France had seen little development.<sup>19</sup> A Napoleonic era section of the Penal Code (Article 419) prohibited certain types of market manipulation, and there were scattered regulatory measures with the same basic objective, but no coherent legal framework for the protection of competition existed.<sup>20</sup> According to one leading expert, "It is essentially during the past forty years that a body of rules has been developed to order, as need be, the phenomenon of competition considered as an instrument of economic policy. But, far from being a planned process, this legislation has been the product of succeeding and sometimes paradoxical acts [of Parliament]."<sup>21</sup>

This developmental process began following World War II, when the French government recognized that economic competition might serve the ends of economic development and modernization. It thus enacted the *Ordonnance* of June 30, 1945, which was to remain in effect for four decades.<sup>22</sup> This statute introduced norms relating to the protection of competition, but provided no effective system for their enforcement. These norms were actually part of a regulatory package that, *inter alia*, gave the government the right to monitor all prices.<sup>23</sup> The *Ordonnance* of September 28, 1967, for the first time treated competition law as a distinct entity

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<sup>18</sup> For an overview of the structure of French administrative law, see RENE DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY* 24-25, 28, 30, & 127-32 (Michael Kindred trans., 1972).

<sup>19</sup> This article does not treat "unfair competition law" as part of competition law. France does, however, have a long tradition of the former. See, e.g., Walter J. Derenberg, *The Influence of the French Civil Code on the Modern Law of Unfair Competition*, 4 AM. J. COMP. L. 1 (1955).

<sup>20</sup> For a detailed description of French competition law before the 1986 reforms, see JEAN-JACQUES BURST & ROBERT KOVAR, *DROIT DE LA CONCURRENCE* (1982).

<sup>21</sup> JACQUES AZEMA, *LE DROIT FRANCAIS DE LA CONCURRENCE* 29 (1989).

<sup>22</sup> In this article, the term "statute" refers to *ordonnances*, but this usage requires explanation. An *ordonnance* is legislation authorized by the legislature, but actually drafted and passed by the administration. JEAN BALEYTE ET AL., *DICTIONNAIRE JURIDIQUE/LEGAL DICTIONARY* 207 (1977).

<sup>23</sup> See generally FROMONT, *supra* note 10, at 57-60.

rather than a corollary of price control,<sup>24</sup> but it continued to operate in a context of pervasive governmental controls.<sup>25</sup>

It was not until the mid-1970s that the French government turned more resolutely toward a greater emphasis on market economics, a corresponding reduction in *planification*, and a loosening of price controls.<sup>26</sup> This was largely a response to a growing belief that state intervention impeded France's economic progress.

### B. *The 1986 Statute: Toward an Autonomous Competition Law*

In 1986 France enacted its first full-fledged competition statute — *Ordonnance* no. 86-1243 ("The Competition Statute").<sup>27</sup> Its enactment reflected a growing realization that existing French competition laws were guided by "principles which were anachronistic in a [modern] economic environment, and which were opposed to the most basic rules of Community law."<sup>28</sup> The context was one of renewed confidence in the future of European economic integration and a desire to harmonize French competition law with its Community counterparts.<sup>29</sup> Yet it was also designed to improve the French economy and to symbolize a move away from France's *dirigiste* traditions.<sup>30</sup>

The Competition Statute specifically repealed *Ordonnance* no. 45-1483 and created a comprehensive competition law system on

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<sup>24</sup> *Id.* at 57-58.

<sup>25</sup> According to the OECD's 1990-1991 survey of France, France is perceived as a developed country in which competition has been weak. This lack of competitive markets has resulted from government intervention aimed at erecting economic giants to rival foreign corporations and uphold France's economic prestige. 1990-91 OECD SURVEY, *supra* note 11, at 71.

<sup>26</sup> ADAMS, *supra* note 9, at 206.

<sup>27</sup> *Ordonnance* no. 86-1243 due 1er décembre 1986 relative à la liberté des prix et de la concurrence, 1986 J.O. 14773, 1987 DALLOZ-SIREY LÉGISLATION [D.S.L.] 3 (Fr.).

<sup>28</sup> Judgment of June 6, 1989, Trib. con., 1990 La Semaine Juridique II, No. 21395, note Philippe Terneyre at 4 (Fr.) (unpaginated reporter, page number refers to fourth page of case as printed in reporter).

<sup>29</sup> On the establishment of the *Conseil de la Concurrence* on February 20, 1987, the French Minister of the Economy explained the reform's objectives in terms of necessities for a revitalized France within a dynamic Europe. 1987 RAPPORT, *supra* note 3, at 38. See also 1990-91 OECD SURVEY, *supra* note 11, at 72.

<sup>30</sup> In describing the background and thrust of the Competition Statute, Senator Pierre-Christian Taittinger stated that: "[T]he balance of the project . . . involved the state renouncing its right to regulate the details of economic life and substituting a free economy for an administered economy." 1987 J.O. 488, SENAT, No. 3947 (daily ed. Apr. 2, 1987) (Fr.) [hereinafter Parliamentary Question No. 3947]. See also 1990-1991 OECD ECONOMIC SURVEY, *supra* note 11, at 71.

the model of Community and German competition law. This one statute created substantive norms, procedural rules and an institutional framework for the system.

The statute's substantive provisions contain both general principles and specific rules. Its general principles (articles 7 and 8) prohibit, respectively, collusive acts which tend to distort competition and the abuse of a market-dominating position. Article 10 then provides an important exception for conduct that would otherwise violate one of these articles, but that is required by statute or justified by its contribution to economic progress. The specific rules (articles 28-37) deal with issues such as refusals to sell.

Title two of the statute creates the *Conseil de la Concurrence* ("*Conseil*"), which is the main enforcement organ of the system, establishes the criteria for selection of its members, and provides many of its procedural rules.<sup>31</sup> The *Conseil* is an independent authority.<sup>32</sup> It may hear cases initiated by others, and it may itself initiate proceedings in situations where it detects potentially anti-competitive behavior. Once proceedings are instituted, the *Conseil* has full investigative powers, and it is empowered to grant injunctions, to impose fines and even to award prison terms of up to four years.

In addition to its adjudicative role, the *Conseil* also serves a consultative function. In certain situations involving economic intervention, consultation with the *Conseil* is mandatory — when, for example, the *Conseil d'État* seeks to impose price controls, or the government seeks to enact legislation which may affect competition, or the Minister of the Economy wishes to regulate mergers.

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<sup>31</sup> Title I of *Décret* no. 86-1309, which regulates the application of the Competition Statute, established the specific functions of the *Conseil*. *Décret* no. 86-1309 du 29 décembre 1986 fixant les conditions d'application de l'ordonnance no. 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence, 1989 J.O. 15775, 1987 D.S.L. 42 (Fr.). *Décrets* are "edicts outlining the practical measures for the application of a law." BALEYTE et al., *supra* note 22, at 86. *Décret* no. 86-1309 was later amended, in small part, by *Décret* no. 88-479. *Décret* no. 88-479 du 2 mai 1988 modifiant le décret no. 86-1309 du 29 décembre 1986 fixant les conditions d'application de l'ordonnance no. 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence, 1988 J.O. 6000, 1988 D.S.L. 274 (Fr.).

<sup>32</sup> In response to a question about the establishment of an independent authority (*jurisdiction*) responsible for protecting competition, the Minister of Justice defined the *Conseil* as "an independent authority of the government entrusted with the control of anti-trust practices, which was previously the domain of the minister of the economy." 1987 J.O. 4923, ASSEMBLÉE NATIONALE, No. 27448 (daily ed. Aug. 31, 1987) (Fr.) [hereinafter Parliamentary Question No. 27448].

The 1986 statute thus gives French competition law a cohesiveness that it had not known before, and this is, in itself, a major accomplishment.<sup>33</sup> Moreover, by establishing the *Conseil* as an independent authority with significant enforcement authority, it made competition law, at least in principle, an independent and significant force.

Yet the system remains a hybrid — the product of a political compromise.<sup>34</sup> There are no private suits under the Statute,<sup>35</sup> and thus its efficacy depends on the role played by the *Conseil*, which remains dependent on the administration for its funding and for other forms of support. Moreover, the administration — specifically, the DGCCRF<sup>36</sup> — continues to have concurrent authority to investigate anti-competitive activity.

#### IV. DIRIGISTE TRADITIONS AND THE EFFECTIVENESS OF COMPETITION LAW

Where, as here, legislation may significantly affect configurations of power within society, its success necessarily depends on the extent to which it receives institutional and intellectual support for its objectives. Seldom can the enactment of a statute reorient thought and practice unless it is supported by significant institutions and given the resources needed to accomplish its mission. Yet French competition law has been given little such support, remaining hobbled by existing traditions and allocations of power.

##### A. *The Continuing Role of the Administration in Competition Matters*

One aspect of the problem is that the Competition Statute left an important component of competition law in the hands of the Economics Minister rather than placing it under the control of the

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<sup>33</sup> See, e.g., AZEMA, *supra* note 21, at 29.

<sup>34</sup> See generally Bolze, *supra* note 3, at 507.

<sup>35</sup> Although article 5 of the Competition Statute entitles private entities, such as corporations, to file complaints before the *Conseil*, this right should not be seen to allow “private suits.”

<sup>36</sup> *Direction Générale de la Concurrence, de la Consommation, et de la Répression des Fraudes* (Directorate General of Competition, Consumer Policy and the Repression of Fraud). The DGCCRF is a directorate of the Ministry of the Economy. It is responsible for the effective operation of markets, and for ensuring “respect for the rules protecting consumers . . . as well as for the rules of competition. On the basis of a complaint or on its own initiative, the DGCCRF launches investigations aimed at disclosing and establishing the existence of anti-competitive practices.” AZEMA, *supra* note 21, at 32-33.

*Conseil*. The Statute gives the *Conseil* jurisdiction only over anti-competitive conduct, leaving potential structural impediments to competition — such as mergers — under the control of the Minister of the Economy.<sup>37</sup> Mergers need not be notified, and even if a merger is notified, the Minister is not obligated to take action regarding it. If he does nothing for a specific period of time (two months) the merger is considered approved. Moreover, there are few text-based constraints on the discretion of the Minister of the Economy in merger cases, allowing him to base decisions primarily on political rather than juridical criteria.

Not surprisingly, Ministers' political interests sometimes lead to relative neglect of competition as a value.<sup>38</sup> For example, the government frequently encourages mergers in order to meet the challenge of international competition rather than discouraging them in order to restrict monopolization.<sup>39</sup>

The *Conseil's* role in this area is peripheral. The Minister may seek the *Conseil's* opinion on a merger, but its opinion is merely advisory. Moreover, the *Conseil* may only give its opinion on aspects of the merger which affect competition. The Minister alone assesses the social and economic consequences involved.<sup>40</sup> Consequently, in this context Economics Ministers have generally ignored the *Conseil*.<sup>41</sup> The justification for leaving such control in the hands of the government appears to be that mergers are critical to economic progress and the administration is alone in a position to assess such issues. Because "progress" generally relates to the entire economic policy of the nation, the government must have

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<sup>37</sup> For discussion of merger control, see, e.g., *id.*, at 373-374 and YVES CHAPUT, *LE DROIT DE LA CONCURRENCE* 49 (1988).

<sup>38</sup> In the first two and a half years after the passage of the Competition Statute, the Minister prohibited only one merger, and this contradicted the *Conseil's* advice in the case. See AZEMA, *supra* note 21, at 379.

<sup>39</sup> CHAPUT, *supra* note 37, at 49.

<sup>40</sup> Article 42 of the Competition Statute allows the Minister almost unlimited discretion, because he can justify decisions by reference to socio-economic factors of which he is the sole judge. "The Minister's decision to either prohibit or to impose certain restrictions upon a [planned merger], is a function of considerations which are broader than the *Conseil's*. [These considerations] include the social aspects relevant to the matter [Art. 42 of the statute], while the *Conseil de la Concurrence's* role remains limited to a purely technical one." AZEMA, *supra* note 21, at 379.

<sup>41</sup> Between 1986 and 1990, 80 concentration projects came before the Minister of the Economy. Only 12 of these, or 15 percent, were referred to the *Conseil* for an advisory opinion. See Table 18. Merger & acquisition control. 1990-91 OECD SURVEY, *supra* note 11, at 89.

final authority to assess the contribution of any concentration to “economic progress.”<sup>42</sup>

The *Conseil* is given a similarly marginal role in other areas involving competition, again leaving the administration in control. For example, the government *must* consult with the *Conseil* in two situations — where it seeks to regulate prices or to introduce legislation which may hamper the competitive process, but the *Conseil's* opinion is not binding on the administration.<sup>43</sup> As a consequence, the government has paid little attention to the *Conseil's* opinions in such cases.<sup>44</sup>

There is only one situation where the government must follow the *Conseil's* recommendations. This is where “the government seeks to decree that the exception to competition law based on economic progress, usually limited to mergers, also applies to certain other types of collusive agreements. [However, as yet] no such situation has arisen.”<sup>45</sup>

Even where the law has granted authority to the *Conseil*, other administrative agencies often have resisted the transfer of power to it,<sup>46</sup> adopting a “turf-fight” mentality and seeking to marginalize the role of the *Conseil*. For example, investigations into potential violations of competition law can be initiated not only by the *Conseil*, but also by the DGCCRF,<sup>47</sup> and the officials of this office have been known to assert the centrality of their function in this area rather than supporting the consolidation of en-

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<sup>42</sup> Even when the Minister of the Economy submits a proposed concentration to the *Conseil*, the latter only “ascertains whether the merger’s contribution to economic progress outweighs its potential negative impact on competition. . . . The *Conseil* may not take into consideration the ultimate social progress [promoted by the concentration]—that issue is exclusively part of the Minister’s calculus.” CHAPUT, *supra* note 37, at 51.

<sup>43</sup> AZEMA, *supra* note 21, at 290-291.

<sup>44</sup> For instance, between 1987 and 1989, the *Conseil* published three opinions in this area, only one of which was followed and that only to a limited extent. *Id.* at 291.

<sup>45</sup> *Id.* at 290.

<sup>46</sup>

From an administrative process dominated by the executive—where the decision-making was in the hands of the Minister [of the Economy], we have moved to an autonomous judiciary [process] dominated by the Cour d’Appel de Paris. However, this change has been fully achieved neither in practice nor in the legislation, and there remain pockets of resistance around which the administration is trying to maintain part of its old privileges. . . .

Bolze, *supra* note 3, at 506.

<sup>47</sup> See 1987 J.O. 5274, ASSEMBLÉE NATIONALE, No. 20000 (daily ed. 21 Sept., 1987) (Fr.) [hereinafter Parliamentary Question No. 20000].

forcement activities in the *Conseil*, as intended by the Competition Statute.<sup>48</sup>

This attitude is illustrated by a memorandum dated August 12, 1987, from the Minister of the Economy to all French *prefets* and *commissaires*<sup>49</sup> concerning potential harms to competition from "paracommercial activities".<sup>50</sup> The memorandum urges officials to "ensure that the regional offices of the [DGCCRF] play a prominent part [in combatting these activities]."<sup>51</sup> It continues that "even before the publication of the Ordonnance of December 1, 1986, [these regional offices] were the natural recipients of any complaints in the realm [of competition],"<sup>52</sup> and it affirms that the Competition Statute gives these offices jurisdiction in the competition area.<sup>53</sup> "Even more than in the past," it urges, "representatives and trades-people will spontaneously turn to them."<sup>54</sup>

Thus only seven months after the new Competition Statute established the *Conseil* as the principal enforcement organ in the area, the Minister of the Economy is actively encouraging his officials to assert the power of their own office rather than allowing

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<sup>48</sup> The justification for this sharing of powers is that investigations "can be launched on the basis of clues or complaints made locally [and this allows] the eventual plaintiffs to easily find an on-site contact [with whom to pursue the case]." *Id.*

The Minister's reasoning is not, however, particularly convincing. The advantages of filing a complaint locally do not necessarily outweigh the importance of giving the *Conseil* a predominant role in the matter. If the true aim of the administration is "to insure suitable judicial protection against arbitrariness," *id.*, then an inquiry directed from Paris may be more suitable than one conducted by local authorities with much vested interest in the outcome of the dispute.

<sup>49</sup> MINISTÈRE DE L'ÉCONOMIE, Memorandum of Aug. 12, 1987, *Relative à la lutte contre les pratiques paracommerciales*, 1987 J.O. 9704 (Fr.) available in LEXIS, Loireg Library, JO File [hereinafter Ministerial Memorandum].

<sup>50</sup> Paracommercial activities refer to acts of private entities "which are involved in trade [commerce] but do not subject themselves to the [legal] requirements and charges associated with that activity." ROGER HOUIN & MICHEL PEDAMON, *DROIT COMMERCIAL* 704 (9th ed. 1990). For instance, selling merchandise in public places without prior permission or engaging in a commercial activity which is not specifically established by a company's charter, have been defined as paracommercial activities. *Id.* at 705. Thus, the commercial activities themselves are not forbidden; what is prohibited is engaging in those activities without submitting to the applicable tax, labor or regulatory rules.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.*

<sup>53</sup> The memorandum is presumably alluding to Article 45 of the Competition Statute, which provides that "[c]ivil servants entitled by the Minister of the Economy to do so, may proceed with investigations necessary to ensure the application of this ordinance. The judge advocates of the *Conseil de la Concurrence* hold the same powers for any dispute brought before the *Conseil*."

<sup>54</sup> Ministerial Memorandum, *supra* note 49, at 4.

the *Conseil* to become the central force in the area. Moreover, he seems to be urging consolidation of enforcement activities around the administrative body rather than the *Conseil*, despite the fact that one of the objectives of the Statute was clearly to unify such efforts in the *Conseil*.<sup>55</sup>

Finally, even with regard to the internal operations of the *Conseil*, the Ministry has been reluctant to allow the *Conseil* to function as autonomously as provided in the Statute.<sup>56</sup> The Ministry is reputed to interfere often in the *Conseil's* implementation of the Competition Statute and to have a significant influence on *Conseil* decisions.<sup>57</sup>

### B. Lack of Financial Support for Enforcement

The government also has failed to provide adequate financial support to the *Conseil*, the organization whose activity is the key to the effectiveness of the Statute. The *Conseil* has sixteen "members", all but three of whom apparently also have other full-time occupations.<sup>58</sup> In addition, some thirty civil servants take care of the administrative and investigative tasks of the *Conseil*.<sup>59</sup> This is

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<sup>55</sup> Any investigation by the DGCCRF is made under the sponsorship of the *Conseil*, but this does not counteract the obvious trespass by the rest of the administration onto the *Conseil's* domain. See also the answers of the Minister of the Economy during parliamentary questioning on Mar. 9, 1987. Parliamentary Question No. 2000, *supra* note 47, at 5274.

<sup>56</sup> According to one observer:

The executive branch and the administration have reacted against the logical implications of the new order in competition law: the decrees establishing the conditions of application [of the Competition Statute] have reintroduced the possibilities of state intervention on a large scale and the passage of the law of July 6, 1987, has been used as an opportunity to deny the *Conseil* any specific jurisdictional characteristics.

Bolze, *supra* note 3, at 507.

<sup>57</sup> "In theory, the *Conseil* may freely reach its decisions, but its autonomy is carefully directed, and its freedom is closely administered by those very authorities who have been dispossessed of their age-old power!" *Id.* at 506.

<sup>58</sup> 1990 RAPPORT D'ACTIVITÉ DU CONSEIL DE LA CONCURRENCE V [hereinafter 1990 RAPPORT]. For the most recent composition of the *Conseil*, see 1991 RAPPORT, *supra* note 2, at 16.

Article 2 of the Competition Statute requires the *Conseil* to be composed of:

1. Seven members or previous members of the *Conseil d'Etat*, the *Cour des comptes*, the *Cour de cassation* or of other administrative or judicial tribunals;
2. Four individuals selected for their specialization in economics or in competition and consumer issues;
3. Five individuals who are or were involved in the fields of production, distribution, craftsmanship, services or as professionals.

<sup>59</sup> See Title II, Competition Statute.

an exceptionally small staff for the responsibilities assigned to the office.

Since it began operations in 1987 the *Conseil* has had large backlogs. From its establishment in early 1987 until the end of 1991, the average percentage of cases decided out of the total number of cases submitted has been 64.3%, with the lowest rate (59%) coming in 1991.<sup>60</sup> A review of the *Rapport d'Activite* ("Annual Report") for 1991 reveals that more than 10% of the cases decided in 1991 were filed in 1987,<sup>61</sup> with the longest delay being that of a case filed on August 6, 1987, and decided on October 29, 1991.<sup>62</sup>

These problems are largely due to an overburdened staff.<sup>63</sup> As the *Conseil's* backlog has grown, it has pointed increasingly to the need for additional resources. In its Report for 1990, a year when it was able to resolve only 67% of its cases, the emphasis was on how "the *Conseil* [had] increased its effort at the price of the intensive workload of its members and civil servants."<sup>64</sup> By 1991, the Annual Report was virtually pleading for more funds to accommodate the *Conseil's* growing workload.<sup>65</sup>

The government also has provided inadequate financial support for activities designed to support the effectiveness of competition law. For example, if the government were committed to promoting competition, one would expect it to support the related efforts of consumer groups to better educate consumers.<sup>66</sup> This has not happened. Instead, the opposite has occurred. For example, in

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<sup>60</sup> See 1987 RAPPORT, *supra* note 3, at V-XI; 1988 RAPPORT D'ACTIVITÉ DU CONSEIL DE LA CONCURRENCE VI-XVII [hereinafter 1988 RAPPORT]; 1989 RAPPORT D'ACTIVITÉ DU CONSEIL DE LA CONCURRENCE X-XXII [hereinafter 1989 RAPPORT]; 1990 RAPPORT, *supra* note 58, at VII-XXI; 1991 RAPPORT, *supra* note 2, at IX-XXV.

<sup>61</sup> 1991 RAPPORT, *supra* note 2, app. 7-83 at 18-196.

<sup>62</sup> *Id.*, app. 52 at 109.

<sup>63</sup> The lack of governmental commitment to the work of the *Conseil* is reflected in numerous complaints and questions about the sufficiency of its resources for adequate competition law enforcement. See Parliamentary Question No. 20000, *supra* note 49, at 5274. See also 1987 J.O. 1368, SENAT, No. 5390, (daily ed. Sep 3, 1987) (Fr.) [hereinafter Parliamentary Question No. 5390]; and 1987 J.O., 1425, SENAT, Nos. 4571 & 7228 (daily ed. Sept. 10, 1987) (Fr.) [hereinafter Parliamentary Questions Nos. 4571 & 7228].

<sup>64</sup> 1990 RAPPORT, *supra* note 58, at V.

<sup>65</sup> 1991 was particularly difficult in this regard: the *Conseil* saw the largest number of referrals and opinion requests with 129, and it had its lowest decision rate yet with 59 percent.

<sup>66</sup> "[T]he power and resources of French consumer associations are limited, and it may be argued that the authorities should endow them with additional means, in line with practice in other European countries." 1988-89 OECD Survey, *supra* note 16, at 72.

the first year after the enactment of the statute the funds for consumer groups were significantly reduced.<sup>67</sup> The government's justification for this step was that consumers had increased their power significantly, presumably making funding less important, and that financial support was not particularly important anyway because such groups were becoming more efficient and their efficiency would compensate for the reduction in funds.<sup>68</sup>

### C. *Hesitant Enforcement by the Conseil*

These factors have led to "hesitant" enforcement by the *Conseil*. Examination of several categories of *Conseil* activity reveals a consistent lack of aggressive efforts to combat anti-competitive activity.

#### 1. *Self-referrals*

A particularly revealing category is that of self-referrals — i.e., cases in which the *Conseil* itself initiates investigation of a potential violation. During the first five years of its operations, for example, the *Conseil* made "self-referrals" in only nine out of its total of 433 cases. In other words, the *Conseil* very seldom initiates proceedings on its own, preferring to wait for referrals from other sources. The authority of the *Conseil* to initiate investigations is a major advance over the position of the *Conseil's* predecessor, the *Commission de la Concurrence*, but it is being little used.

The *Conseil's* attempts to "explain" its lack of enforcement vigor have been unconvincing. In 1989 only one of its 82 referrals was self-initiated, and the *Conseil's* Annual Report explained away this "moderate use" of self-referrals by pointing to the *Conseil's* "priority for resolving the cases still pending from the [old] *Commission de la Concurrence* and for responding to the first referrals based on the new [s]tatute."<sup>69</sup> By 1991 this "explanation" obviously was no longer valid, but the number of self-referrals changed little: four out of 184 for the years 1990 and 1991.

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<sup>67</sup> See Parliamentary Question No. 5390, *supra* note 63, at 1368.

<sup>68</sup> See Parliamentary Questions Nos. 4571 & 7228, *supra* note 63, at 1425.

<sup>69</sup> 1989 RAPPORT, *supra* note 60, at IX.

## 2. Preliminary Injunctions

A related tendency has been the *Conseil's* reluctance to grant injunctions.<sup>70</sup> Even considering the rather high requirements for obtaining preliminary injunctions,<sup>71</sup> the *Conseil* has granted very few.<sup>72</sup> Since its inception in 1987, it has ruled 68 times on requests for injunctive relief, and it has only granted four of those requests — i.e., 5.9% of all requests.<sup>73</sup> In 1988 and 1989 the *Conseil* awarded no preliminary injunctions at all despite receiving 19 and 15 requests, respectively,<sup>74</sup> and in its most generous year, 1991, it awarded but 16.7% of the requests for preliminary injunctions.<sup>75</sup> The official explanation for this reluctance to grant injunctions has been the wish to avoid sinking into interventionism.<sup>76</sup> In light of the ratio between the number of requests and the number of grants, however, this justification seems feeble.<sup>77</sup>

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<sup>70</sup> "After a hearing, the *Conseil* may grant any injunctive relief which has been requested by either the Minister of the Economy, the entities mentioned in the second paragraph of article 5 [i.e., regional authorities, professional organizations and trade unions, registered consumer groups, chambers of agriculture, trade chambers or chambers of commerce and industry] or by the corporations [involved]." Article 12, Competition Statute.

<sup>71</sup> In ruling on a request for an injunction, "the *Conseil* considers whether the alleged practices cause grave and immediate harm to the economy in general, to the specific market involved, to consumers or to the plaintiff, and it also considers whether it is in a position to grant the requested injunction." 1991 RAPPORT, *supra* note 2, at XX. "The conditions required by the *Cour [d'Appel de Paris]* for the granting of injunctive relief pursuant to Art. 12 [ . . . ] are very close to those found in community law." Judgment of Nov. 15, 1989, *Cour d'Appel de Paris*, 1991 D. S. Jur. 71, note Claude Lucas de Leyssac at 72 (Fr.).

<sup>72</sup> The *Cour d'Appel* generally has a broader view of the right to a preliminary injunction. It deems such relief appropriate in any case of manifest damage to the exercise of free competition. See Judgment of May 19, 1988, *Cour d'appel de Paris*, Bulletin Officiel de la Consommation de la Concurrence et de la Repression des Fraudes, Jun. 15, 1988, at 165; see also Judgment of Apr. 9, 1990, *Cour d'appel de Paris*, G.P., June 20-21 1990, at 344.

<sup>73</sup> See 1987 RAPPORT, *supra* note 3, at VII; 1988 RAPPORT, *supra* note 60, at VII; 1989 RAPPORT *supra* note 60, at XV; 1990 RAPPORT, *supra* note 58, at XIV-XV; and 1991 RAPPORT, *supra* note 2, at XVIII-XIX.

<sup>74</sup> 1988 RAPPORT, *supra* note 60, at VII; and 1989 RAPPORT *supra* note 60, at XV.

<sup>75</sup> 1991 RAPPORT, *supra* note 2, at XVIII-XIX.

<sup>76</sup> 1989 RAPPORT, *supra* note 60, at XVI.

<sup>77</sup> Referring to the *Conseil's* reasons for avoiding injunctive relief, Claude Lucas de Leyssac writes:

We remember . . . that the December 1, 1986 Ordinance had, as one of its main goals, the end of economic interventionism on the part of the administration. Therefore, it is both revealing and saddening that a body which renders decisions of a "judicial form or substance"[the *Conseil*] . . . refers to this condemnation of administrative interventionism so as to free itself of the authority [and holding] of the *Cour d'Appel de Paris*.

Lucas de Leyssac, *supra* note 71, at 72.

The *Conseil's* reluctance to issue injunctions has obviously discouraged attempts to seek them. In its first two years of operation, the *Conseil* recorded 45 petitions for injunctive relief, while in its next three years the number had fallen to 14 requests a year. Thus competitors have quickly learned not to expect the *Conseil* to respond aggressively to anti-competitive activities.

### 3. *Private Referrals*<sup>78</sup>

This may help to explain why "private referrals" (i.e., those from private persons and firms) have not increased as expected. The highest number of private referrals, both in terms of percentage and absolute numbers, came during the short 1987 term with 69 referrals representing 80% of total referrals.<sup>79</sup> Those numbers have declined, so that in 1990 there were only 39 private referrals representing 48% of the total,<sup>80</sup> and in 1991 there were 50 such referrals comprising 50% of the total.<sup>81</sup>

While in 1988 the *Conseil* could reason that the drop in private referrals was due to improved public understanding of the *Conseil's* activity and a consequent decline in irrelevant referrals,<sup>82</sup> that reasoning can no longer be valid. Furthermore, while referrals from firms have stabilized between 45% and 50% of all referrals,<sup>83</sup> all other categories of private organizations have virtually abandoned attempts to secure assistance from the *Conseil*.

Referrals from professional organizations, for example, were between 8% and 12% of total referrals during the period from 1987 through 1989, but there were no referrals in this category in 1990 and 1991.<sup>84</sup> Similarly, consumer groups made five referrals in 1987, but only a total of five during the next four years.<sup>85</sup> Such

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<sup>78</sup> The term "private" is used here to distinguish these cases from those which are the result either of self-referrals or of referrals by the Minister of the Economy. Such "private" referrals can come from private firms, professional organizations, chambers of commerce, guild chambers of trade, consumer groups, and local communities.

<sup>79</sup> 1987 RAPPORT, *supra* note 60, at VI.

<sup>80</sup> 1990 RAPPORT, *supra* note 58, at VII.

<sup>81</sup> 1991 RAPPORT, *supra* note 2, at IX.

<sup>82</sup> 1988 RAPPORT, *supra* note 60, at VI.

<sup>83</sup> See 1987 RAPPORT, *supra* note 3, at VI; 1988 RAPPORT, *supra* note 60, at VI; 1989 RAPPORT *supra* note 60, at X; 1990 RAPPORT, *supra* note 58, at VII; and 1991 RAPPORT, *supra* note 2 at IX.

<sup>84</sup> See 1990 RAPPORT, *supra* note 58, at VII; and 1991 RAPPORT, *supra* note 2, at IX.

<sup>85</sup> 1988 RAPPORT, *supra* note 60, at VI; 1989 RAPPORT *supra* note 60, at X; 1990 RAPPORT, *supra* note 58, at VII; and 1991 RAPPORT, *supra* note 2, at IX.

declines in attempts to use the *Conseil* appear attributable to the perception that they are unlikely to be successful.

If certain groups have lost confidence in the new competition law, others have never relied much on it at all, reflecting, perhaps, deep-rooted cultural resistance to seeking such assistance. Chambers of Commerce and Guild Chambers each have made only one referral to the *Conseil*, and both came in 1987.<sup>86</sup>

The *Conseil's* official response to its failure to generate use of the competition law system has been minimal. In 1988, commenting on the lone referral from consumer groups, the *Conseil's* Annual Report speaks of a "weakness" in the number of referrals from such groups.<sup>87</sup> Similarly, the 1990 Report refers laconically to the "already noted hesitance of professional organizations, consumer groups, and chambers of commerce and trade"<sup>88</sup> when the total number of referrals from all of those organizations for that year was zero!

#### 4. Government Referrals

While self-referrals have not been increasing and private referrals have been declining, referrals from the Minister of the Economy have increased dramatically. From a mere 17 referrals in 1987<sup>89</sup> to 49 in 1991,<sup>90</sup> governmental referrals have risen steadily since the *Conseil's* inception and currently represent half of its caseload.<sup>91</sup>

One might interpret this as an encouraging sign for the state of competition law in France and a "manifest[ation] of the desire of the government to fight against anti-competitive practices."<sup>92</sup> This interpretation would be difficult to reconcile, however, with the generally scant attention paid by the government to competition law.

A more convincing interpretation might be that the Ministry of the Economy is using this referral procedure to recapture some of the control over competition issues which it lost with the 1986

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<sup>86</sup> 1987 RAPPORT, *supra* note 60, at VI.

<sup>87</sup> 1988 RAPPORT, *supra* note 60, at VI.

<sup>88</sup> 1990 RAPPORT, *supra* note 58, at V.

<sup>89</sup> 1987 RAPPORT, *supra* note 60, at VI.

<sup>90</sup> 1991 RAPPORT, *supra* note 2, at IX.

<sup>91</sup> Fifty-one percent of all referrals in 1990 and 49 percent in 1991. *See*, 1990 RAPPORT, *supra* note 58, at VII; and 1991 RAPPORT, *supra* note 2, at IX.

<sup>92</sup> 1988 RAPPORT, *supra* note 60, at VI.

reform. This conclusion is buttressed by the fact that most of the cases brought by the government to the *Conseil* are, for all intents and purposes, largely in the hands of the Ministry of the Economy. As the *Conseil* admits, governmental referrals are "cases which can generally be reviewed immediately since the investigation has, in most instances, been completed by the minister prior to the referral."<sup>93</sup>

### 5. *Advisory Opinions*

This somewhat skeptical appraisal of the Minister of the Economy's motivations for filing so many referrals draws support from the government's restraint in using some of the other tools of competition law. If the government were intent on improving the efficacy of competition law in France rather than on controlling its field of operation, then why has it so rarely sought the opinion of the *Conseil* before making important decisions affecting competition? As we have seen, the Competition Statute provides that the government can ask the *Conseil* to render advisory opinions in several situations (e.g., Arts. 5 and 38), but the government has made very little use of these opportunities.

## V. DIRIGISTE TRADITIONS AND THE SCOPE OF COMPETITION LAW

The conflict between *dirigiste* traditions and competition law affects not only the effectiveness of competition law, but also its scope. The most significant battleground here is the provision of the Competition Statute that directs appeals from *Conseil* decisions to the regular courts rather than to the administrative courts.<sup>94</sup> This

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<sup>93</sup> 1991 RAPPORT, *supra* note 2, at IX.

<sup>94</sup> Articles 12 and 15 of the Competition Statute initially provided that appeals from *Conseil* decisions be directed to the *Conseil d'État*, the country's highest administrative court. However, only two days after the Competition Statute was published, a number of legislators proposed an amendment to Article 15. The amendment transferred appellate jurisdiction over *Conseil* decisions to the *Cour d'Appel de Paris*, part of the regular judiciary. In the course of parliamentary debates, the change in appellate jurisdiction was expanded to include article 12 injunctions as well as ordinary decisions.

Sixty-two legislators challenged the constitutionality of judicial review of decisions made by an administrative body. Their constitutional challenge was heard by the *Conseil Constitutionnel* ("Constitutional Council"), the sole arbiter of constitutional issues in France, which reviews the constitutionality of legislation only at an abstract level and only prior to its promulgation. This Constitutional Council decided the judiciary's appellate jurisdiction over *Conseil* decisions was constitutional, and Articles 12 and 15 of the Competition Statute were amended by *Loi* no. 87-499 granting appellate review to the *Cour*

provision represents a direct assault on the influence of the administration and its court system. Many view it as even more — encroachment upon the prerogatives of the administrative courts, and they have sought to eliminate it or at least to minimize its impact.

In order to appreciate the importance of this conflict, it is necessary to perceive the link between *dirigisme* and the role of the administrative courts. Administrative actions have been insulated from interference by the regular courts for more than two centuries, because only the administration's own court system has had the authority to review administrative action. This freedom from interference has afforded administrative officials a large measure of discretion and independence that has contributed to the strength of the *dirigiste* tradition.

The transfer of appellate jurisdiction over *Conseil* decisions to the regular courts was intended to break the hold of the administration in economic regulatory matters.<sup>95</sup> The objective was to establish an enforcement agency that operated juridically — i.e., through the application of articulated norms of law rather than political discretion.

This move thus confronts *dirigiste* traditions and the power configurations associated with them, and it has generated powerful opposition. Moreover, it comes at a time when an apparent tendency to reduce the role of the administrative courts has led the defenders of administrative prerogatives to heightened vigilance in their defense.<sup>96</sup>

#### A. *The Constitutionality of The Competition Law Statute*

The first battle in this jurisdictional conflict was an attack on the constitutionality of the Statute.<sup>97</sup> A group of legislators asked the Constitutional Council to find the statute unconstitutional on the grounds that it violated a constitutionally mandated separation of administrative and judicial authority, thereby divesting the ad-

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*d'Appel de Paris. Loi no. 87-499 du 6 juillet 1987 transférant le contentieux des décisions du Conseil de la concurrence à la juridiction judiciaire*, 1987 J.O. 7391, 1987 D.S.L. 269 (Fr.) See Bruno Genevois, *Réforme du droit de la concurrence et respect des règles et principes de valeur constitutionnelle*, 1987 REVUE FRANCAISE DE DROIT ADMINISTRATIF [R. Fr. D. Admin.] 288. For a discussion of the constitutional issues, see, *infra*, notes 97-111 and accompanying text.

<sup>95</sup> See, Jean-Pierre Bizeau, *Le juge administratif n'est-il plus que le juge de la puissance publique?* 1992 A.J.D.A 1 available in Lexis, Revues Library, AJDA File.

<sup>96</sup> See, e.g., Bizeau, *id.*

<sup>97</sup> See *supra*, note 94 and accompanying text.

ministrative courts of their authority to review administrative acts and subjecting them to review by the regular courts.<sup>98</sup>

This concept of separation of authorities is well-known in French law.<sup>99</sup> According to it, the “authority” of the regular courts is distinct from administrative authority, and the two must be kept separate. It is closely associated with the principle of “separation of powers,” the fundamental notion that the executive, judicial and legislative branches of government must be kept separate.<sup>100</sup> While this latter principle is constitutionally secure, the question was whether the related principle of separation of authorities also had constitutional status.

Analysis was complicated by the lack of definition of the *Conseil*’s status by the Competition Statute.<sup>101</sup> That body is part of the administration for some purposes, such as budgeting, but it is also intended to act autonomously and in accordance with the neutral application of the principles of the Statute.<sup>102</sup> Thus, there was uncertainty as to how the principle of separation of powers should apply to this new form of organization.

In its decision of January 23, 1987, the Constitutional Council upheld the constitutionality of this transfer of power from the administrative court system to the regular courts.<sup>103</sup> It held that although the constitution protected the separation of the judicial and the administrative branches of government, “the issue at hand

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<sup>98</sup> See generally Genevois, *supra* note 94, at 288. The claim that the principle of separation of authorities is constitutionally protected has doctrinal support. For instance, Professor Bizeau views the idea of separation of authorities as flowing directly from that of the separation of powers. He argues that since the separation of powers has constitutional value, the separation of authorities must *a fortiori* deserve constitutional protection. See, Bizeau, *supra* note 95, at 9-10 n.25.

<sup>99</sup> Commenting on the Constitutional Council’s decision regarding the transfer of appeals to the judiciary, Louis Favoreu characterizes the issue of separation of authorities as “one of the most famous controversies in administrative law.” Louis Favoreu, *Le principe de séparation des autorités administratives et judiciaires n’a pas valeur constitutionnelle*, 1987 R. Fr. D. ADMIN. 301 (Fr.).

<sup>100</sup> The administrative courts are part of the executive branch of government while all other courts belong to the judiciary.

<sup>101</sup> The *Conseil* is officially an “administrative body”, even though some of its characteristics may belie that label. See, Judgment of Jan. 23, 1987, Con. const., 1988 D.S. Jur. 117 (Fr.).

<sup>102</sup> “[T]he passage of the law of 6th July 1987 has been an opportunity to deny the *Conseil* [*de la Concurrence*] any jurisdictional attributes.” Bolze, *supra* note 3, at 507.

<sup>103</sup> See Judgment of Jan. 23, 1987, Con. const., 1988 D.S. Jur. 117, 118 (Fr.). The Constitutional Council held the amendment unconstitutional on other grounds, but it specifically held that the principle of separation of authorities was not constitutionally protected.

was not the principle of separation of powers but rather the principle of separation of authorities which, having no constitutional value, could be departed from and modified whenever necessary."<sup>104</sup> In essence, it uncoupled two concepts that had long been intertwined, and thus created a major inroad into the conceptual bastion around the independence of the administration.

The Constitutional Council did, however, establish a minimum sphere of jurisdiction for administrative courts in cases where public authorities were performing acts of state sovereignty.<sup>105</sup> It recognized "the existence of an independent administrative authority endowed with the competence to resolve any disputes involving the repeal of acts of the public authorities committed pursuant to the notion of state sovereignty."<sup>106</sup> It thus effectively reduced the minimal guaranteed jurisdiction of administrative courts from all acts of the administration to those involving state sovereignty (*puissance publique*).<sup>107</sup> It implied that all other matters could legitimately be reviewed by the judiciary.<sup>108</sup>

The Council also included in its judgment a caveat that any modification of the existing rules of competence had to be "*precise and limited in scope* [and] *justified* by the necessities of a proper administration of justice (emphasis added)."<sup>109</sup> It concluded, how-

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<sup>104</sup> Favoreu, *supra* note 99, at 302. See also Genevois, *supra* note 94, at 290. "[The] principle of separation of powers . . . does not necessarily command the separation of administrative and judicial authorities . . . These two principles of government are not necessarily linked as can be seen in the United States where the separation of powers is the central tenet of political organization while the separation of authorities is little known. Likewise, in France, the concept of separation of powers survived days when the separation between authorities was unclear. . ."

<sup>105</sup> See, Genevois, *supra* note 94, at 291.

<sup>106</sup> Judgment of Jan. 23, 1987, Con. const., 1988 D.S. Jur. 117,8 (Fr.).

<sup>107</sup> "The notion of state sovereignty is a remnant of the administration's execution of acts of royal prerogative, when administrative activity was essentially equated with royal power and authority. The Second Empire formalized the notion by opposing it to acts which related to private law." JEAN MARIE AUBY & ROBERT DUCOS-ADER, *GRANDS SERVICES PUBLICS ET ENTREPRISES NATIONALES* 14-15 (1969). The scholarship of the 19th century thus distinguished between activities of state sovereignty and activities of state management. One of the prominent scholars of the time "formulated a clear explanation of the distinction: 'The acts which are taken pursuant to the administration's power to command *put the administration beyond the reach of the common [civil] law*. . . since there are no comparable acts which can be taken by private individuals.'" ANDRÉ DE LABAUDERE, JEAN-CLAUDE VENEZIA & YVES GAUDEMET, *1 DROIT ADMINISTRATIF* 36 (12th ed. 1992) (quoting Berthélémy) [hereinafter LABAUDERE].

<sup>108</sup> Genevois, *supra* note 94, at 290.

<sup>109</sup> *Id.* at 295.

ever, that the rules established in the Competition Statute met these requirements.

This decision has been attacked by defenders of traditional administrative prerogatives.<sup>110</sup> What assurance is there, they have asked, that this newly restricted domain of the administrative courts will not be further diminished? Once the legislature has allowed the judiciary to review administrative decisions, it has also created the possibility for the judiciary "to assert jurisdiction over cases involving state sovereignty."<sup>111</sup> Nevertheless, the Constitutional Council's basic proposition that the principle of separation of authorities is not constitutionally mandated and does not prevent the transfer of jurisdiction over administrative acts has now been established.

### B. *The Ville de Pamiers Case*

Unable to prevent the transfer to the regular courts of authority to review administrative acts, defenders of administrative prerogatives have sought to restrict the category of administrative actions that are subject to such transfer. Unlike the issue of constitutionality, this issue is decided not by the Constitutional Council, but in the traditional court system, which, perhaps not surprisingly, has paid less attention to the objectives of competition law.<sup>112</sup>

Here the focus is on Article 53 of the Statute, which provides that "rules of this Ordonnance are applicable to all activities entailing production, distribution and services, *including those activities which are entered into by public entities* (emphasis added)." Proponents of administrative autonomy read this language narrowly in order to maintain the power of the administrative courts and the freedom of the administration to direct economic affairs. Supporters of competition law reform, on the other hand, seek a broad reading that would subject administrators to the norms of the Competition Statute and to the authority of the regular courts wherever the government becomes involved in the marketplace.

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<sup>110</sup> See, e.g., Judgment of Jan. 23, 1987, Con. const., 1987 Recueil Périodique et Critique 1341 note P. Gaudemet (Fr.).

<sup>111</sup> Bizeau, *supra* note 95, at 12.

<sup>112</sup> The concept of judicial review of legislation was nonexistent in France until the creation of the Constitutional Council in 1958. For further details, see Louis Favoreau, *La décision de constitutionnalité*, 38 REVUE DE DROIT COMPARÉ (1986). It is perhaps not coincidental that a different conceptualization was accepted more readily in a new judicial body like the Constitutional Council than in the traditional court system.

At stake is the administrative judge's role in the great range of cases involving "public services."<sup>113</sup> The administrative judge has long had sole adjudicative responsibility in this area. He has been the judge of all "activities aimed at satisfying a need of general interest [that have been] undertaken by public entities."<sup>114</sup> Yet the growing trend toward privatization of public services has called this role into question.<sup>115</sup> If, for example, public authorities contract with private enterprises to provide a service, do they now fall within the principles of competition law and the jurisdiction of the judiciary or do they remain a matter of administrative control subject only to the supervision of the administrative courts? Similarly, if a governmental institution acts in the marketplace, does it become subject to the regular courts for those acts?

The issue was joined in the *Ville de Pamiers* case, which has assumed pivotal importance in the battle to restructure the relationship between law and administrative authority in France. The basic facts of the case are not complex. On March 10, 1988, the municipality of Pamiers decided to improve its water distribution network. Accordingly, it cancelled the management contract that had been in effect since 1924 and according to which the Societe Anonyme d'Exploitation et de Distribution d'Eau (SAEDE) handled its water distribution. The municipality then entered instead into a similar supply contract with the Societe Lyonnaise des Eaux (SDE), a private corporation.

SAEDE asked the *Conseil* to enjoin both the termination of its contract with the city of Pamiers and the execution of the new contract with SDE until allegations relating to the legality of the contract under the Competition Statute could be investigated. It alleged that there had been unlawful "contacts" between the city of Pamiers and SDE that violated Article 7 of the Competition Statute.

This request raised, however, the issue of the scope of Article 53. The *Conseil* found that the cancellation of one contract and the signing of a new one did not constitute "acts of production, distribution or services" as defined in the Statute. Rejecting both

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<sup>113</sup> The term "public services" translates the French "*Services Publics*" and includes as its most important component "public utilities."

<sup>114</sup> Bizeau, *supra* note 95, at 3.

<sup>115</sup> "This disaggregation is the result of a continuous process of inevitable distension which occurs when one incorporates into a notion [(that of public utility)] new situations which no longer correspond to its initial elemental composition." *Id.*

SAEDE's claim for relief and its petition for an injunction, therefore, the *Conseil* held that the Competition Statute was not applicable and that the *Conseil* had no authority to act with regard to the issues raised.

SAEDE then filed an appeal against the *Conseil's* decision before the *Cour d'Appel de Paris*. In June, 1988, that court reversed the *Conseil's* decision, recognizing both its own jurisdiction and the jurisdiction of the *Conseil* to hear the case. It granted SAEDE its injunction and ordered that SAEDE continue to run Pamiers' water services until a final judgment was entered. The court reasoned that "the city of Pamiers had the choice to either organize and provide a drinkable water supply itself or to commission a contractor for the job . . . [A]s soon as it chose the latter . . . the city of Pamiers became actively engaged in the marketplace."<sup>116</sup> As active participants in the marketplace, the court continued, even public entities fall within the scope of Article 53, and their sphere of action is subject to the constraints imposed by competition law.<sup>117</sup>

The *prefet de Paris* challenged the *Cour d'Appel's* jurisdiction to hear the case, creating a *conflit d'attribution*,<sup>118</sup> that is, a conflict as to which of the two court systems had the right to hear a particular case.<sup>119</sup> This brought the case before the *Tribunal des Conflits*, a special court specifically charged with resolving such jurisdictional disputes.<sup>120</sup> The *conflit d'attribution* procedure is intended to be impartial, but it is often seen as generally protecting the realm

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<sup>116</sup> Judgment of June 30, 1988, *Cour d'appel de Paris*, 1988 A.J.D.A. 744 note Michel Bazex at 745 [hereinafter Bazex 1].

<sup>117</sup> *Id.* at 745.

<sup>118</sup> The idea of a "*conflit d'attribution*" is rooted in the law of 16th fructidor, Year III of the Revolutionary period, which established the separation between administrative and judiciary powers.

<sup>119</sup> Despite the mechanism set in place to contend with the existence of two separate court systems, much controversy still remains. "The numerous decisions of lack of competence [handed down by the *Tribunal des conflits*], and the hesitations among lawyers who often consider it prudent to file the same action before both jurisdictions, are a good measure [of the uncertainty which endures]." Fougere, *supra* note 17, at 3.

<sup>120</sup> "*Conflit de juridiction*" is distinct from "*conflit d'attribution*". The former involves a contest between two courts of the same jurisdictional order (i.e. civil/judiciary, criminal, or administrative) which is resolved by a higher court of that same jurisdiction. In the *conflit d'attribution* the contest is between a judicial court and an administrative one, and the *Tribunal des conflits* decides which court has competence to hear the matter.

of the administrative courts from encroachments by the judiciary.<sup>121</sup> According to the *Tribunal des Conflits*:

water supply is a public service whose organization does not entail [acts of production, distribution, or services as mentioned in article 53 of the Competition Statute] . . . Consequently, only the institutions (*jurisdictions*) related to the interested party [(i.e., the administrative courts)] have a right to verify the validity of this act in light of the dispositions of article 9 [of the Competition Statute].<sup>122</sup>

The Tribunal thus concluded that the *Cour d'Appel* had exceeded its powers when it ordered the adoption of measures which were beyond the *Conseil's* jurisdictional reach.

### C. Reactions to Ville de Pamiers

The *Ville de Pamiers* decisions have led to an outpouring of literature in which the juridical conception of competition law has struggled against traditional categories of thought that are central to *dirigisme's* power. One group of commentators, here called "traditionalists,"<sup>123</sup> supports the decision of the *Tribunal des Conflits* as analytically correct and necessary to preserve the administrative court system and thus maintain the integrity of the French legal system as a whole. Another group, we can call them "reformers,"<sup>124</sup> sees that decision as a major impediment to the effectiveness of the Competition Statute and to the attainment of its reform objectives. These two groups clash on two levels — the content of the relevant legal principles and, more fundamentally, the analytical methods to be employed in making such decisions.

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<sup>121</sup> "The principle of separation [of administrative and judicial powers] is no longer justified by the notions of defiance towards judicial judges which had prompted the declaration of that principle. Nonetheless, it continues to protect the administration. This [protective] function is apparent [with the *conflit d'attribution* where] the *Tribunal des conflits* allows the administration to remove a case in which it is involved from the judiciary's jurisdiction." DAVID, *supra* 18, at 374.

<sup>122</sup> Judgment of June 6, 1989, Trib. con., 1990 D. S. Jur. 418, 419 (Fr.).

<sup>123</sup> See, e.g., René Chapus, *Activités des personnes publiques, droit de la concurrence et compétence juridictionnelle*, 1989 R. Fr. D. Admin. 80 (Fr.); Terneyre, *supra* note 28; and Bizeau, *supra* note 95.

<sup>124</sup> See, e.g., Francois Llorens and Pierre Soler-Couteaux, *La Soumission des personnes publiques en droit de la concurrence*, 1989 Dalloz-Sirey Chronique [D.S. Chronique] 67 (Fr.); Judgment of June 6, 1989, Trib. con., 1989 A.J.D.A. 467 note Michel Bazex at 470 (Fr.) [hereinafter Bazex 2]; and Bazex 1, *supra* note 116.

### 1. *Traditionalists: In Defense of Authority*

The traditionalists generally see the issue as one of subsuming new fact patterns within existing conceptual categories. For them, classification is the central decision-making process, and they assume that the relevant categories are those currently considered authoritative within French law. At this level, therefore, the conflict is about the meaning of existing authoritative terms. The key issues have been the “meaning” of the operative concepts of Article 53 (“activities entailing production, distribution and services”) and the respective roles of the principles of “separation of authorities” and “state supremacy.”

This “traditionalist” argumentation interprets Article 53 by reference to concepts that have acquired authority within the French legal system, but that are external to the language of Article 53. In effect, it seeks the “meaning” of the statutory language by relying on the authority of such external concepts to shape thought about the language itself and to structure the process of interpretation.

Accordingly, traditionalists argue that the central issue in cases such as *Ville de Pamiers* is whether the actions of the city of Pamiers are to be classified as administrative *in nature*. If they are, the argument goes, they cannot fall within Article 53’s concept of “activities entailing production, distribution and services,” because such activities are, by definition, commercial rather than administrative.<sup>125</sup> The argument rests on distinguishing between activities “depending on whether they are of an administrative type or of an industrial and commercial type.”<sup>126</sup>

Traditionalists conclude that agreements between political authorities and private enterprises for the performance of services must be considered as “administrative in nature” because they are part of the organization of public services. The public authorities are carrying out their public duties, regardless of whether they perform the relevant services themselves or contract with private firms for the provision of those services. Traditional conceptualizations of the role of the administrative courts thus becomes the touchstone for interpreting Article 53. From this perspective, whether

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<sup>125</sup> Chaput, *supra* note 123, at 81-82.

<sup>126</sup> *Id.* at 83.

such conduct affects the marketplace is not a criterion of decision.<sup>127</sup>

To buttress this conclusion traditionalists rely on other traditional conceptualizations. They argue that the concepts of "separation of authorities" and "state supremacy" represent important values within the French state system and thus demand protection. Accordingly, where there is ambiguity in a statute, such ambiguity should be resolved in a way that will avoid harming those values.<sup>128</sup> Since Article 53 is ambiguous, it should be interpreted narrowly so as not to cause administrative acts to fall within the jurisdiction of the regular courts and thus violate those principles.

Some traditionalists admit that certain adjustments may have to be made to the traditional definitions of administrative power in order to take account of changing economic conditions, especially the management of some public utilities by private firms.<sup>129</sup> Professor J.P. Bizeau, for example, would maintain the notion of state supremacy as the "index of the existence of public service and therefore of administrative competence,"<sup>130</sup> but redefine it by fusing concepts from the decisions of the Constitutional Council and the *Tribunal des Conflits*. From the Tribunal decision he takes the distinction "between normative activities, which entail the regulation and organization of public service, [and] activities aimed at carrying out the service's objective."<sup>131</sup> This distinguishes between "those things which relate to organization and regulation, on the one hand, and operation, on the other hand."<sup>132</sup>

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<sup>127</sup> *Id.* at 82-84.

<sup>128</sup> In commending the *Tribunal des Conflits'* opposition to judicial review of acts of "state supremacy", and stressing the importance of the issue, Philippe Terneyre demonstrates the potential impact of the case when he asks, "[D]id this simple case not plainly question the very existence of administrative law?" Terneyre, *supra* note 25, at 2.

<sup>129</sup> This issue relates primarily to situations in which the claim of a private entity to prerogatives of state sovereignty is based only on its status as a provider of public services. In this context, state sovereignty is but one of "various material and moral advantages" endowed upon the private entity by the state. Jean-Marie Auby, *INSTITUTIONS ADMINISTRATIVES* 39 (1973). This advantage is "compensated by a proportional amount of state control," *id.*, such as "the submission of [their] prerogatives of state sovereignty to administrative [rather than private] law." *Id.* at 42. See, e.g., Judgment of May 5, 1944, Conseil d'État, 1944 Dalloz Jurisprudence 164 (Fr.) (private companies operating the machinery in a port); and Judgment of Feb. 6, 1948, Conseil d'État, 1948 Lebon 69 (Fr.).

<sup>130</sup> Bizeau, *supra* note 95, at 32.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 33.

He then draws from the Constitutional Council's opinion the proposition that "only when a public body specifically delegates [the operations of] a public utility [to a private party] can the means at the disposal of that private party be classified as prerogatives of state sovereignty."<sup>133</sup> Here the idea is that one determines whether sovereignty attaches to the operations of a private contracting party by referring to the form of the transaction. A government office can delegate responsibility, in which case it remains politically responsible for the acts of the private party and subjects those acts to the administrative courts. Or, it may merely contract with the private party for services, in which case the private party's actions become subject to the Competition Statute.

This analysis avoids the formalistic distinction between "public" and "private," but it also avoids qualifying activities according to their relation to the marketplace. It seeks a compromise solution which maintains the authority of the key traditionalist concept of public service, but reconfigures its content.

## 2. *The Reform Response*

### a. *Manipulating Existing Categories*

One response of the reformers is to accept the relevance of these traditional categories, but to contest the content attributed to them — i.e., to reinterpret them. For example, they say, even if one accepts the formal distinction between conduct that is administrative "by nature" and that which is commercial "by nature," activity which is essentially economic — such as a contract for services — is not made administrative merely because a governmental organization contracts for its performance; it remains commercial rather than administrative. Here, classification within authoritative concepts is accepted as the structuring device for decision-making, but the focus is on the characteristics of the conduct — contracts for services — rather than on the purposes of such activity or the characteristics of the actors involved.

This line of argument also contests the interpretation of the collateral structuring concepts deployed by the traditionalists. It holds, for example, that the application of competition law to governmental entities does not harm state supremacy, because limitations have been put in place to prevent such an impact. Indeed, only activities of a governmental body that involve production, dis-

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<sup>133</sup> *Id.* at 32.

tribution or services are subject to the Competition Statute, and, reformers say, such activities cannot harm supremacy interests.<sup>134</sup> In this view, economic conduct is conceived as a category that cannot, by definition, impinge on governmental prerogatives, because it has different characteristics — it neither applies nor implicates governmental authority.

Reformers also operate within existing categories when they seek to allay concerns that Article 53 threatens the principle of separation of authorities. They claim, for example, that the authority which the Competition Statute has granted to the *Cour d'Appel* does not threaten this principle, because that court “must only evaluate the anti-competitive impact of [administrative] acts, but in no way the legality of the acts in and of themselves.”<sup>135</sup> Thus, from a technical standpoint, the *Cour d'Appel* is not infringing on the territory of the administrative courts, which continue to have sole authority to invalidate government acts.

This argument reveals, however, the risks of aggressive formalism. While it is true that the *Cour d'Appel* cannot directly proclaim a stay of execution against an administrative act, it has the power to grant preliminary injunctions and enforce a return to the status quo ante, and there is relatively little difference in practical effect. In *Ville de Pamiers*, the *Cour d'Appel* made use of this authority in suspending the operation of the contract between Pamiers and the SDE until such time as a final decision was rendered in the case. “[T]he decision does not prescribe a stay of execution of the decisions of the municipality, but its effects are analogous to one.”<sup>136</sup>

#### b. Toward a Paradigm Shift

The reformers have not only argued on the basis of existing concepts, but they have also sought to shift the grounds of argument and to apply a different type of analysis to the problem. They argue that attempts to resolve issues concerning the scope of competition law by reference to the authority of traditional categories are misguided. It is necessary to look at the problem from a different perspective that is consistent with the statute's reform objectives.

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<sup>134</sup> Llorens and Soler-Couteaux, *supra* note 124, at 69.

<sup>135</sup> Bazex 2, *supra* note 124, at 470.

<sup>136</sup> Bizeau, *supra* note 95, at 29.

In this view, the Competition Statute was intended to break the hold of *dirigisme* and the conceptual and institutional framework supporting it. It should, therefore, be interpreted in light of these goals, and the very concepts against whose power it was directed should not be allowed to limit its scope. According to one analysis, "the philosophy which governs the new competition law [. . .] proceeds from an economic rather than juridical perspective, a material rather than formal perspective on the administration's activities."<sup>137</sup>

From this perspective, for example, the principle of "separation of authorities" should not be applied in determining the extent to which appellate jurisdiction can be transferred to the regular judiciary. Given the reform objective of breaking the constraints of such concepts, these should not be allowed to restrict its application. The Competition Statute was part of a process of liberalization and privatization; it sought to increase the private sector's involvement in traditionally state-controlled sectors of the economy; thus it must be interpreted and applied in that light.

Reformers also denounce the decision of the *Tribunal des Conflits* for its lack of "realism."<sup>138</sup> State intervention inevitably affects competition in the market "in so far as it inevitably is a source of advantages or disadvantages for those operating in the market."<sup>139</sup> Special governmental prerogatives necessarily "distort competition," and formalistic restraints on the scope of competition law avoid the "real" issue of whether, as one observer put it, "governmental entities should be allowed to circumvent the rules of competition when acting in a sovereign capacity[?]."<sup>140</sup>

Some reformers look to the discourse of European Community law as a lever to move toward a changed mode of thought. According to Michel Bazex, for example, the approach of the European Court of Justice (ECJ) to the problem would allow the *Cour d'Appel* to arrive at its desired conclusion more directly.<sup>141</sup> For him, the ECJ sees "the grant of a license [to provide a public service] as an integral part of the grantee's corporate activities" and declares that competition law is "concerned with the opera-

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<sup>137</sup> Llorens and Soler-Couteaux, *supra* note 124, at 68.

<sup>138</sup> Bazex 2, *supra* note 126, at 469.

<sup>139</sup> *Id.*

<sup>140</sup> Bazex 1, *supra* note 116, at 746.

<sup>141</sup> *Id.* at 747.

tions themselves rather than with the parties [involved].”<sup>142</sup> This approach would resolve the issues involved in *Ville de Pamiers* by focusing on the nature of the activity rather than on the characteristics of the parties, and contracts for public services would thus represent commercial activities for purposes of Article 53.

#### D. *Subsequent Case Law*

Given the extensive controversy which has surrounded the decision in *Ville de Pamiers*, one might have anticipated a response by either the *Conseil* or the courts to this controversy. This has not occurred. French competition law still sails the course set by the *Tribunal des Conflits* in 1989, allowing administrative authorities a large measure of freedom from the norms of the Competition Statute.

In the two most recent cases involving a fact pattern similar to that of *Ville de Pamiers*, the *Conseil* has adhered to the principles set out by the *Tribunal des Conflits* in that case. Each involved the process of contracting with private firms to provide public services.

In a 1990 case, the issue was the granting of licenses by a publicly administered hospital to private ambulance services for transporting patients to and from the hospital.<sup>143</sup> The case was referred to the *Conseil* because of alleged collusive practices surrounding the submission of the tender offers for the licenses. The *Conseil* recognized that the conduct complained of violated the provisions of Article 7 of the Competition Statute. It concluded, however, that the preferential treatment received by the three ambulance services that obtained the contract was accorded by the hospital as part of the process of organizing a public service. Applying the principles it drew from the decision of the *Tribunal des Conflits* in *Ville de Pamiers*, the *Conseil* concluded that any conduct of public authorities in connection with the organization of public services was beyond the scope of competition law and that it had no jurisdiction in the matter.

The following year the *Conseil* applied the same analysis in a case involving the allocation of retail space in a railway station.<sup>144</sup> The complaint came from the manager of a bakery who submitted that the non-renewal of her lease at the station violated the terms

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<sup>142</sup> *Id.*

<sup>143</sup> *Décision* no. 90-D-26, 1990 RAPPORT, *supra* note 58, at XXIII and app. 33 at 84.

<sup>144</sup> *Décision* no. 91-D-20, 1991 RAPPORT, *supra* note 2, at XXVII and app. 27 at 58.

of Articles 7 and 8 of the Competition Statute. The *Conseil* concluded that “the non-renewal of the [lease] . . . and the selection of a new [lessee] constituted acts of management of the public rail domain by the S.N.C.F.<sup>145</sup>, a public firm; and that such acts are beyond the scope of the *Conseil*’s jurisdiction.”<sup>146</sup> On appeal, the *Cour d’Appel* de Paris confirmed the *Conseil*’s decision and explained that even though the discharge of the various services provided in railway stations does fall under the provisions of the Statute, the agreements whereby the S.N.C.F. chooses the firms which insure those services are not covered by the language of its Article 53.

In other words, the *Ville de Pamiers* decision continues to guide developments in the area. At both the trial and appellate levels, the exemption of public authorities from the reach of Article 53 and thereby of the entire *Ordonnance* has been rigorously applied since the summer of 1989. *Ville de Pamiers* and its progeny thus mark the continued vigor of the notion of state supremacy in France and reflect a cultural allegiance to *dirigiste* notions that are antagonistic to the reform of competition law.

#### E. *The Implications of Ville de Pamiers*

The *Ville de Pamiers* decisions provide a dramatic example of the confrontation between competition law and *dirigiste* traditions. This tradition embodies a system of conceptual distinctions and institutional expectations, and the Competition Statute represents an attack on this “protective network which administrative law has built on the grounds of state sovereignty, public interest, and public service.”<sup>147</sup> This network has, however, proven difficult to alter. Authoritative decision-makers within the court system have tended to rely on the existing structure and traditional concepts and have resisted conceptual and perspectival moves that would amend them.

The fundamental importance of these moves as well as their practical implications for the distribution of power make this resistance understandable. In effect, the “overall issue [in *Ville de Pamiers*] was the applicability of competition law to governmental

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<sup>145</sup> S.N.C.F. (*Société nationale des chemins de fer français*) is an acronym for the governmental organization that runs the French rail system.

<sup>146</sup> *Décision* no. 91-D-20, 1991 RAPPORT, *supra* note 2, app. 27 at 58.

<sup>147</sup> Bizeau, *supra* note 95, at 17.

organizations.”<sup>148</sup> In a country accustomed to large doses of *dirigisme*, few changes could be more basic.

The efforts to use competition law to reduce the hold of *dirigisme* have caused a blurring of past distinctions and “a loss of the specificity which was traditionally ascribed to the activities of governmental entities.”<sup>149</sup> Put another way:

[t]he development of state interventionism followed by a renewal of liberal ideals has caused a compounding of public and private activities. This leads us to the recognition that ‘public service’ and ‘private activity’ no longer necessarily constitute distinct areas of activity, but rather denote means of action which increasingly coexist within the same area.<sup>150</sup>

Moreover, where the jurisdiction of the administrative courts is tied to the notion of state sovereignty rather than to the broader concept of public service, this represents “a reduction of administrative jurisdiction over public services, whether these are industrial and commercial public services or administrative public services, [whenever the services are provided by private persons.]”<sup>151</sup> It is a change that the administrative branch of government has not welcomed.

## VI. CONCLUDING PERSPECTIVES

France’s new competition law threatens well-established traditions and strikes at the core of firmly-rooted conceptions of the role of government. Moreover, it affects structures of power within French society by diluting the administration’s control over economic conduct. Not surprisingly, it has encountered resistance and conflicts that have hampered its effectiveness.

At one level, the resistance is institutional. Institutions seldom relinquish power willingly, and this is especially true where such power may be associated with economic gain for the individuals involved. In the areas that we have looked at in this article, there has been a pattern of reluctance to transfer power, as administrators have failed to implement aggressively the objectives and norms of the new competition law system.

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<sup>148</sup> Bazex 1, *supra* note 116, at 745.

<sup>149</sup> Llorens and Soler-Couteaux, *supra* note 124, at 75.

<sup>150</sup> Bizeau, *supra* note 95, at 33.

<sup>151</sup> *Id.* at 7.

A second form of resistance is less obvious, but no less important. It involves the ways in which individuals and communities think about law, government, economic conduct and their interrelationships. *Dirigiste* relationships and patterns of conduct became traditions in France and, in so doing, came to be perceived as “natural,” perhaps even implicitly “right.” The Competition Statute sought to introduce a way of thinking in which competition was accorded independent value and protected by a juridical conception of government’s role in the area. In this model, articulated general standards of conduct are applied and enforced by decision-makers constrained to act within the bounds of those norms rather than on the basis of the discretionary political judgments of administrators. The clash is fundamental, and there is little evidence that the new way of thinking is making rapid progress.

One reason for the paucity of progress in this area is the hybrid character of the system created by the statute. That legislation was a compromise in which the competition law system was to symbolize and to secure movement away from *dirigisme*, but it went only part of the way. It did not replace the *dirigiste* model with a juridical model; it merged the two conceptions. As a result, competition law remains to some extent a child of neither conception and an orphan of both.<sup>152</sup>

In such a hybrid system one would expect the best-established ways of thinking and the most powerful institutions to win the battle for influence, and this has occurred. The administrative authorities have far more political power than the *Conseil*, and the interventionist patterns of thought and action are far more deeply ingrained than those of competition law.

Consequently, progress toward the objectives of competition law reform is likely to require new sources of impetus. One such source may be public opinion. Some speculate that the controversy surrounding the scope of the Competition Statute that we have sketched here may rekindle the “debate as to the function of the administration”<sup>153</sup> and that such a debate could produce political pressure to strengthen the autonomy of the *Conseil*, thus making the system more effective and engendering confidence in its mission.

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<sup>152</sup> As one commentary put it, competition law may be “torn between two logics, that of the economy and that of state supremacy/sovereignty” and unable to obey either logic. Llorens and Soler-Couteaux, *supra* note 124, at 68.

<sup>153</sup> *See id.* at 76.

This would, however, require changes in popular perceptions of the *Conseil* and its role. The *Conseil* is currently little known, and those who are aware of its existence often assume it to be merely another agent of governmental intervention rather than an institution designed to reduce such intervention. Moreover, this type of issue does not typically mobilize public opinion, especially at a time when attention is focused on economic weakness and unemployment.<sup>154</sup>

"Education" of the public, and particularly of administrators and legal professionals, may contribute to progress toward a more effective competition law. There is much mistrust and misunderstanding of competitive markets in France, and, as the *Conseil* has put it, the "consumers and all the players on the market, [still have attitudes which are] actually very far from the behavior which is necessary for the proper performance of a market economy."<sup>155</sup> Support for protecting competition will remain thin where there is little appreciation of the values of competition.

Finally, there is the European Community factor in all of this, and it is particularly difficult to assess. If we look at the impact of the Community on French competition law, the central factor is the perception that French competition law is a result of France's membership in the Community. Given the history of competition law in France, French competition law is often seen as an imposition from the Community and thus something alien to French traditions and antagonistic to French interests. Viewed from this perspective, *dirigisme* appears to be an attractive opponent which is part of French traditions and likely to comfortably cohabit with nationalist interests. This may mean that as the fortunes of nationalism rise in France, those of competition law may wane.

Yet there is another level at which the Community may impede the progress of competition law. The Community has its own competition law, and it is a significant influence on economic conduct within France. As a result, the very existence of this Community system reduces incentives for French politicians and administrators to take the costs and risks of pushing competition law domestically. Community competition law provides a cheaper

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<sup>154</sup> In its 1991 Report, the *Conseil* acknowledged the need to improve its public image and move away from its association with interventionism and toward an image based on neutral application of competition principles. 1991 RAPPORT, *supra* note 2, at V.

<sup>155</sup> 1990 RAPPORT, *supra* note 58, at VII.

and less politically costly alternative for achieving competition law's general goals.

This view has, however, its own risks. Community competition law is not an autonomous force. It depends for its success on support from Member State governments and the cooperation of national business communities. To the extent, therefore, that *dirigiste* ideas, attitudes and practices weaken this support, they will impede the capacity of Community competition law to achieve its objectives. French experience suggests that the objectives of competition law face significant obstacles from *dirigiste* traditions, and those obstacles may affect the progress of European integration.

The French struggle with the relationship between competition law and *dirigisme* illustrates some of the basic conflicts involved in the introduction of a competition law regime into a political-legal-economic context characterized by government direction of the economy. As such, the French experience deserves close study, because competition law is being used in many parts of the world to restructure the relationship between government and the economy, and the success of that restructuring depends on understanding the factors that are likely to affect it.

