

Interaction between Regulation and Competition Law in Regulated Industries A French Perspective

Laurence Idot

Professeur à l'Université Paris II (Panthéon Assas)

Collège européen de Paris

Preliminary remarks on the French context

* Notion of « regulation »: controversial issue

Proposed definition: transitory process to accompany former sectors under monopoly which are opened to competition (MAFR)

* « Competition Law »: not the French broad definition, but the « international » one: antitrust and merger control

Summary

- No real conflict between regulation and competition law but complementarity
- Due to the institutional system (I)
- Illustrations of regulation by the French competition authorities (II)
- Tools used by the French competition authorities to make regulation (III)

I- French institutional design

Competition Authorities

Till the end of 2008

- Conseil de la Concurrence
 - Antitrust
- Ministry of Economy
 - Investigation powers (no sector inquiries)
 - Mergers

1st January 2009

- New law (LME)
Loi de modernisation de l'économie- 4 August 2008
 - New «*Autorité de la concurrence*»
 - Jurisdiction in Antitrust and Merger Control

Regulators

Old ones (no EC law influence)

- Financial services:
Commission bancaire,
Commission de contrôle
des assurances....
- Média
Conseil Supérieur de
l'Audiovisuel (CSA, 1986)

"New" ones (EC directives)

- Telecommunications and
Postal Services
ART (1996) – now ARCEP
- Energy (electricity, gas)
CRE (2000)

Overlap between regulation and competition law

- | | |
|--|---|
| Intervention of sectoral regulators on competition issues (broadly speaking) | <ul style="list-style-type: none">• Control on access to the regulated activity<ul style="list-style-type: none">- Deliver authorizations, licenses...- Give access to facilities (eg. frequencies)• Control on exercise of the regulated activity<ul style="list-style-type: none">- Control on duties imposed to the operators (may include control of prices); infringement procedures...- Settlement of disputes between operators |
|--|---|

Settlement of disputes

- Before ART, then ARCEP: + 90 decisions (1 in Postal Services)... mainly interconnexion issues or tariff conditions

- Before CRE: 44 (2002-2006), but only 3 since the new system (CORDIS)
mainly issues in relations with EDF (2 for gas)

- Before CSA (since 2006), already 15 decisions,

System to avoid potential conflicts in antitrust (1)
First level – duties imposed on regulators

Regulators

- Duty to transfer to the CA any information on anticompetitive conducts
- Entitled to make a referral to the CA

Competition Authorities

- Antitrust: duty to ask an opinion to the competent regulator, when examining a file in a regulated industry

System to avoid potential conflicts in antitrust (2)
Second level – Judicial control

- Judicial control on all decisions with competition issues broadly speaking (CA or SR) exercised by the same judge. Specialised chamber (1st) of the Court of appeal of Paris
- Then, Cour de Cassation, Commercial chamber

System to avoid potential conflicts in merger control

- Withdrawal of jurisdiction to the SR which try to control competition issues of mergers (mainly, old ones in financial services and audiovisual)
SR only apply specific rules (pluralism of media, prudential rules...)
- Competition issues of mergers only controlled by the CA but, if there is a second stage, must ask for an opinion of the SR

Conclusion on the French system

- IT WORKS QUITE WELL
VERY GOOD COOPERATION BETWEEN THE CONSEIL DE LA CONCURRENCE AND ARCEP AND CSA
- IMPACT OF THE NEW LAW (LME):
No legal change
The creation of the new *Autorité de la concurrence* will still improve the cooperation in the field of mergers

II. Illustrations of regulation by the French CA

- Application of article 82 EC (French CA n° 1 of NCA within the ECN)
- Due to duty to examine all complaints (no *opportunité des poursuites*)
- Consequence: actions of the incumbent challenged by the new operators before the CA
- Telecoms (since 1997): 51 decisions of the Conseil de la concurrence (29 opinions of the ART/ARCEP)

A. Regulation of access to markets

- a) Liberalised markets
 - Telecoms: very numerous decisions
 - Energy: 07 MC 01, 07 MC 04
- b) Emergent markets
 - Development of Internet and ADSL
 - Introduction of the Digital Terrestrial Television

B. Regulation of prices

- a) classical control; illegal rebates and price discriminations
- b) new developments: predatory prices and margin squeeze
 - energy: 07 MC 04
 - - broadcasting: 07 MC 05

III- Tools used by the FCA to make regulation

- A. Decisions in specific cases
- B. General positions on texts

A. Decisions in cases (1)

a) intensive use of adequate procedures

- interim measures: quite numerous
more than 18 decisions in telecoms (1998/2008)
2 very important decisions in energy (2007)
4 decisions in media
- commitments
in antitrust: 2 in 2007
in mergers: Canal +/TPS (2006)

A. Decisions in cases (2)

b) adoption of adequate remedies

- injunctions to suspend (eg, offers or exclusivity clauses
(00 MC 19, 01 MC 06, 07 MC 02)
- injunctions to adopt positive conducts: to give access, to offer
adequate prices... to remove exclusivity clauses...

B. General positions

a) non application of national texts contrary to EC directives

- 03 MC 03 (broadcasting and telecom): application of CIF caselaw

b) opinions

- * on the sector
- following EC directives in Telecoms (11 for the first round; 2 for the second round)
- outside EC directives: referral of regulators (08 A 09, 08 A 16, ARCEP), of associations (08 A 11)
- * on proposed draft: 08 A 06

CONCLUSIONS

- The CA is very active in regulated industries
- regulation made by the regulator as a transitory process; specific regulation must be given up when the process of opening to competition may be considered as completed (eg, fixed telephony in France)