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MERGER CONTROL IN FRANCE

1. Overview

Introduction

Long before the EU, France has had a merger control regime provided for, initially, in Law 77-806 of 19 July 1977, which regulates the phenomena of economic growth and the structural evolution of companies. The rules governing merger control have been amended in particular by:

- the Order of 1 December 1986 on freedom of pricing and competition;
- the Law of 15 May 2001 on new economic regulations;
- the Law of 4 August 2008 on the modernisation of the economy; and
- the Law of 6 August 2015 on growth, activity and equal economic opportunities.

Today, merger control in France is governed by the Commercial Code, whose provisions apply when the transaction does not have an EU dimension. However, certain provisions of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) are also directly applicable to merger control by the French *Autorité de la concurrence* (the Authority), notably:

- Article 1, which sets the limit of the respective competences of the European Commission (the Commission) and the national competition authorities according to the turnover of the undertakings concerned by the concentration;
- Article 5, which specifies the method for calculating the turnover figures referred to in Article L. 430-2 of the Commercial Code; and
- Articles 4 (paragraphs 4 and 5), 9 and 22, which provide for mechanisms for the referral of a merger between the Commission and the national competition authorities of the member states.

The other provisions of the EUMR are not directly applicable to merger control where jurisdiction lies exclusively with the Authority. However, to ensure consistency with European practice and to ensure legal certainty for all companies active on the French market, the Authority uses the same concepts and mechanisms as those covered in the EUMR. In doing so it can determine the scope of the various merger control concepts used in the Commercial Code. The various notices published by the Commission on these subjects also provide the Authority with useful analytical guidance.

Concept of concentration under French law

The definition of a concentration in French law is identical to the one used in the EUMR. It is therefore expressed in very broad terms and covers mergers, acquisitions and the creation of full-function joint-ventures (joint ventures having sufficient personnel and resources to perform the functions normally carried out by other companies on the same market). Hence, in France, a concentration is defined by reference to the existence of a change of 'control' of all or part of an undertaking. This change of control may be achieved by the conclusion of a legal act or on the basis of factual elements (ie, an alliance of business activities leading to the creation of a single economic entity, which is rare in practice). Merger control applies to undertakings as defined by the EU *Höfner* judgment and includes any entity carrying out an economic activity, irrespective of the legal status of that entity and the way it is financed (CJEU, C-41/90 of 23 April 1991 Höfner and Elser).

The notion of 'control'

Control refers to the ability to exercise decisive influence over the business of the controlled undertaking, i.e. where a party is able to determine a company's commercial strategy (including strategic planning, budget, major investments, appointment and dismissal of key managers). This possibility must be real, but it is not necessary to demonstrate that the decisive influence is or will be effectively exercised.

Control is analysed on the basis of legal elements, such as shareholding, company statutes, shareholder agreements and de facto elements, such as the dispersion of the shareholding, structural, contractual, economic and financial links.

Control may be direct or indirect. It may be exclusive, i.e. exercised by a single undertaking or joint when several undertakings have the power to take or block the strategic decisions of another undertaking.

What concentrations are controlled

French merger control only assesses mergers and acquisitions carried out by companies of a certain size. Only the largest mergers are subject to review. The size of the operations is measured by reference to the turnover of the companies involved. Smaller mergers are not subject to review because they are not considered to be harmful to competition as they do not entail a risk of market domination.

French law has adopted a system of thresholds below which a merger would not be subject to review. These thresholds are found in Article L. 430-2, I of the Commercial and hence, a merger must be notified to the Authority in France if:

- the undertakings involved in the transaction together have a worldwide turnover of more than €150 million;
- each of at least two of the undertakings involved in the transaction have an individual turnover in France of more than €50 million; and
- the transaction does not have a European dimension and is not subject to the provisions of the EUMR.

Furthermore, one of the particularities of French law is the existence of specific thresholds for companies operating in the retail sector. In this case, concentrations are notifiable to the Authority if:

- the undertakings involved in the transaction have a combined worldwide turnover of more than €75 million;
- each of at least two of the companies involved in the transaction have an individual turnover in France of more than €15 million; and
- the transaction does not have a European dimension and is not subject to the provisions of the EUMR.

French law also provides for specific rules applicable in France's overseas territories. This applies to Mayotte, Wallis and Futuna, Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy. It should be noted that there are two separate competition authorities in New Caledonia and French Polynesia, with specific rules that will not be dealt with here.

The turnover criteria

The method for calculating turnover is modelled on the EU method. The calculation requires the identification of the 'undertakings concerned' by the transaction, and then the turnover of the group to which they belong (which should make it possible to assess the economic power of the undertaking concerned as a whole and not only limited to the legal entities involved in the transaction).

Whether a merger has little or no impact on competition, which could be due to market shares and positions of the parties on the various markets concerned, has no bearing on whether it must be notified to the Authority. For the Authority, whether a merger is caught by the merger control rules is assessed only in relation to thresholds expressed in terms of the turnover of the undertakings (*Autorité de la concurrence*, Decision No. 13-D-22 of 20 December 2013, section 24*)*.

In practical terms, it is the turnover of the last closed financial year that is taken into account and allocated geographically to the relevant market, in principle on the basis of the location of the customer. Finally, adjustments should be made where necessary to reflect, for example, the acquisition or disposal of assets after the closure of the accounts.

Notification procedure

Once the turnover thresholds are met, it is mandatory to notify the transaction to the Authority. The notification procedure has a suspensive effect and it is thus prohibited to proceed with the transaction as long as the Authority has not issued a decision authorising the transaction. The obligation to notify rests on the party or parties acquiring or retaining control of all or part of an undertaking.

Similarly to the EUMR, the notification can take place in two phases.

Phase I

This phase corresponds to an initial examination. One possible outcome is that the Authority finds that the transaction was not subject to its control. Another option is that the Authority clears the transaction unconditionally or conditional upon compliance with certain specified commitments. However, if the Authority considers that there are serious doubts as to whether the transaction will harm competition, it may open the in-depth investigation as a second phase.

The first phase is limited to 25 working days. This period may be suspended or extended by 15 working days if the parties offer commitments.

Phase II

This phase corresponds to an in-depth review. Once the parties have been informed of the opening of an in-depth review, they may still offer commitments to remedy the anticompetitive effects of the transaction.

This second phase is limited to 65 working days. This period may be extended by 20 days if the proposed commitments require a longer review and investigation. A suspension of the deadline is also possible at the request of the parties or on the Authority's own initiative.

If the parties are not satisfied with the Authority's decision, they may challenge it, for annulment or for reformation, before the Paris Court of Appeal and, then, before the French Supreme Court (*Cour de Cassation*).

The notification procedure to the Authority is an administrative procedure. Nevertheless, it is adversarial and respects the rights of defence. Companies have the opportunity to be heard and to put forward their arguments on the issues discussed before the Authority.

Finally, although the debates in connection with the transaction are not public, the notification of the transaction is subject to a certain degree of publicity. French legislation provides for systematic information of operators likely to be affected by mergers (eg, competitors, customers). The information is provided by means of a press release published by the Authority.

In France, the Authority is obliged to inform the Minister of Economy of all decisions it takes. This gives the Minister two powers:

- to request the opening of a Phase II within five working days of a Phase I decision. This, however, has never happened to date; or
- to take a decision in lieu of the Authority'*s* decision within 25 working days of being informed, where the decision has been taken in Phase II. This was the case in the acquisition of the Agripole group by Financière Cofigeo. In this case, the Minister's decision annulled a commitment imposed by the Authority's decision.

Compatibility assessment

When assessing the compatibility of a transaction under French law, the Authority makes a prospective analysis of whether it would significantly impede effective competition in all or a substantial part of the French market, in particular because of the creation or strengthening of a dominant position. After the definition of the relevant market, the assessment of the transaction is carried out in two steps. It will be necessary to assess the potential harm to competition resulting from the merger and if that proves negative, it will be necessary to carry out an economic and social assessment of the transaction.

As regards the competitive analysis, the Authority will verify that the transaction will not harm competition. This is a question of assessment of the market power. The operation must not create nor strengthen a dominant position or create nor strengthen purchasing power which places suppliers in a situation of economic dependence. The market power assessed by the Authority corresponds concretely to the capacity of the transaction to lead to an increase in prices or a reduction in the production, choice or quality of goods and services or a reduction in innovation.

At the same time, the Authority must identify whether efficiencies, beneficial to consumers, could offset the identified harm to competition. The Authority will also take into account the degree of market concentration in analysing the risks associated with the transaction. The analysis involves looking for three main categories of effects.

Horizontal effects

The analysis of horizontal effects is the most common analysis in merger operations. In this regard it is necessary to verify that the operation does not lead to a suppression of competitive pressure. The first indicator is the combined market share of the parties. On the one hand, market shares of less than 25 per cent indicate a low risk of harm. On the other hand, market shares of more than 40 per cent will indicate increased risks and the possibility of achieving a dominant position.

Vertical effects

These are analysed when the transaction involves complementary, vertically integrated players operating at different levels of the supply chain. Here, the Authority will look at the risk of upstream or downstream foreclosure. In this respect, the Authority considers that a market share of less than 30 per cent will not lead to foreclosure.

Conglomerate effects

These effects refer to the possibility of foreclosing access to one or more related markets through leveraging. These effects may arise and restrict competition when the merged entity will enforce its dominant position in related markets.

The existence of barriers to entry could justify the Authority's concerns about the transaction. It should be noted that such an approach is forward-looking. Thus, it is possible to authorise a transaction despite the existence of relatively high barriers to entry, as long as the development of competition is not excluded in the future.

In its analysis of the transaction, the Authority may take account of a maverick, which is a small operator playing a role in stimulating competition. Its presence on local markets in particular may be such as to disrupt any market coordination. As a result, the elimination of a maverick may work against the transaction. Similarly, the Authority will take into account the 'failing firm defence'. In this respect, it is possible to authorise a transaction even if its competitive assessment is initially negative when the target is subject to bankruptcy proceedings. It is considered that the imminent disappearance of the firm could be counterbalanced by the approval of the transaction.

The Authority's analysis will take into account the efficiencies generated by the transaction. This amounts to considering the synergies that arise from the operation and that will be beneficial to the market. The gains must meet three cumulative conditions to be taken into account: they must be quantifiable and verifiable, specific to the transaction, and benefit consumers.

Instead of prohibiting the transaction, the Authority may condition its clearance on a series of structural or behavioural commitments that will remedy the anticompetitive effects of the transaction at the time of the notification of the transaction:

- Structural commitments involve divesting assets or creating Chinese walls, namely creating a seal between the companies to avoid the exchange of sensitive information, maintaining separate brand policies, etc.
- Behavioural commitments involve proposing an obligation to do or not to do something that would allow the market to function better (eg, not to sign agreements or to grant a licencee).

The Authority is responsible for monitoring the implementation of the commitments. Failure to comply with the commitments that are a condition for authorisation entails the possibility that the Authority substitute other measures for these initial commitments. Failure to comply with the commitments could also entail remedies for victims of wrongful conduct in the context of a merger. The *Cour de Cassation* allows an injured third party a right to civil compensation (Cass., com., 31 January 2018).The parties may request a review of the commitments in order to modify their duration or substance by justifying a change in market conditions.

Recent developments

French merger control law has not escaped the recent debates aimed at extending control to so-called killer acquisitions. The Authority advocates for the introduction of an obligation to inform the Commission or the relevant competition authorities of all mergers implemented in the EU by 'structuring' companies, which would be listed according to objective criteria (*Autorité de la concurrence*, communiqué, 19 February 2020).

In July 2020, the Authority published new guidelines that show a great convergence between the practice of the Authority and that of the Commission.

Additionally, a new reading of article 22 of the EUMR was adopted by the Commission. Initially, a transaction that did not meet the turnover thresholds triggering French merger control was, until recently, immune from of the application of article 22 EUMR and thus from referral to the Commission. The approach has changed since March 2021 and it is now possible, in line with the Authority's proposal to capture killer acquisitions, to refer transactions to the Commission, even below the thresholds. The first case examined by the Commission was even a French referral and concerned the takeover of Grail by Illumina.

Applicable legislation

Merger control falls within the legal framework provided by articles L. 430-1 to L. 430-10 of the French Commercial Code. Its implementation and procedural rules are specified by articles R. 430-2 to R. 430-10 of the regulatory part of the same code. In addition, the Authority's merger control guidelines provide numerous substantive and procedural clarifications.

The application of these rules presupposes the exclusion of the transaction from the scope control for concentrations with a Community dimension which, in principle, fall within the exclusive competence of the Commission and imply the application of the EUMR. An articulation of national rules with European rules can be envisaged when the operation is referred by the Commission to the French Authority or in the event of parallel control by a national authority by virtue of powers other than the application of the competition rules.

Enforcement Agency

The entire merger control procedure falls under the jurisdiction of the Authority, which replaced the Competition Council (*Conseil de la concurrence*). The latter was directly supervised by the Minister in charge of the economy, since 2 March 2009, by virtue of the law of 4 August 2008 on the modernisation of the economy. The Authority is now the only body competent for merger control. The Authority is an independent administrative authority and is therefore no longer subject to the hierarchical supervision of a minister. This gives it the independence required to best regulate the operations notified to it.

Horizontal mergers

The substantive rules for the assessment of horizontal mergers are described in the Authority's guidelines. The Authority carries out a legal and economic analysis to assess the state of the market with and without the transaction via a counterfactual.

There are two types of anticompetitive effects stemming from horizontal mergers: non-coordinated and coordinated effects.

Non-coordinated effects

Also known as unilateral effects, non-coordinated effects result, by definition, from the elimination of competition between merging parties who are no longer competitors and enjoy increased market power.

Such effects are possible in a situation of single firm dominance, that is, a company in a position of market power that allows it to behave largely independently of other competitors, customers and ultimately consumers.

Unilateral effects are also possible in oligopolistic markets, even in the absence of single firm dominance, where a transaction removes a significant competitive constraint that the parties previously exercised over each other. In its assessment, the Authority will take into account market shares, the degree of market concentration, the level of product differentiation, competitive pressure and potential competition.

Coordinated effects

Coordinated effects occur when the transaction may also change the nature of competition in the market in such a way that firms that previously did not coordinate their behaviour are much more likely to do so or, if they were already coordinating their behaviour, can do so more easily. A horizontal merger, especially in an oligopoly, could disrupt the functioning of the market and lead to higher prices, reduced output or other adverse effects.

The coordination at issue here is tacit, not express, as each firm is expected to continue to behave independently, according to its own interests. The analysis of these effects takes into account the number of operators and the symmetry of the firms, the homogeneity of the products and the stability of demand.

Vertical Mergers

The assessment of vertical mergers is always made in the light of the Authority's merger control guidelines. Provided they are not accompanied by significant market power, vertical mergers are not in principle likely to raise significant competition concerns. Moreover, they are more often associated with the creation of substantial efficiencies because the activities of the notifying parties are complementary and therefore generate synergies.

However, a vertical merger may restrict competition by making it more difficult to enter the markets in which the new entity will be active. The new entity may foreclose competitors or harm them by increasing costs. Such foreclosure will increase prices or reduce consumer choice. These elements are taken into account by the Authority in its analysis of the transaction. Following the same logic as the Commission, the Authority will take into account input foreclosure and customer foreclosure. Ultimately, the Authority will exhaustively analyse all the elements likely to have a negative impact on competition to the detriment of consumers which cannot be counterbalanced by efficiency gains.