

# The European Antitrust Review 2015



Published by Global Competition Review  
in association with

Gide Loyrette Nouel AARPI

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GLOBAL COMPETITION REVIEW

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# France: Merger Control

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The French merger control regime is governed by the provisions of Book IV of the French Commercial Code (article L.430-1 and following), as amended by the Law on the Modernization of the Economy (LME) enacted on 4 August 2008, and the Government's Order No. 2008-1161, dated 14 November 2008.

## Presentation of the French Competition Authority

The Competition Authority is an independent administrative authority. It was created in 2009 from the transformation of the former Competition Council.

As far as antitrust is concerned, the Competition Authority, whose assignment is to regulate market competition, is in charge of the application of both national (Book IV of the French Commercial Code) and European legislation (articles 101 and 102 TFEU, ex articles 81 and 82 ECT).

The Competition Authority enforces antitrust and has the power to engage actions for anti-competitive practices on its own or at the request of a plaintiff. The Competition Authority also plays an advisory role by issuing opinions on its own initiative or at the request of corporations representing the collective interests: government, parliament, local authorities, professional organisations or organisations acting for the consumers' interests' defence.

The Competition Authority is a collegial institution (comprising 17 members), appointed for five years by the Ministry of the Economy. The decisions of the Competition Authority are made collectively, except in cases where the president or vice president may act alone.

Investigations are conducted by rapporteurs from different professional bodies (ie, judges, economists, lawyers, engineers, etc) under the direction of the general rapporteur and the deputy general rapporteurs.

The LME also created the position of 'hearing officer', who reports to the president and proposes solutions to ensure the compliance of the proceeding with the parties' rights. The role of the hearing officer is of great importance as regards the parties' rights of defence. In Notice No. 09-A-41, dated 1 July 2009, related to the proposal of nomination of the hearing officer, the Competition Authority made it clear that the role of the hearing officer shall be that of a procedural expert separate from other members who is the only one able to take a decision.

As far as merger control is concerned, a specific team dedicated to merger control was created. This department is now a part of the Competition Authority's investigation services and is in charge of the definition of the Competition Authority's policy in merger control. The investigation services also include a team of economists in charge of conducting economic analyses in order to appreciate the impact of the concentrations on the market.

## Merger control

Merger control, which was previously within the exclusive competence of the Ministry of the Economy, was transferred by the LME

to the Competition Authority. The latter assesses the competition effects of the mergers by taking into account any possible efficiency gains. The executive power, through the Ministry of Economy, may nonetheless have the last word in situations where France's fundamental interests are at stake.

If the operation does not raise any particular competition issue or if the commitments made by the parties are sufficient to remedy to competition difficulties, the operation is scrutinised and a decision is made within 25 business days (except in case of commitments, a maximum of a 15 business days' period can be added) from the filing of a complete notification form (Phase I). Another 15-day period can be added if the parties request to suspend the procedure. Taking into account this 'stop the clock' period, the maximum duration of the examination under Phase I is 55 days.

The president of the Competition Authority is the only one authorised to rule on merger transactions that do not imply competition issues (Phase I). If necessary, the president can discuss commitments with the undertakings concerned.

If any serious doubts of anti-competitive effects persist at the end of this phase, the Authority will take the decision to open a Phase II investigation, during which the Authority will conduct a thorough examination of the contemplated merger by launching a market test and by an economic analysis of the impact of the transaction on the market. The Phase II examination lasts 65 business days except if commitments are presented within the last 20 days of the 65-day period. In such a case, the examination time period will be extended with 20 business days starting from the date of reception of the commitments. Another 20-day period can be added if the parties or the Competition Authority request to suspend the procedure. Taking into account this stop the clock period, the maximum duration of the examination under Phase II is 105 days.

Within 25 business days after the Competition Authority has adopted its decision, the Ministry of the Economy can decide to evoke a merger that would imply issues of fundamental interest other than competition. The fundamental interests that may be in question are related to industrial development, the competitiveness of the undertakings concerned as regards the international competition and the employment sustainment. However, the Ministry of Economy has thus far not used this right of evocation since the LME was adopted in 2008.

Where a merger raises significant anti-competitive effects that cannot be counterbalanced by economic efficiency gains and where the failing firm defence is not relevant, it may be necessary for the parties to undertake some commitments that will remedy or compensate for the anti-competitive effects.

## New Guidelines on Merger Control

2013 brought a final touch to the global revision of French merger control proceedings through the adoption of the Authority's new Guidelines on Merger Control in July 2013, replacing the already 'old' guidelines published in 2009.

However, it should be noted that the new Guidelines are not a revolution in France's merger control – they are more a revision of the former ones enhanced by the Authority's experience acquired since 2009 when the Authority took over merger control enforcement from the Ministry of Economy.

The Guidelines rely on observations provided by practitioners to the Authority through a public consultation process, the contributions of which are publicly available on the Authority's website.

The additions to the text of the new Guidelines focus on:

- favouring the pre-notification process, which is the pre-filing optional and informal approach that can be held by parties to a concentration with the Authority in order to discuss the issues raised by the case, and thus facilitate the presentation of the subsequent formal filing;
- presenting the criteria for obtaining a straightforward review of the filing through a 'simplified procedure';
- better definition of relevant markets;
- the standardisation of the transfer of assets and trustee mandates process; and
- providing a guide for providing economic studies.

According to the Guidelines, 'simplified proceedings' are applicable to cases that normally would not raise competition issues. In this respect, several cases can allow the submission of a simplified notification. For instance, where the undertakings concerned are not active on the same markets or in vertically related or neighbouring markets, they can submit a less detailed form than usual.

Moreover, companies running a significant number of concentrations subject to review each year (eg, investment funds or major actors in the retail trade sector) can, after the closing of their annual financial statements, provide the merger control department of the Authority with a core summary, preferably in electronic format, containing general information that is likely to be repeated in all of the notifications throughout the year to come. Then they can limit the content of their notification to information specific to the operation.

It is also worth mentioning that the Authority took into consideration some remarks from the public consultation to reshape its approach towards the definition of relevant markets and, more particularly, to take into consideration the specificities of agricultural markets involving food processing or retailing in supermarkets.

Finally, the Guidelines also emphasise the importance of compliance with the commitments taken by companies. For structural remedies, the Authority – taking inspiration from models developed by the European Commission, other competition Authorities and its own experience – proposes two model forms for the transfer of assets and the trustee mandate. Those documents notably list the legal requirements for divestiture commitments and contain a pre-formulation of the asset transfer procedure together with basic guarantees the Authority considers necessary to retain for the viability of the assets transferred. Moreover, the role of the trustee is to monitor the commitments or the transfer procedure. By proceeding this way, the Authority intends to facilitate, secure and standardise the companies' practices during the commitments phase.

This set of comments on the Guidelines highlights the importance of taking into consideration the pre-notification process, which, while optional, is really a very helpful tool for enabling the parties to prepare the formal filing and even gain some time for collecting useful information as requested by the Authority and to manage possible competition concerns with the Authority. While time consuming in the initial phase of the process, this optional pre-notification proceeding usually saves time.

### Notable decisions from 2013–2014

The Competition Authority continues to sanction companies for lack of notification

According to article L.430-3 of the French Commercial Code, a merger must be notified to the Competition Authority prior to its implementation if the thresholds, referred to in article L.430-2, are met. In the event of a failure to notify, either intentionally or negligently, the French Competition Authority may impose fines up to 5 per cent of the aggregate turnover of the undertaking concerned. The Authority may also impose periodic penalty payments on the concerned undertakings to compel them to notify a merger.

The case under review of the Authority by its decision No. 13-D-22 dated 20 December 2013 sanctioned up to €4 million on the head company of a group active in the winery sector (Castel Frères) for not having notified the gain of control of six companies (the Patriarche group) for merger control prior to implementing the transaction. This high sanction can be explained by the particularities of the case.

Indeed, the sanctioned lack of filing has been indicated to the Competition Authority by a third party during the review of a merger control filing submitted to the Authority by Castel Frères for another transaction, and was thus not brought spontaneously to the knowledge of the Authority.

Moreover, the Authority underlined that, although the transaction has been cleared by the Authority after a filing that finally occurred, the lack of notification is even more blameable as Castel Frères knew that it had to comply to such obligation and its gun-jumping attitude was only motivated by the intention to close as fast as possible the non-referred transaction.

### Examples of transactions cleared in Phase II by the French Competition Authority

Although under French merger control, decisions following an in-depth examination are quite rare, in 2013 one can mention at least two prominent transactions cleared in Phase II.

First, one of the major transactions of the year was the acquisition of sole control of the retail chain Monoprix by retail chain Casino. The latter already holds 50 per cent of Monoprix's share capital, the other 50 per cent being previously owned by Galeries Lafayette.

The transaction was notified in an adversarial context shortly after the outcome of a sector inquiry of the French Competition Authority (Opinion 12-A-01 dated January 2012) at the request of the City of Paris by which it acknowledged that at that time Paris food retail market was quite concentrated and Casino hold in Paris a quite significant share in this market.

The in-depth examination led to several market tests to which operators participated in the food retail sector, including competitors and suppliers, and the analysis of the incidence of the transaction throughout the territory. Casino submitted several commitments that were improved after a discussion with the Authority, and the Authority identified 50 areas where the transaction led to high market shares. Casino undertook to divest 55 stores in Paris and three in two other departments that led to the clearance of the transaction by the Authority.

The transaction is also interesting when considering that for the Authority the transaction led to a change in the competition situation, even though Casino had already acquired joint control over Monoprix.

Finally, Casino had to implement a warehousing structure in order to respect the deadline imposed by the seller.

It is also worth mentioning the clearance, also in Phase II, subject to conditions, of the acquisition by Bouyer-Leroux of Imerys assets in the wall and partition bricks sector. According to the Authority, the rationale of such Phase II examination was that Bouyer-Leroux would operate a virtual monopoly over the manufacture of partition bricks market in the West of France and hold a significant position in the manufacture of wall bricks market in Aquitaine, where competitors or clients could not be in a position to compete.

The Authority launched a wide market consultation, listened to the professionals and finally agreed that all risks to competition in the West of France should be removed since the Authority noted that plaster bricks could be substituted with other construction materials for non-load bearing walls.

As far as the issues in Aquitaine were concerned, the Authority noted that the transaction led to competition problems in this region. To prevent those risks, Bouyer-Leroux undertook to transfer a volume of 25,000 tons of bricks per year to competitors at cost price, over a period of five years.

For this transaction also, a trustee was appointed in order to monitor the execution of the commitments.

#### The Canal Plus/Vivendi saga

In its decision of 23 July 2012, the French Competition Authority cleared the acquisition of two television channels (D8 and D17) by Groupe Canal Plus and Vivendi subject to five commitments (decision 12-DCC-101).

However as the parties challenged the decision before the Council of State (the highest administrative French court), the latter quashed the Authority's decision, allowing the Authority to take a new decision in this case by postponing the effect of its decision of 1 July 2014 only.

In this context, Groupe Canal Plus and Vivendi filed a new notification with the French Competition Authority in January 2014 and the Authority carried out a new competition analysis of the competition situation on the relevant markets taking into consideration the new market situation.

This new analysis of the Authority led notably to submitting the commitments suggested by the parties to other professionals in the sector and launched two market tests on those commitments. The Authority also took into consideration the comments made by the sectorial regulatory bodies (ie, the CSA and the ARCEP).

The result of this process was to obtain from the parties to the transaction an improvement of the commitments initially submitted to the Authority with regards to French film acquisition rights. The rest of the initial commitments have been maintained.

All the commitments run until 23 July 2017, and again are monitored by an independent trustee, provided the Authority reserves the right to renew the implementation of all or part of these measures once and for five years if a competition analysis to be performed before the five-year term requires such renewal.



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Antoine Choffel is a partner specialising in economic and European law. He represents French and foreign companies before French and European competition authorities (notifications of mergers and agreements, complaints, defending clients in judicial proceedings) as well as domestic jurisdictions. He advises clients on French and EC law in competition law (cartels, abuse of dominant position and merger control); state aid; dumping; intellectual property; distribution; advertising; and product liability.

Antoine has also been involved in Central and Eastern Europe. He assisted the Hungarian government in reforming legislation on consumer protection (in the context of the Phare programme) and the Russian government in its reform of national policy and legislation on monopoly control (in the context of the Tacis programme). He also advises large companies in the context of the distribution of their products via the internet or in the framework of their vertical agreements.

Antoine Choffel was resident partner of the firm's Brussels office from 1997 to 2000. He was admitted to the Paris Bar in 1991.



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