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I. Objective

1. Concentrations, whether they consist of mergers, acquisitions or the creation of joint ventures, allow firms to improve their competitiveness by generating economic efficiency gains that can have a positive impact on the welfare and purchasing power of consumers as a result of lower prices, improved product quality or a broader selection of choices provided to them. As such, as recalled in the fourth recital of EC Regulation n° 139/2004 on the control of concentrations between undertakings: mergers "are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community".

2. However, this benefit for consumers is not certain when a merger operation significantly impedes effective competition. As such, in France like in the vast majority of developed countries, lawmakers have set up a system to prevent any anticompetitive effects as a result of mergers. This control is not intended to protect the specific interests of competitors, but rather to see to it that competition remains adequate so as to prevent any undermining of consumers welfare.

3. Merger control is part of the compliance with the principle of freedom of trade and industry: the restrictions that it imposes on this freedom must be both limited and proportionate. From 2000 to 2008, 94% of mergers were authorised without conditions after the national competition authority examined their competitive assessment. However, in appropriate cases, competition authorities seek out remedies to address the anticompetitive effects on competition of a concentration, in the form of commitments proposed by the firms, or injunctions and provisions that are imposed on them. They may also, when no satisfactory remedy can be found, prohibit an operation.

4. Merger control was established in France by the law of 19 July 1977. Its operation was successively improved by the ordinance of 1st December 1986 relative to the freedom of prices and competition, by the law of 15 May 2001 relative to the new economic Regulations, and by the law of 4 August 2008 on the modernisation of the economy.

5. The Autorité de la concurrence has been responsible for merger control in France since 2 March 2009. The objective of the present guide is to provide firms with an educational presentation regarding the scope of merger control, the procedural steps of the Autorité’s review and the objectives, criteria and methods used.
II. Sources

6. The organisation of the Autorité de la concurrence, its attributions, general rules of procedure, decision and appeal are defined in Section VI of Book IV relative to the freedom of prices and competition, within the Code de commerce (French Code of commercial law). The Autorité de la concurrence’s internal rules provide some practical provisions with regard to the proceedings.

7. More specifically, merger control falls within the legal framework defined by Articles L. 430-1 to L. 430-10 of the Code de commerce. Its implementation is stipulated by Articles R. 430-1 to R. 430-10 of the regulatory part of the Code de commerce.

8. Certain provisions of Council Regulation (EC) n° 139/2004 of 20 January 2004 on the control of concentrations between undertakings are also directly applicable, notably Article one that sets down the limits of the respective competencies of the European Commission and of the national competition authorities on the basis of the turnovers of the firms involved in the merger. Similarly, for the turnover calculation method, Article L. 430-2 of the Code de commerce refers to Article 5 of the Regulation, as stipulated by the Commission's Consolidated Jurisdictional Notice of 16 April 2008.

9. Regulation (EC) n° 139/2004 also provides mechanisms for referral to Article 4, paragraphs 4 and 5, to Article 9 and to Article 22, between the European Commission and the competition authorities of the Member States, for which the implementation provisions are stipulated in the Commission notice of 5 March 2005.

10. The other provisions of Regulation (EC) n° 139/2004 are not directly applicable to the national merger control. However, in decisional practice, in an effort to remain consistent and to harmonise with community practices, the various notions relative to merger control used in the Code de commerce have been aligned with the ones used in Regulation (EC) n° 139/2004 and the various notices published by the Commission which, relative to these subjects, provide the Autorité with useful analysis guides.

11. Light has been shed on the implementation of these texts by the case law developed by the Conseil d'État (French administrative Supreme Court). The Autorité also refers to the decisional practice of the European Commission, and to the case law of the Court of First Instance and of the Court of Justice of the European Communities.

12. The present guide has no normative value but it completes these rules of reference. It replaces the DGCCRF guidelines produced under the system that existed prior to the implementation of the law on the modernisation of the economy of 4 August 2008.

13. Intended to be educational, this guide does not aspire to be a detailed explanation of all possible implementations of the analysis method used by the Autorité de la concurrence with regard to merger control. For the
Autorité, it constitutes a directive, i.e. it is opposable to firms and, conversely, may be referred to by firms. In order to provide them with maximum legal security, the Autorité undertakes to apply the guidelines whenever it reviews a concentration that has been notified to it as of 1st January 2010, unless the concentration at hand involves a specific circumstance or a consideration of general interest justify an exception. This guide is intended to be updated in keeping with the decisional practice of the Autorité.

III. Scope


15. Exceptionally, it should be noted that these provisions, as well as all of book IV of the Code de commerce, do not apply to New Caledonia and to French Polynesia, as stipulated in Articles L. 930-1 and L. 940-1 of the Code de commerce.

A. THE NOTION OF “CONCENTRATION”

16. Article L. 430-1 of the French Code of commercial law (Code de commerce) provides that

"I. A concentration arises:

1° When two or more previously independent undertakings merge together;

2° When one or more person(s) who already has control of at least one undertaking or when several undertakings acquire, directly or indirectly, whether by equity investment or purchase of asset elements, contract or any other means, control of the whole or of parts of one or more other undertakings.

II. The creation of a joint venture that fulfils, on a lasting basis, all of the functions of an autonomous economic entity constitutes a merger for the purposes of the present Article.

III. For the application of the present section, the control results from the rights, contracts and other means that provide, whether alone or jointly and in view of the factual or legal circumstances, the possibility of exercising decisive influence on a company’s activities, and notably:

- ownership or enjoyment rights to all or part of a company’s assets;

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1 See the case law resulting from the Crédit Foncier decision by the French Supreme Court for administrative law (Conseil d’Etat) of 11 December 1970.
- rights or contracts that provide for a decisive influence on the composition, deliberations or decisions of a company’s bodies.”

17. Article L. 430-1-III stipulates that, when determining if an operation is a merger, the Autorité considers both legal and factual circumstances. Indeed, merger control could not be efficient if the examination were limited to legal considerations: as of the moment when it constitutes an economic merger that changes the structure of the markets, every operation must undergo a control, irrespective of the adopted legal arrangements.

18. The main questions stemming from this definition relate to the notions of firm, person, merger, control and joint venture, which are presented below.

1. THE NOTIONS OF “FIRM” AND “PERSON”

19. A “firm” is said to be "any entity carrying out an economic activity, independently of the legal status of this entity and of its financing means"⁴; with economic activity being understood as “involving the offer of goods and services on the market”⁵. A merger can relate to all of one or more firms, but also to asset elements that constitute part of a corporation, such as brands or patents, as of the moment when these asset elements constitute an activity that results in a presence on a market, to which a turnover can unambiguously be attached⁶.

20. The notion of "person" mentioned in point I-2 of Article L. 430-1 includes legal persons governed by private law, public bodies⁷, including the State itself, and individuals. Acquisitions of control carried out by individuals are only likely to constitute a merger if these persons are involved in economic activities on their own behalf, or if they control at least one other firm before the operation⁸.

21. In the rest of the present guide, the expression "firm" will be used in a generic manner, whether referring to a company as a whole or only to asset elements that meet the above criteria, whether involving an economic activity that is controlled by a private law or public law body, or an individual.

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² CJEC, 23 April 1991, Höfner and Elser, case C-41/90, point 21.
³ CJEC, 16 June 1987, European Commission vs. Italy, case 118/85, Rec. CJEC.2599, point 7.
⁴ See for example Community case COMP/M. 3867 - Vattenfall/Elsam and E2 Assets of 22 December 2005.
⁵ See for example Commission case IV/M.157 - Air France / Sabena of 5 October 1992 with regard to the Belgian State; IV/M.308 - Kali and Salz/MDK/Treuhand of 14 December 1993 with regard to other public bodies such as the Treuhand.
⁶ See for example Commission case IV/M.82 - Asko/Jakobs/Adia of 16 May 1991, in which the firm in question is an individual; COMP/M3762 – or also Apax/Travelex of 16 June 2005 in which an individual acquiring joint control was not considered to be a firm concerned.
22. Concentrations in name can be carried out either through the creation of a new firm, or by one company’s absorption by another company. In the first case, the legal personality of the merging firms disappears while, in the second case, only the legal personality of the absorbed firm disappears.

23. Whether in name or in deed, concentrations are subject to merger control as of the moment when they lead to a combination of the activities of formerly independent firms within a single economic unit. The existence of single and lasting economic management is one of the conditions that is needed to determine if one is in the presence of such a concentration. To determine this, the Autorité takes into consideration all legal and factual circumstances that serve to characterize the operation. In its appraisal, it can also consider various factors such as the existence of cross-shareholdings, the offsetting of profits and losses between the firms brought together by the operation, the distribution of earnings between the different entities, as well their joint liability.

24. The determination of the former independence of the firms is an essential point, as an operation can consist of no more than an internal reorganisation of a group, in which case there is no concentration. This determination is based on the notion of control, which is assessed according to the principles outlined below. If neither of the firms involved undergoes a change of control, the operation is not a merger.

2. THE NOTION OF “CONTROL”

25. A firm is under another firm’s control as of the moment when the controlling corporation can exercise decisive influence over the activities of the controlled corporation. This possibility must be real, but it is nevertheless necessary to demonstrate that this decisive influence is or will actually be wielded.

26. These notions of "control" and "decisive influence" are specific to national law and Community law with regard to merger control, with the two systems meeting up on this aspect. For example, the notion of "control" in the national merger control law is not identical with the notion of "control" when it comes to company law. One should also note that the notion of "decisive influence" is not identical with that of "significant influence", which is used in the area of accounting consolidation.

27. Control can be exclusive (i.e. acquired by a firm acting on its own), or joint (i.e. acquired by several associated firms). The notion of "common control" is equivalent with that of "joint control".

a) Exclusive control

28. A firm has exclusive control when it alone has decisive influence over the activities of another firm.
A firm can hold decisive control over another firm in two cases:

- when it alone has the power to take strategic decisions for the firm in question;
- when it is the only shareholder able to block the other firm’s strategic decisions, though without the ability to impose these decisions on its own (this is then referred to as “negative” exclusive control).

29. It should be noted that, when an operation allows the holder of negative exclusive control to move to a position of positive exclusive control, the status of the control is not considered to have been modified by the operation. For example, when a minority shareholder acquires the power to take, on its own, the firm’s strategic decisions, the operation is not a merger if, before the operation, it already held exclusive “negative” control.

30. As with the notion of a concentration, the notion of exclusive control is based on an assessment of all legal and factual circumstances. Fully-fledged exclusive control is normally acquired when a firm acquires a majority of a company’s voting rights. Exclusive control can also legally result from a minority holding when specific rights are attached to the latter, such as veto rights, for example. A minority shareholder can also be considered to hold de facto exclusive control. This is the case, for example, when the latter is virtually certain of obtaining a majority during the general meeting, on the basis of its holding level and the actual presence of shareholders at the general meetings in past years. Symmetrically, a majority holding does not necessarily mean exclusive or even joint control.

31. Exclusive control does not presuppose that the controlling firm has the power to determine the controlled firm’s day-to-day management. The important factor is its ability to control the controlled firm’s strategic decisions.

b) Joint control (or common control)

32. When two or more firms can exercise decisive influence over another firm, control is joint. The controlling firms must therefore work together and agree on the controlled firm’s strategy.

33. As with the previous notions, the notion of joint control is based on an assessment of all legal and factual circumstances. The most classical form of joint control sees both controlling firms equally sharing the controlled firms’ voting rights between them. Nevertheless, joint control can exist even when the two controlling firms do not equally share the voting or representation rights in the decision-making bodies, or when more than two controlling firms jointly share control.
34. As is the case of exclusive control, joint control does not presuppose that the controlling firms have the power to determine the controlled firm’s day-to-day management. The important factor, as is the case with exclusive control (cf. paragraph 31), is their ability to control the controlled firm’s strategic decisions.

35. When two or more firms acquire a target firm in order to immediately share out its assets between them, the operation does not constitute a joint acquisition of control, but rather an exclusive takeover, by each of the controlling firms, of the assets that each one is acquiring. From the viewpoint of merger control, this is actually two separate operations.

c) Absence of control

36. Moreover, it is worth noting that a firm may not be the subject of any control relative to merger control law if no shareholder or other firm exercises decisive influence. This case can arise when a firm’s capital and voting rights are divided between several minority shareholders, with no legal or factual element requiring a stable majority as part of the decision-making procedure, and when a majority can arise on a case-by-case basis according to the possible combinations of the votes of the minority shareholders (fluctuating majorities). As such, the European Commission recently decided that Keolis was not controlled by any one of its shareholders, and that the increased capital interest of SNCF Participations therefore constituted a merger operation, by providing it with joint control of the firm.

3. CRITERIA FOR ASSESSING DECISIVE INFLUENCE

37. Most often, it is the rights granted to the majority shareholder, or even to a minority shareholder, that determine how control is exercised over a firm. Other elements, such as contractual or financial relations, when added to the rights granted to a minority shareholder, can result in factual control. In very exceptional circumstances, a firm can even exert decisive influence without any interest in the capital.

38. Taken together, these criteria are assessed by the Autorité using the body of evidence technique, even though each of the clues in question, if taken separately, would be insufficient to result in decisive influence in its own right.

a) Rights granted to shareholders

39. Decisive influence over a firm generally results from the fact that a shareholder holds the majority of the voting rights. Nevertheless, a minority holding can also allow a shareholder to wield decisive influence if this holding includes rights that exceed the ones normally granted to minority

7 Commission decision COMP/M.5557 SNCF/CDPQ/KEOLIS/EFFIA.
shareholders for the purposes of protecting their financial interests\(^8\) or if these rights. In assessing this, the Autorité gathers a body of evidence and examines whether concurring and precise a legal and economic evidence confirms the existence of a decisive influence.

40. To determine if a minority shareholder has decisive influence, the Autorité examines, on the one hand, the rights granted to it and the provisions for their usage. For example, it considers:

- veto rights, in particular the ones that apply to the strategic plan, the appointment of the main directors, investments and the budget;
- the possibility of benefiting from special rights that, immediately or in the future, would grant a greater share in the decisions compared to the share of the capital;
- the possibility of appointing certain managers within the firm’s management bodies;
- the possibility of increasing the capital holding at a later time, either through individual agreements or by holding securities that can be converted into shares, or even through the existence of purchase options; in and of themselves, such options cannot entail control relative to the period prior to their exercising, unless this option will be exercised in the near future in compliance with legally binding agreements, but they can reinforce other indicators of decisive influence;
- the possession of pre-emptive or preferential rights;
- the possibility of obtaining detailed information on the firm’s activities, in particular information generally reserved for the management or for parent companies.

41. The Autorité also analyses whether or not the dispersion of shares may give the minority shareholder's participation a more concrete weight in the deliberations. If necessary, this examination is based on minutes of board of directors meetings over several years, that can be used to determine the distribution and actual influence of the votes of the shareholders. For example, the Minister for the economy felt that the increase of the holding of SNCF Participations in the Novatrans capital from 38.63% to 49.02% in 2006 was such as to provide it with decisive influence, after an in concreto analysis of the structure of the votes during the Novatrans general meetings. Indeed, SNCF Participations was sure to have a de facto majority, and it therefore had decisive influence over Novatrans. In particular, the Minister ascertained that in order to prevent decisions by SNCF Participations, 96.2% of the other shareholders would have to be mobilised, a much higher rate than the maximum turn-out rate over the 2003-2006 period and during the 2007 ordinary general meeting, during which the turn-out had been exceptional, with a participation rate of 79.1%.

42. In certain cases, it is necessary to determine if certain shareholders will be coordinating their decisions:

- as a result of a shareholders’ pact or other formal agreement that will lead them to act in concert or will facilitate the coordination of their votes;
- because of sufficiently strong common interests that will lead them not to oppose one another when exercising their rights.

43. For example, the *Conseil de la concurrence* considered that the companies Pan Fish and Wartdal jointly had decisive influence over the company Aalesundfisk. Indeed, these two companies together owned more than 80% of the Norwegian company’s shares, with the other shareholders having a maximum of 6.80% of the shares. This capital control was further reinforced by exclusive pre-emptive and reciprocal rights regarding the purchase of the other party’s shares, granted to each other by the two main shareholders. This shareholders’ pact also provided the members of the board of directors appointed by Pan Fish and Wartdal with decision-making powers regarding the purchase of shares by employees. Moreover, the pact called for the two shareholders to exercise their powers jointly within the board of directors (the number of members was jointly determined, the two shareholders each appointed one member, the chairman’s appointment required the approval of both parties and, finally, they had agreed to allow the other shareholders to appoint one common member). Moreover, the two companies influenced the sales policy of the company Aalesundfisk, while the Pan Fish group’s control over the sales policy of the company Aalesundfisk was further confirmed by the Pan Fish Internet site, that identified Aalesundfisk as part of its distribution strategy. The outcome of these elements was that the companies Pan Fish and Wartdal jointly had decisive influence over the company Aalesundfisk.

b) Contractual relations

44. In their own right, contractual relations are only likely to result in decisive influence over a firm in certain very specific cases. As such, point 18 of the Commission's consolidated notice reiterates that "in order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights)".

45. As an example of contracts that, on their own, can lead to an acquisition of control, the Commission mentions in that same point business lease agreements, whereby the acquirer obtains control over the management and the resources despite the fact that property rights or shares are not transferred, and refers to Article 3, paragraph 2, point a) of Regulation n°139/2004 that provides that control can also result from a right to use a firm’s assets.

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*Conseil de la concurrence* opinion 06-A-20 of 20 October 2006.
46. With more specific regard to franchise contracts, as the Commission indicates, “franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor”.

47. Other questions relating to distribution contracts are covered in appendix C.

c) Other elements likely to allow decisive influence

48. In its assessment, the Autorité also considers the economic ties that the shareholders will have with the new entity, such as, for example:

- the fact of being the new entity's main industrial shareholder that is active in its sector or in related sectors, while the other shareholders are financial investors or shareholders who only have a small part of the voting rights;
- the existence of significant long-term delivery contracts with the new entity;
- the ascertained of very favoured commercial relations such as exclusive sales contracts, contracts for the use of rights or sharing of brands, patents, distribution networks or production units;
- the fact of representing a very high share of the firm’s turnover, such that a break of commercial relations will threaten the firm’s survival in the short term;
- the fact of being significantly involved as a lender to the firm.

d) Examples of the appraisal of elements likely to result in decisive influence

49. In the Est-Républicain / BFCM / Socpresse case, the Conseil d’État considered that BFCM had decisive influence over EBRA as a result of its veto rights and role as a lender: "from the elements in the file, we note that Article 19 of the EBRA Articles of association provides for the appointment and dismissal of the members of its management committee - which, pursuant to Article 14 of these Articles of association, is granted the broadest possible powers in order to direct, manage and administer the company - requires a decision with a two thirds majority from the meeting of shareholders; that, as the owner of 49% of the capital, versus 51% for the SA Le Journal L'Est Républicain, BFCM therefore has, relative to the latter, a veto right on the appointment and dismissal of five committee members whereas in application of Article 13 of the statutes of association, it only has proposal powers relative to two of them; moreover, the BFCM financed, on its own and in the amount of 189 million euros, the purchase of the SA Delaroche by the EBRA company, which itself has capital of only 38,000 euros; that this situation as lender strengthens its influence over the latter's

Paragraph 19 of the Commission's consolidated notice.

11 Conseil d’État (French Supreme Court for administrative law) decision of 31 January 2007.
strategic decisions, whereas it is also able, in view of the voting rights defined in Article 19 of the company’s Articles of association, to oppose, during the meeting of shareholders, any increase of the shareholders equity; that the circumstance that, by means of a current account agreement dated 22 May 2006, BFCM undertook not to require the repayment of its loan for an interval of three years, which is not sufficient to reduce this power, notably as a result of the scale of the financial difficulties encountered by the SA Delaroche and the size of the loan relative to the latter’s annual turnover.”

50. On the other hand, in an opinion relative to the acquisitions carried out by the Scottish & Newcastle-Kronenbourg group 12 in the beer distribution sector, the Conseil de la concurrence considered that the acquisition of a minority interest in the capital of four companies did not provide Kronenbourg with decisive influence: “In this case, Kronenbourg’s acquisitions of minority interests in the capitals of the companies Ferrer, Feuvrier, Murgier and Kihl resulted in a modification of the Articles of association. The provisions of these Articles of association, relatively similar from one operation to the next, provided Kronenbourg with a veto right over certain decisions by the board of directors, regarding significant financial commitments, and a pre-emptive right in case of the sale of shares. Moreover, Kronenbourg signed a shareholders’ pact with the family groups of the Ferrer, Feuvrier and Kihl companies, notably including a promise to sell all of the capital to it by an unspecified deadline. In their terms, none of the legal provisions exceeds what is normally granted to minority shareholders in order to protect their financial interests, and they do not allow Kronenbourg to control the firm’s strategy”.

51. Similarly, the Autorité also considered, as part of the examination of the merger of the Banques Populaires / Caisses d’Epargne groups 13 that the French State would not have decisive influence over the new group. This conclusion was based on a body of legal and factual evidence. In particular, the Autorité checked whether the French State could wield de facto control. It considered that the €5 billion capital equity brought in by the State had to be repaid quickly, and that the State would lose its right to be represented by two members within the supervisory board as soon as half of the preference shares, i.e. approximately €1.5 billion would be paid back. In any event, the Autorité noted that the State had the power to suggest the appointment of two independent members but was not entitled to dismiss them, and that it therefore did not have the power to block decisions that could be taken with a qualified majority.

12 Conseil de la concurrence opinion 04-A-08 of 18 May 2004 relative to several warehouse acquisitions carried out by the Scottish & Newcastle-Kronenbourg group in the beer distribution sector for the CHR (café, hotel, restaurant) circuit.

13 Autorité de la concurrence decision 09-DCC-16 of 22 June 2009.
52. In exceptional cases, control can be established even though the firm does not acquire any single share. For example, in an opinion dated 15 October 1991, the Conseil de la concurrence took note of Gillette's decisive influence over Eemland Holdings NV (hereinafter "Eemland"), even though Gillette does not own any Eemland shares, and had neither voting rights within the Eemland board of directors, nor the right to be represented on this board, nor the right to attend the ordinary general meetings of the shareholders, or even the right to information about the company. In this case, decisive influence was based on a converging body of evidence. First, Gillette held convertible bonds that included a pre-emptive right on the Eemland ordinary shares and other convertible bonds, thereby allowing Gillett to be the only industrial and commercial operator amongst Eemland's shareholders, which could then partly or totally it take over, as relevant. Second, Eemland was financially dependent on Gillette given that, as a lender, the latter had contributed capital representing almost 70% of Eemland's turnover. Third, the commercial agreements signed between the parties would provide Gillette with the possibility of limiting Eemland's competition on the segment of high-end products in France, within which the Gillette brand is positioned.

4. SPECIFIC CASE OF JOINT VENTURES

53. For the creation of a common structure between several firms to be considered a merger, it must, pursuant to Article L. 430-1, involve "a common undertaking that is carrying out all functions of a stand-alone economic entity on a long-term basis". The creation of such a joint venture can result:

- from the creation of a totally new common structure,
- from the contribution of assets that the parent companies previously held on an individual basis to a pre-existing joint venture, provided that these assets, if they involve contracts, know-how or other assets, allow the joint venture to extend its activities,
- from the acquisition of joint control of an existing firm by one or more new shareholders.

54. In particular, the firm is a full-function joint venture if it has sufficient resources in order to operate in an independent manner within a market, and notably "all structural elements need for the operation of autonomous companies (human resources, budget, commercial responsibility)". The resources needed for its activity can be transferred by the parent companies "notably with regard to personnel and intangible assets (brands...)" and, moreover, "their expertise in the area of the design, manufacturing and marketing (...) by transfer of all of their activities in this sector, of the

14 Letter C2007-14 of 13 November 2007, CCIP / UNIBAIL.
contracts, of the employees as well as of all rights needed to carry out the activities.”

Moreover, the structure must be "an undertaking carrying out all functions of an autonomous economic entity" (or also a full-function undertaking), which means that it is operating within a market, carrying out the functions that are normally performed by other firms also present within this market. This is the case, for example, of joint ventures for which the role is limited to research and development, or to production”. On the other hand, the fact that the parent companies represent a significant share of this joint venture’s sales does not prevent the fact that this could be a concentration, provided that, on a commercial level, the joint venture deals with its parent companies in the same manner as with third parties.

As stipulated in point 93 of the European Commission’s consolidated notice, the notion of full-function must not be confused with that of autonomy relative to the parent company, as defined by the Autorité with regard to the disputing of anticompetitive practices: "The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with. It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect".

The structure must be "common", i.e. controlled jointly by two or more firms.

The structure must operate "on a lasting basis". For example, the creation of a joint venture established to create a work of art and intended to be dissolved at the end of the project is not considered to be a merger. On the contrary, the fact that the agreement signed between the parent companies anticipates a joint venture’s dissolution in case of failure does not prevent the status of a merger.

For example, in its decision relative to the Opéra operation, the French administrative Supreme Court (Conseil d’État) considered that the Opéra purchasing alliance, a common subsidiary of Casino, Perrachon and Cora, did not have the characteristics of a stand-alone economic firm: "while the essential role of the Opéra company is to look after the "reference listing" of the suppliers of its parent companies for a broad range of products and to negotiate purchasing conditions with the producers "referenced" in this manner, the purchasing decisions will continue to be taken by the parent companies and their subsidiaries, which remain present in the capacity of buyers on the market for the supply of mass retail distribution products; that the Opéra company must negotiate the settlement time limits by referring to the previous practices of its parent companies and can only grant payment

17 Consolidated notice § 95.
18 French Supreme Court for administrative law (Conseil d’État) decision of 31 May 2000.
discounts with their approval; that while the Opéra company is responsible for buying certain products in order to sell them to its principals, the elements in the file do not indicate that this activity, which relates to a very small share of the purchases of the parent companies and of their subsidiaries, is sufficient for it to provide the status of a stand-alone economic entity; that it therefore follows that by considering that the Opéra company did not have, in its daily operations, a sufficient autonomous character for its creation to be considered as a merger, the Minister did not sully its decision with an incorrect consideration of the facts of the case”.

5. INTERRELATED TRANSACTIONS

60. As indicated in the Commission's consolidated notice (points 38 et seq), the Autorité considers that multiple operations comprise one and only one merger operation in the event that they are interdependent, meaning that one operation could not be carried out without the other. Whereas clause 20 of Regulation n° 139/2004 on the control of concentrations further stipulates that closely connected operations, in the sense that they are linked by a condition, should be treated as a single merger. On the other hand, when operations are not interdependent, which means that the parties would carry out one of the operations even in case of failure of all of the others, the different operations must be assessed individually.

61. The operations can be considered as legally connected with one another, when the agreements themselves are linked by reciprocal conditionality. However, it cannot be excluded that elements will be taken into account that, on an economic level, demonstrate that the operations cannot be carried out without one another. As stipulated in point 43 of the consolidated notice, the fact that the agreements are concluded simultaneously is one of the essential elements of interdependence

62. Even in the event of a conditional connection, operations can still only be considered as a single merger operation if, for each of them, control is acquired by the same firm(s). For example, when several firms share out assets, the Autorité considers each operation separately, even though each of these acquisitions is dependent on the realisation of the other operations. It is also necessary for each of the operations to individually constitute a concentration. Operations that do not constitute an acquisition of control, such as, for example, non-controlling minority holdings, cannot be considered as comprising an indissociable whole with operations relating to the acquisition of control of firms, even though these two types of operations are connected with one another.

63. From the cases described above, one must distinguish the case anticipated in Article 5, paragraph 2, second sub-paragraph of Regulation n° 139/2004, for

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19 For an application of these provisions, see the Commission's decision COMP/M.2978 VUPE/NATEXIS/LAGARDERE, points 6 to 8: "It is therefore in response to this need for speed that, at the request of Lagardère, Natexis Banques Populaires involved itself in the process for acquiring the assets in question from VUP. On 3 December 2002, the Natexis Banques Populaires Group and Lagardère signed a firm sale agreement that would allow Lagardère (via Ecrinvest 4), after the Commission's authorisation of the merger, to become the owner of all the capital of Investima 10, the company that holds VUP's assets. The acquisition price for these securities was immediately paid in advance by Lagardère to Segex, the company owning all of the shares comprising the capital of Ecrinvest 4, on the same date. Consequently, the merger is an acquisition of sole control, for the purposes of Article 3, paragraph 1, point b) of the merger Regulation".
the purposes of calculating the turnover of the firms concerned. In application of this Article, successive operations (each one resulting in an acquisition of control) carried out over a period of two years between the same persons or firms are considered to be a single merger even if none of them is subordinate to the other.

6. SPECIFIC CASE OF TRANSITORY OPERATIONS

64. Article 3, paragraph 5 of Regulation n° 139/2004 on merger control considers that a concentration shall not be deemed to arise, where "credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set".

65. In its consolidated notice, the European Commission indicates that it uses two conditions in order to assess whether or not a transitory operation constitutes a lasting change of control. Firstly, the transitory nature of the operation must be agreed between the various acquirers in a legally binding manner and, secondly, there must not be any doubt as to the fact that the break-up will proceed within a short time-frame. The European Commission also indicates that "[...] in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission".

66. The Autorité will draw inspiration from these provisions in order to assess whether national merger control provisions should apply of not to transitory control of assets that are intended to be re-sold in the short term.

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20 Paragraphs 28 et seq of the European Commission's consolidated notice.

21 Paragraph 47 of the European Commission's consolidated notice.
67. For questions relative to transitory control acquisitions in the retail trade sector, the reader can refer to the appendix on matters relating to distribution contracts.

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68. In general terms, for any question relative to the notion of a concentration, the parties can also refer to the points that have been mentioned or not quoted from the European Commission's Consolidated Jurisdictional Notice relative to Regulation (EC) n° 139/2004 of 16 April 2008. This notice only implements Community law, but it will provide a useful analysis guide for the Autorité when it applies for national merger control law.

B. JURISDICTIONAL THRESHOLDS

1. NATIONAL MERGER CONTROL THRESHOLD

69. In accordance with Article L. 430-2 of the French Code of commercial law (Code de commerce) that defines national merger control thresholds, and with Regulation (EC) n° 139/2004 that defines Community thresholds, mergers are subject to control by the Autorité de la concurrence if:

- the total worldwide net of tax turnover of all of the firms or groups of natural or legal persons taking part in the merger is more than 150 million euros;
- the total pre-tax turnover generated in France by at least two of the firms or groups of individuals or legal persons involved is more than 50 million euros;
- the operation does not fall into the European Commission's jurisdiction (normally described as not having a "Community dimension"). As indicated in the first Article, paragraphs 2 and 3 of the Regulation (EC) n° 139/2004: "an operation has a Community dimension if:

2. a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million, and
b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A merger that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

c) in each of at least three Member States included for the purposes of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

70. Regulation (EC) n° 139/2004 uses the expression "undertakings concerned", while the French Code of commercial law (Code de commerce) uses "undertakings or groups of natural or legal persons parties involved in the merger". Since these two expressions target the same objective, the term "undertaking(s) concerned" will be used without distinction in the rest of this document. This notion's interpretation, developed in the Commission's consolidated notice, depends on the operation type:

- in the case of mergers, the firms concerned are the corporations that are merging;
- in the cases of an acquisition of full control, the firms concerned are the acquiring firm and the target corporation;
- in the case of a joint acquisition of control relative to a pre-existing firm, the firms concerned are the corporations assuming control and the pre-existing acquired company; however, when the pre-existing company was under the exclusive control of a company and that one or more new shareholders are assuming joint control while the initial parent company continues to exist, the firms concerned are each of the companies that are exercising joint control (therefore including the initial shareholder). In this case, the target company is not a firm concerned, and its turnover is part of that of the initial parent company;
- in case of a transformation from joint control to exclusive control, the corporations concerned are the firm acquiring control and the target firm, while the selling corporations are not considered to be concerned;
- in the case of a joint acquisition of control relative to a newly created joint venture, the firms concerned are the controlling firms. Lacking any turnover of its own before the operation, the newly created firm is not considered to be "concerned". If one of the controlling firms provides assets to the newly created company, the turnover attached to them is taken into account in the turnover calculation of this controlling firm.

71. The thresholds in Article L. 430-2-I of the French Code of commercial law (Code de commerce) indicated below are lowered in two cases: firstly, for operations in the retail trade sector and, secondly, for operations involving the overseas départements and local and regional administrations.
a) Retail trade

72. For the retail trade sector, Article L.430-2-II indicates the applicable thresholds:

"II. - When at least two of the parties involved in the concentration operate one or more retail stores, every merger operation, for the purposes of Article L. 430-1, is subject to the provisions of Articles L. 430-3 et seq when the three following conditions are met:

- the total worldwide net of tax turnover of all of the undertakings or groups of natural or legal persons taking part in the merger is more than 75 million Euros;
- the total pre-tax turnover generated in the retail trade sector in France by at least two of the undertakings or groups of natural or legal persons involved is more than 15 million Euros;
- the operation does not enter into the scope of the aforesaid Council Regulation (EC) n° 139/2004 of 20 January 2004."

73. This new provision regarding retail trade, stemming from the law of 4 August 2008 on the modernisation of the economy, is intended to prevent operations that could substantially weaken competition within certain trade areas, by allowing the Autorité to examine operations that are not subject to merger control as a result of the thresholds given in Article L. 430-2-I.

74. To check if an operation exceeds the initial €75 million threshold, one must consider all of the activities of the firms concerned, and not only their retail trade activities. On the other hand, the second €15 million threshold only applies to retail trade activities themselves. For example, in an operation involving two firms, one of which has an aggregate turnover of €30 million, exclusively in the retail trade sector, while the other has a total turnover of €50 million, of which €20 million in retail trade, this operation will be subject to merger control. Indeed, the aggregate turnover of all of the firms concerned is more than €75 million. The first threshold has therefore been crossed (even though, overall, their retail trade turnover is only €50 million). As each one also generates more than €15 million in the retail trade sector, the second threshold is also crossed.

75. The notion of retail trade must be defined with reference to the applicable rules in terms of commercial equipment. A retail store is understood to be a store that primarily generates its turnover, i.e. more than half of it, through the sale of merchandise to consumers, for home usage. This includes the sale of second-hand objects (second-hand markets, consignment shops, etc.). A certain number of small-scale services (dry cleaning, hair styling and aesthetics, shoe repair, photography, vehicle maintenance and tire installation) are traditionally included within the retail sector, though they do not involve the sale of merchandise. Excluded are services of an immaterial or intellectual nature (such as banks, insurance and travel agencies), as well as establishments providing services or equipment rentals (such as laundromats or video rental shops) and restaurants. Also excluded are firms that carry out all of their sales online, since Article L. 430-2-II stipulates that firms are only concerned if they operate at least one store.
76. An example may serve to illustrate the scope of merger control in retail trade defined above. A firm owns a series of stores that, all together, generate a turnover of €17 million, €12 million by selling merchandise to consumers for home usage, with the balance resulting from related activities carried out through the same sale surfaces, such as sales to professional customers and equipment rentals. The firm's stores generate more than half of their turnover by selling merchandise to consumers for home usage. These stores are therefore considered to be retail stores. As their turnover is more than €15 million, the firm has crossed the second threshold indicated in Article L. 430-2-II.

77. Another example: a producer of manufactured goods intended for individuals sells a portion of its products through its own stores, and another portion through independent distributors. If this manufacturer generates an aggregate turnover of €50 million, of which €10 million through its own shops, the firm does not cross the second threshold indicated in Article L. 430-2-II. Indeed, its turnover in the retail sector is only €10 million.

78. The thresholds indicated in Article L. 430-2-II only apply to firms that operate at least one retail store in France. A firm that operates retail stores abroad, but none in France, will not be subject to the thresholds indicated in Article L. 430-2-II. On the other hand, it is still subject to the thresholds indicated in Article L. 430-2-I.

b) Overseas local administrations (“départements” and “collectivités d’outre-mer »)

79. For operations in the overseas départements and local and regional administrations, Article L. 430-2-III stipulates:

"III.- When at least one of the parties in the merger carries out all or part of its activity in one or more overseas départements or in the overseas local and regional administrations of Mayotte, Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy, every merger operation, for the purposes of Article L. 430-1, is subject to the provisions of Articles L. 430-3 et seq when the three following conditions are met:

- the total worldwide net of tax turnover of all of the undertakings or groups of natural or legal persons taking part in the merger is more than 75 million euros;

- the total pre-tax turnover generated individually in at least one of the overseas départements and local and regional administrations concerned by at least two of the undertakings or groups of natural or legal persons concerned is more than 15 million euros;

- the operation does not enter into the scope of the aforesaid Council Regulation (EC) n° 139/2004 of 20 January 2004."
80. To determine if the second threshold has been crossed, one must consider the aggregate turnover generated by the firm concerned in each of the overseas départements and overseas local and regional administrations, on an individual basis. For example, if a firm generates a pre-tax aggregate turnover of 8 million euros on Reunion Island, and a pre-tax aggregate turnover of 8 million euros on Mayotte, it will be considered that this firm has not crossed the 15 million euro threshold.

2. METHOD FOR CALCULATING TURNOVER

81. Article L. 430-2-V indicates that the turnover calculation provisions applicable to national merger control are the ones found in Article 5 of Regulation (EC) n° 139/2004. In paragraphs 157 through 217 of its consolidated notice, the Commission commented on and explained these provisions.

82. All of these provisions are intended to see to it that the calculated turnovers reflect the real and current economic market strength of the firms concerned, while remaining relatively easy to implement such as to allow firms to easily determine if an operation will be subject to control, and whether it will have a Community or national dimension.

83. The present guide will be limited to reviewing the key points for the turnover calculation, while the reader is invited to refer to the Commission's consolidated notice for any more specific question relating to a given case.

84. The turnover calculation must make it possible to assess the overall economic strength of the firm concerned, and not only of the legal entities involved in putting together the operation.

85. As part of a control acquisition, for each of the acquirers, the calculation must consider all of the group's activities and not only those of the subsidiaries directly involved in the operation, or the ones related to the markets concerned or affected by the operation. For the seller, only the turnover of the part that is being sold is taken into account, as paragraph 2 of the Regulation's Article 5 stipulates that "(...) where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers".

86. Paragraph 4 of Article 5 of Regulation (EC) n° 139/2004 stipulates that the aggregate turnover that must be considered for a firm concerned is determined in the following manner: "without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

a) the undertaking concerned;
b) those undertakings in which the undertaking concerned, directly or indirectly:

i) owns more than half the capital or business assets, or

ii) has the power to exercise more than half the voting rights, or

iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

iv) has the right to manage the undertaking’s affairs;

c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b)."

87. The criteria used to identify firms for which the turnover can be attributed to the firm concerned are different from the "decisive influence" criteria used for determining the exercising of control. Indeed, a firm may have a decisive influence over another one without owning half of the capital, or exercising half of the voting rights, or being able to designate more than half of the members of the supervisory board, the administrative board or bodies legally representing the firm, or the right to manage the firm's affairs (in this regard, see paragraph 184 of the Commission's consolidated notice).

88. Paragraph 1 of Article 5 stipulates that "the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4". Indeed, not consolidating intra-group sales in the turnover calculation for a firm concerned would serve to artificially inflate its economic weight on the market.

89. In the specific case of joint ventures between several firms concerned, paragraph 5 of the Regulation's Article 5 stipulates that the joint venture's turnover involving third parties shall be apportioned equally amongst the various firms concerned, irrespective of the share of the capital or voting rights that they hold.

90. Public aid granted to firms must be included in the turnover calculation, as soon as this aid is directly linked to this firm's sale of products and services, since such aid strengthens the company's economic weight on the market by allowing it to sell at prices that are lower than the ones that they would be able to apply without such public aid.
91. The notifying parties must provide turnovers that reflect the economic situation of the firms at the time of the signing of the binding document that leads to the notification\textsuperscript{22}. It is for this reason that the turnovers must be assessed on the date of the last closed fiscal year and then corrected, if relevant, to account for permanent modifications to the firm's economic reality, as a result of merger or acquisition operations occurring after that date. In principle, one should refer to the last certified turnover. However, in case of significant discrepancy between the turnover of the last closed but not yet certified fiscal year and that of the previous certified fiscal year, the most recent turnover can be taken into account for the turnover calculation, even though it has not yet been certified\textsuperscript{23}.

92. With regard to the geographical allocation of the turnover, it must be allocated to the location where the competition is in effect\textsuperscript{24}, in other words, generally to the place where the customer is located. With regard to the sale of goods, the location where the contract was signed and the delivery location take precedence over the invoicing address. With regard to services, the location where they are provided must be taken into account.

93. Moreover, merger control applies to all of the firms, irrespective of their nationality or location, whether or not they have assets or a structure in France, and whether or not the operation takes place outside of the national territory, provided that they generate a turnover in France and have crossed the controllability thresholds.

94. Article 5, paragraph 2 of Regulation n° 139/2004 includes a specific provision in order to ensure that firms do not split an operation into a series of asset sales spread over time in an effort to avoid merger control by dipping below the controllability thresholds. As such, successive operations carried out during a period of two years between the same firms are considered to be a single merger for the purposes of calculating the turnovers of the firms concerned\textsuperscript{25}. Nevertheless, this rule is no longer applicable if other firms join these same companies for only some of the operations in question. The overall operation will have to be declared to be Autorité as soon as the consolidated turnover resulting from these successive operations exceeds the compulsory notification thresholds.

95. In the specific case of credit institutions and other financial institutions, Article 5, paragraph 3, of the Regulation stipulates that the turnover is replaced by the sum of interest income and similar income, income from securities (income from shares and other variable yield securities, income from participating interests, income from shares in affiliated firms), commissions receivable, the net profit on financial operations and other operating income, less, if relevant, the value added tax and other taxes related to these products, in other words, the gross banking income.


\textsuperscript{24} Consolidated notice, paragraphs 195 to 203.

\textsuperscript{25} Minister's decision C2002-127 RBS / Rexnord of 14 November 2002 published in the BOCCRF of 31 March 2003.
96. For insurance companies, Article 5(3), point b of Regulation n° 139/2004 stipulates that the notion of turnover is replaced by "the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums".

97. In certain business sectors, such as package holidays or advertising, where the service may be sold through intermediaries, the Commission's consolidated notice indicates that "even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, i.e. those undertakings wishing to place advertising."26

98. In the case of distribution networks involving independent members and coordinated by a network head (franchise networks, cooperatives,....), the general provisions for the allocation of the sales figure included in paragraph 4 of Article 5 of Regulation (EC) n° 139/2004 apply. As a general rule, the network head's turnover does not include the sales to the public carried out by its members. On the other hand, it includes the sales carried out by the network head to its members in order to supply them, or the compensation for services provided that the network head invoices to its members.

IV. Procedure

A. OVERVIEW OF THE PROCEDURE BEFORE THE AUTORITÉ

1. COMPULSORY NOTIFICATION

99. As soon as a merger operation is subject to merger control pursuant to Articles L. 430-1 and L. 430-2 of the French Code of commercial law (Code de commerce), it must be notified to the Autorité de la concurrence.

100. This notification obligation is "incumbent on natural or legal persons who acquire control of all or part of an undertaking or, in the case of a merger or the creation of a joint venture, on all parties concerned, who must then notify jointly." (Article L. 430-3). In the special case of the arrival of new

26 Paragraph 159 of the Commission's consolidated notice of 16 April 2008.
shareholders who are acquiring joint control, all of the parties having joint control, even the ones who had already undergone a control before the operation, must notify jointly. Moreover, the referral to the Autorité of all or part of a merger case notified to the European Commission is equal to a notification for the purposes of Article L. 430-3.

101. In accordance with the first sub-paragraph of Article L. 430-3, "The merger operation must be notified to the Autorité de la concurrence before its completion. Notification can be made as soon as the party or parties concerned are able to present a sufficiently concrete file to allow an investigation of the file, and notably when they have signed an agreement in principle, or a letter of intent, or as of the announcement of a public offer". The assessment of the "sufficiently concrete" nature of a project is on a case-by-case basis. In general, a project can be submitted if the notifying parties assure the Autorité of their intention to sign a firm agreement and provide proof of this, that they indicate the purpose and provisions of the proposed merger, the identities of the parties to the operation, the merger scope and the anticipated calendar.

102. While the authorisations granted by the Autorité do not bear a sunset clause, operations must nevertheless be carried out within a reasonable timeframe, and in any event, within unchanged legal and factual circumstances. If a project is authorised but undergoes significant modifications before its realisation, the authorisation decision is no longer valid. Indeed, in this case, the decision issued by the Autorité would be for a project other than the one that is actually carried out. The notifying parties are therefore invited to once again notify the operation before its realisation such as, in this case, to obtain authorisation of the project that will actually be implemented. To verify compliance with these provisions, the Autorité can ask the parties that have been granted an authorisation decision on the basis of a draft project, to provide it with the irrevocable agreements once they have been signed.

103. Firms that carry out a merger operation subject to control but without having first notified it ("gun-jumping"), can face the penalties indicated in Article L. 430-8-I:

"I.-If a merger operation is carried out without having been notified, the Autorité de la concurrence compels the parties, subject to a periodic penalty payment within the limits of (II) of Article L. 464-2, to notify the operation, or to return to the condition that existed before the merger. The procedure indicated in Articles L. 430-5 to L. 430-7 then applies.

Moreover, to the persons required to carry out the notification, the Autorité can apply a financial penalty in the maximum amount, for legal persons, of 5% of their pre-tax turnover generated in France during the last closed fiscal year, plus, if relevant, that of the acquired part generated in France during the same period and, for natural persons, equal to 1.5 million euros".

104. It should be noted that this penalty system applies both to an intentional violation and to an omission through simple negligence. In particular, the Autorité de la concurrence takes note, in its appraisal, of the circumstances explaining the absence of notification and of the behaviour of the firms
relative to the *Autorité de la concurrence*. The implementation of this penalty system is subject of *inter partes* proceedings before the *Autorité*.

105. Prior to the entry into force of the new provisions of Articles L. 430-1 et seq of the French Code of commercial law (*Code de commerce*) on 2 March 2009, the Minister for the economy had, for example, applied this penalty system against SNCF Participations, a subsidiary of the SNCF group, for having taken control on Novatrans without authorisation, after an *in concreto* analysis of the votes’ structure during Novatrans general meetings, which indicated that the minority holding of SNCF Participations in Novatrans was such to provide it with decisive influence over Novatrans (cf. above).

2. SUSPENSIVE EFFECT OF THE PROCEDURE AND EXEMPTIONS

106. Pursuant to Article L. 430-4, *"the actual completion of a merger operation can only occur upon approval by the Autorité de la concurrence, or the Minister for the Economy, when the latter has taken up the case under the conditions indicated in Article L. 430-7-1"*. People violating this provision are subject to the financial penalty indicated in Article L. 430-8-II.

107. As such, the Minister applied a penalty against Bigard\(^\text{27}\) that, on 14 December 2007, had notified an operation to acquire certain assets of the company Arcadie Centre Est. However, in view of the elements provided as part of the notification, it appeared that the operation had been carried out as of 1\(^\text{st}\) November 2006, without the parties being entitled to the exemption contained in Article L. 430-4 of the French Code of commercial law (*Code de commerce*).

108. The completion of an operation is effective as soon as the control is carried out in the meaning of Article L. 430-1-III. For example, in an operation where rights of possession to the target firm are transmitted before the property rights, the operation is completed as of the realisation of the transfer of the rights of possession.

109. However, the second sub-paragraph of Article L. 430-4 indicates that *"In case of a duly well-founded need, the parties who have carried out the notification can ask the Autorité de la concurrence for an exemption that will allow them to look after the actual completion of all or part of the merger without waiting for the decision mentioned in the first sub-paragraph and without prejudice to the latter"*. It is the responsibility of the parties to stipulate, when filing their notification, the reasons for their exemption request. Every request is closely examined by the *Autorité*.

110. While the granting of such an exemption is, by definition, exceptional, takeover offers involving firms in liquidation or judicial settlement generally receive one, since such offers can result in the parties automatically finding themselves in violation of L. 430-4 of the French Code of commercial law (*Code de commerce*), by the decision of the commercial court that provides them with control of the firm concerned.

\(^{27}\) Order from the Minister C2007-174 Bigard / Arcadie Centre Est, dated 18 January 2008.
Other extraordinary circumstances such as the risk of imminent exit of the target firm can also justify the granting of such an exemption. Firms wishing to receive such an exemption must submit a request at least 5 days before the court issues its decision, by attaching it to a notification file that is as complete as possible and that includes, at the very least, a presentation of the parties and of the operation, the justification of the exemption request, and a preliminary analysis of the operation's effects on competition.

111. Nevertheless, an exemption granted by the Autorité will have no impact on the final decision taken after the investigation. The Autorité may impose remedies and even prohibit the operation if it entails anticompetitive effects. During the period before the final decision is issued, the parties must therefore make every effort to avoid actions or measures that would serve to modify the operation's structure, such as disposing of assets belonging to the target, or operationally carrying out their merger in an irreversible manner.

112. Article R. 430-5 also provides a second overriding mechanism to the proceedings suspension: "When a merger is carried out through the purchase or exchange of securities on a regulated market, its actual performance, within the meaning of Article L. 430-4, occurs when the rights attached to the securities are exercised. The absence of a decision from the Autorité de la concurrence does not prevent the transfer of the said securities". As such, the transfer of securities’ ownership does not mean the merger's realisation, and can be carried out before the operation is approved by the Autorité. However, this exemption does not apply to the usage of the voting rights associated with the transfer of securities. Until the operation has been approved by the Autorité, the exercise of these rights, except in case of an individual exemption as anticipated in the second sub-paragraph of Article L. 430-4, carries out the merger, and is therefore subject to sanction pursuant to Article L. 430-8. This mechanism applies to public takeover bids (PTB), public exchange offers (PEO) or control acquisition through simple purchase of shares on a regulated market without the launch of a takeover bid.

113. For concentrations that proceed with two steps, first, by the over-the-counter acquisition of a block of shares, which resulting thereafter in an obligation to launch a PTB for the remaining capital, these two events taken together are considered to trigger acquisition of control. Such operations can be notified as soon as the parties have sufficiently elaborated their project, at the point of the over-the-counter agreement or after the launch of the PTB28. This mechanism does not apply to operations carried out on non-regulated markets (over-the-counter or not listed markets).

3. PROCEDURAL STEPS

115. Several phases of the procedure before the Autorité can be distinguished.

- Pre-notification: this phase is optional, informal and confidential. Prior to notification, it allows firms to discuss matters arising from the concentration with the mergers unit. Pre-notification is not necessary for all concentrations. However, it can be useful when the operation raises issues as regards the requirement or not of notification, when a referral is envisaged, or in the event of complex operations that are likely to require remedies. (see paragraph B)

- Referrals: operations of national dimension can, at the initiative of the firms or of a national competition authority, be referred to the Commission, or vice versa; operations of Community dimension can, at the initiative of the firms or of the Autorité, or possibly if requested by the Commission, be referred to the national Authority. These referrals are examined at the start of the procedure, depending on the case, before or after the notification. (see paragraph C)

- Phase 1: Once notified (or referred by the Commission), the operation is reviewed by the Autorité as part of its first examination, known as "phase 1". When the operation may result in anticompetitive effects, the parties can propose commitments in order to remedy them. At the end of this examination, which can involve consultations with third parties, customers, competitors or suppliers as part of a market test, the Autorité issues its final decision on the concentration. It can find that the operation is not subject to merger control, or authorise it, if the need arises, subject to remedies, or, if serious doubts remain as regards an anticompetitive effect, initiate an in-depth examination, known as "phase 2". The Minister of the economy can also request the initiation of phase 2 (see paragraph D).

- Phase 2: In practice, "phase 2" examinations are undertaken in more limited circumstances. As in phase 1, the Autorité can receive commitments submitted by the parties. The in-depth examination results in a report sent to the notifying parties and to the representative of the minister of the economy ("commissaire du gouvernement"), who can file their observations to the Autorité. A hearing takes place before the board of the Autorité. At the end of these inter partes proceedings, the Autorité can authorise the concentration, if the need arises, subject to the implementation of the commitments submitted by the parties, or injunctions and provisions imposed on the parties. It can also prohibit the concentration. Once the Autorité has issued its decision, the Minister can take up the case and issue a well-founded decision on the concentration for reasons of general interest other than maintaining competition and, if relevant, offset the anticompetitive effect resulting from the concentration (see paragraph E)
• Appeals: Finally, all decisions relative to merger control taken by the Autorité or taken up by the Minister can be appealed to the French Administrative Supreme Court (Conseil d’État). (see paragraph F)

• Implementation of remedies: the implementation of remedies is closely monitored by the Autorité de la concurrence in order to check that the parties properly comply with their obligations. (see paragraph G)

B. PRE-NOTIFICATION PHASE

116. The optional pre-notification phase is launched at the initiative of the merging parties who wish to consult with the Autorité’s mergers unit when uncertainties arise as to the operation involves control or, for complex operations, when the parties plan to file ad hoc economic studies, or when they wish to get an initial idea as to the acceptability of their project, so as to anticipate possible future modifications.

117. Making upfront contact up before the notification is filed also serves to accelerate the operation’s review, notably by minimising the risk of an incomplete notification.

118. To initiate this phase, the parties can submit a presentation of the operation (describing the parties, the planned operation, the markets concerned, the competitors and the market shares of the parties), or a preliminary version of their notification file. These documents can be submitted directly by mail, to the address controle.concentrations@autoritedelaconcurrence.fr. After this submission, informal meetings with the parties may be organised wherever required.

119. When the parties wish to check whether their operation falls into the scope of merger notification and review, the mergers unit examines the submitted elements. On the basis of these elements, if it proves that the operation does not fall in the scope of merger notification and review, the parties may be so informed by the mergers unit in a comfort letter. Nevertheless, if the examination of the submitted documents brings new questions to light as regards merger notification and review, the firms will be asked to notify the operation so that the Autorité can settle these questions.

120. When the parties plan to file ad hoc economic studies, exchange meetings relative to the proposed methodology may be organised with the mergers unit and the economic service, as of the pre-notification phase. The sooner these meetings are held, the more likely these economic studies contribute efficiently to the review. For more details, please refer to the appendix relative to the recommendations on the submission of economic studies.

121. The whole pre-notification phase is strictly confidential: it does not result in any publication on the Internet site of the Autorité, nor in any contact with third parties. Nevertheless, subject to the prior written approval of the parties, a market consultation may be initiated as of this phase such as to gather more precise information without waiting for the notification.
C. REFERRALS AND IMPLEMENTATION OF NATIONAL LEGISLATION RELATIVE TO LEGITIMATE INTERESTS

122. As previously indicated, Regulation (EC) n° 139/2004 defines the turnover thresholds that set the jurisdiction of the European Commission and of the competition authorities in the Member States with regard to merger control. However, in Article 4, paragraphs 4 and 5, in Article 9 and in Article 22, the Regulation provides for referral mechanisms that, in certain special cases, will allow operations of national dimension to be examined by the Commission, and indirectly, for operations having a Community dimension to be examined by the national competition authorities of the Member States. Firms which intend to ask for the application of Articles 4(4) and 4(5) must request so at the pre-notification stage. Implementation of Articles 9 and 22 is requested by the Member States after receiving the notification.

123. These mechanisms serve two objectives: allowing a merger to be examined by the competition authority that is the best placed in order to carry out the review, and to allow firms to benefit from the "one-stop shop" role played by the Commission, when operations involve multiple notifications within the European Community.

124. These mechanisms are clarified in the Communication notice on case referrals relative to mergers dated 5 March 2005.

1. REFERRALS TO NATIONAL AUTHORITIES

125. Concentrations of Community dimension can be referred to the national competition authorities at the request of the merging parties, or at the request of the Member States, and if need arises at the request of the Commission.

126. As such, the parties concerned by a major operation that falls within the scope of Regulation (EC) n° 139/2004 can ask the Commission to refer the envisaged operation in whole or in part to the competent authorities of a Member State, pursuant to Article 4 paragraph 4 of the Regulation. To this end, even before notifying the concentration, the parties must inform the Commission by means of a reasoned submission (known as the "Form RS") "that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market, may decide to refer the whole or part of the case to the competent authorities of that Member State". The Commission thereafter transmits the submission to all Member States without delay. The Member State referred to in the reasoned submission must, within fifteen working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed. Within 25 working days of receiving the reasoned submission, the Commission issues its decision on whether or not to refer the case to the national authorities. Should the Commission agree to a request to refer an operation to the

French authorities”, national merger law will apply. The parties must then submit a notification file to the Autorité de la concurrence. Should the Commission refuse the request, the parties must then submit their notification to the Commission.

127. Moreover, the total or partial referral of a merger operation notified to the Commission can be requested by the competent authorities of a Member State in application of paragraphs 1, 2 and 3 of Article 9 of the Regulation (EC) n° 139/2004 when "a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market" (Article 9.2.a), or that "a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market" (Article 9.2.b), with this latter case notably targeting markets of regional or local geographical dimensions”.

128. This request must be submitted within 15 days following the relevant national authority's reception of the copy of the notification filed with the Commission by the parties. This can be carried out at the request of the Member State, or upon the invitation of the Commission. The request must be well-founded, “based on a preliminary analysis” by the requesting Member State. The Commission assesses the request's relevance and merits in view of the conditions indicated in Article 9. However, in the event of a request based on Article 9.2.b, if the Commission finds that the conditions have been met, it then has an obligation to refer the case. Should the Commission agree to refer the request, the Commission's decision is equivalent to a notification pursuant to national law, meaning that the national control time limits start to run as of the date of the decision to refer the case.

129. The fact that a request to refer the case has been accepted pursuant to Article 9 for it threatens to affect significantly competition has no bearing on the review carried out thereafter by the Autorité de la concurrence. The CFI reiterated this in the Seb / Moulinex case”. Competitors of Seb had disputed the Commission's decision to refer the case to France, on the basis of the contradiction between, on the one hand, the reasoning of the decision to refer the case, which was based on a threat to the play of competition, and, on the other hand, the decision from the French Minister for the

31. The Member State can decide to request the case's referral for examination of all of the markets for products and services located within its territory, or only a part of them. The request cannot relate to relevant markets located outside of the national territory. Nevertheless, the referral of cases affecting the local markets in border areas is possible if, for reasons related to the market's operation, only the national part must be included in the relevant market (Commission decisions M.2898 - Carrefour/Brico of 13 December 2002 and M.3373 - Accor / Barrière / Colony of 4 June 2004).
33. See paragraph 41 of the Commission Notice on Case Referral in respect of concentrations dated 5 March 2005.
34. The CFI reiterated this in the Seb / Moulinex case”. Competitors of Seb had disputed the Commission's decision to refer the case to France, on the basis of the contradiction between, on the one hand, the reasoning of the decision to refer the case, which was based on a threat to the play of competition, and, on the other hand, the decision from the French Minister for the
35. Philips ruling from the CFI on 3 April 2003, T-119/02.
economy, who authorised the operation without conditions as he held that the failing firm defence applied. The parties claimed that the French competition authorities were bound by the reasons of the decision to refer the case, and that they could not approve the operation without seeking commitments. The court rejected this reasoning and ruled that the decisions at hand did not have the same purpose and that no link existed between them. It confirmed that the Commission's review of the competitive situation at the time of the referral was a *prima facie* examination that was only intended to determine if the conditions to refer the case had been met: "the Commission cannot, without depriving point b of the first subparagraph of Article 9(3) of its substance, conduct an examination of the compatibility of the concentration in such a way as to bind the national authorities in regard to their substantive findings but must merely establish whether, prima facie, on the basis of the evidence available to it at the time when it assesses the merits of the request to refer the case, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets". According to the CFI, the results of this *prima facie* examination should in no way prejudge the conclusions of the national competition authorities at the end of their possible in-depth analysis of the operation.

130. Pursuant to Article L. 430-3 of the French Code of commercial law (*Code de commerce*), the total or partial referral of an operation having Community dimension is publicly announced through a press release of the *Autorité de la concurrence*. These operations are published on the Internet site of the *Autorité*, in the section relative to operations under examination, as are the operations directly notified to the *Autorité*.

2. **REFERRALS TO THE COMMISSION**

131. Mergers of national dimension can be referred to the Commission at the request of firms pursuant to paragraph 5 of Article 4 of the Regulation, or at the request of Member States pursuant to Article 22 of the Regulation.

132. When a merger is not of Community dimension but is capable to be notified to three Member States or more, Regulation (EC) n° 139/2004, in an effort to ensure "[...] that multiple notifications of a given concentration are avoided to the greatest extent possible"36, allows the parties to the merger to request to refer the case to the European Commission. This request must be made before any notification to the competent national authorities. By means of a reasoned submission ("Form RS"), the parties must inform the Commission that they wish to refer the operation to it. This request can be made to the Commission solely based on the fact that the concentration is likely to be examined by at least three Member States; no other justification is needed. The Commission sends the submission from the parties to all Member States without delay. Any Member State competent to examine the concentration under its national law may, within 15 working days of receiving the reasoned express its disagreement as regards the request to refer the case. Should it not express its disapproval within this time, the national authority shall be deemed to have approved. When at least one

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Member State expresses its disapproval within the required time limit, the Commission so informs the parties and the Member States, and the case shall not be referred; the parties must then notify each of the competition authorities in the relevant Member States. If, on the other hand, no Member State expresses its disapproval of the request to refer the case, the concentration shall be notified to the Commission. Community merger control law then applies. The members of the ECA (European Competition Authorities) have established the principles for the implementation of Article 22’.

133. Article 22 of Regulation (EC) n° 139/2004 provides the possibility for one or more Member States to require that the Commission examines a merger that does not have a Community dimension but that "affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making this request".

134. The members of the ECA (European Competition Authorities) network have defined the following as the main criteria that justify the implementation of Article 22:

"the market(s) in which there may be a potentially significant impact on competition is/are wider than national in scope and the main competitive impact of the concentration is linked to such market(s);

- the national competition authorities expect to encounter difficulties in information-gathering as the parties or the main third party(ies) from whom information is likely to be sought is/are not based in their Member State;

- there are potentially significant competition concerns in a number of national or sub-national markets located in the EEA, and national competition authorities are expecting problems in identifying and/or enforcing appropriate and proportionate remedies ("suitable remedies"), should these prove necessary, in particular where suitable remedies could not be secured by the NCAs under national law or through cooperation among NCAs. »

135. The Commission informs the competent authorities of the Member States of any request without delay, but also to the firms concerned. Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission. As such, the Autorité de la concurrence can implement Article 22 for operations notified in France or in another Member State. The Commission may, at the latest 10 working days after the expiry of this period, decide whether or not to examine the concentration and so inform the Member States and the firms concerned. In the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request. The national time limits are suspended until this decision is taken. As soon as a Member State informs the Commission and the firms concerned that it does not wish to join the request, the

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37 Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation
suspension of its national time limits ends. If the Commission accepts the referral, all Member States that have so requested or that have joined in the request no longer apply their national laws to the merger in question. Also, the Commission can then ask the firms concerned to refer to the operation to it.

3. PROTECTION OF NATIONAL LEGITIMATE INTERESTS WITHIN THE FRAMEWORK OF COMMUNITY MERGERS

136. In paragraph 3 of Article 21 of Regulation (EC) n° 139/2004, it is recalled that the Commission has exclusive jurisdiction for the reviewing of operations that fall within its sphere of competence. Except in case of a referral by the Commission, the Member States cannot apply their own competition legislation to these operations.

137. However, for Community mergers, in accordance with paragraph 4 of this same Article 21, the Member States "may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law."

Public security, plurality of the media and credential rules shall be regarded as legitimate interests (...).

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication."

138. The Commission has already accepted that other categories of legitimate interest could be covered by paragraph 4 of Article 21. For example, in the case of Lyonnaise des eaux / Northumbrian Water38, the Commission accepted as a legitimate interest the fact that Great Britain claimed compliance with the Regulation regarding the essential service of water distribution and the specific protection of consumers in this regard.

D. PHASE 1

1. FORMAL FILING OF NOTIFICATION

139. As provided by Article R. 430-2 of the French Code of commercial law (Code de commerce), four copies of the notification file must be submitted. Moreover, Article 27 of the rules of procedure of the Autorité stipulates that one of these copies must be provided in an electronic version, in PDF format. This copy, on a CD-ROM, can be included with the paper copies.

140. The notification file can be sent to the Autorité by recorded delivery letter, sent to the following address:

Autorité de la concurrence
To the attention of the Head of the mergers unit
11, rue de l'Échelle F–75001 Paris (France)

141. It can also be delivered on working days between 9 AM and 7 PM, to the reception desk of the Autorité de la concurrence, 11 rue de l'Échelle in Paris. Upon being received or delivered, the notification files are date-stamped by the Autorité.

142. Article R. 430-2 of the French Code of commercial law (Code de commerce) stipulates that "The notification file indicated in Article L. 430-3 includes the elements listed in appendices 4-3 to 4-5 of the present book". A typical notification form is available on the Internet site of the Autorité, under the heading "merger control / where should notification be sent?". As quickly as possible, the mergers unit verifies that the file is complete, or that the submitted elements are compliant with the specification contained in the aforesaid appendices. If relevant, it asks for the file to be completed or corrected.

143. When the notification is complete, an acknowledgment of receipt, including the reception date of the last elements making up the file, is sent to the parties in accordance with the third sub-paragraph of Article R. 430-2. The time limit for the investigation begins to run as of midnight on the working day that follows the date indicated in the acknowledgment of receipt.

144. Upon receiving the notification file, the Autorité de la concurrence sends a copy to the Minister for the economy (Article L. 430-3).

39 If they wish, the parties can also submit four paper copies, while submitting one electronic version by e-mail, sent to the following address: controle.concentrations@autoritedelaconcurrence.fr.
2. CONTENT OF NOTIFICATION FILE

145. As indicated above, the notification file must include the elements listed in appendices 4.3 to 4.5 of Book IV of the regulatory part of the French Code of commercial law (Code de commerce).

146. It includes 5 parts:

- a description of the operation,
- a presentation of the firms concerned and of the groups to which they belong,
- a presentation of the markets concerned (delimitation of the markets, market shares of the parties),
- a detailed presentation of each of the affected markets (see below),
- a declaration regarding the accuracy and completeness of the supplied information.

147. A detailed presentation of the markets is only requested when a market is affected (cf. below), such as to simplify the notification file for the simplest operations.

148. The operation description must include a non-confidential summary of the operation, intended to be published on the website of the Autorité. Limited to 500 words, this summary is primarily intended to explain the operation's perimeter for third parties. This summary must not contain preliminary assessment on the effects of the operation on competition.

149. When the relevant markets are broken down into local trade areas, maps showing these zones should be included in the file, showing the location of the stores belonging to the parties and those of their competitors, while indicating the relevant isochronous curves (i.e. the travel time curves around the points-of-sale in question) for the market in question.

150. Moreover, the notification file should include a copy of all legal documents that are important for a good understanding of the operation, such as, for example, agreements between the parties, distribution contracts, franchise contracts, the decision from the commercial Court in the event of firms purchased within the framework of bankruptcy proceedings, etc.

151. In case of doubts as to the precise content of the file, the parties can contact the mergers unit during the pre-notification phase, such as to clarify the necessary elements.

152. The notifying parties are also asked to indicate, as part of the operation's description, the list of States in which the operation has been or will be notified, and the dates of the various notifications. If the operation is subject to notification in other European Union Member States, the Autorité will quickly inform the authorities in the other Member States and the European Commission that a notification has been filed, while indicating the name and contact information of the case officer at the Autorité who is looking after the file. This exchange can allow the authorities in charge of the case to coordinate their schedules, insofar as possible, and to exchange a certain
number of non-confidential elements, such as, for example, an assessment regarding the definitions of the relevant markets. Moreover, this mechanism can also facilitate the joint implementation of Article 22 of Regulation (EC) n° 139/2004.

153. The parties must pay particular attention to the indications relative to their main competitors, customers and suppliers. This information must be carefully verified since, if relevant, it will be used as the basis for sending out questionnaires for the completion of a market test. The parties will be asked to supply contact details that are as precise as possible, in the form of a computer file, for which a template can be downloaded from the website of the Autorité.

a) concerned markets

154. A market concerned is a "relevant market, defined in terms of products and in geographical terms, on which the notified operation has a direct or indirect effect".

155. As such, the notification must include a definition of each market concerned, as well as a precise description of the arguments that led to the proposed delineation, on the basis of previous decision-making practices. For more information of the method for delineating relevant markets, see chapter V of the present guide.

156. Missing information related to the delineation of markets and to market shares are the most frequent reasons for the Autorité to deem a file incomplete; particular attention must be devoted to them. The parties are therefore invited to indicate their market shares and those of their competitors while considering all possible segmentations, in particular the strictest ones.

b) affected markets

157. A market concerned is considered to be affected if at least one of the three following conditions is met:

- two or more firms concerned or groups to which they belong are active in this market and their aggregate market shares amount to 25% or more;
- at least one firm concerned is active in this market and another one of these firms or groups is active in a market that is upstream, downstream or related, whether or not there are supplier to client relations between these firms, from the moment that, in either one of these markets, all of these firms or groups have market shares amounting to 25% or more;
- the operation leads to the exit of a potential competitor in one of the markets in which the parties are active.

158. For each of the markets affected, the parties supply a detailed presentation of the market and of the firms within it. Appendix 4-3 lists the information that must necessarily be included in the file. If the parties encounter
difficulties gathering the required information, they must indicate this when submitting their file (or, if relevant, at the time of any contacts prior to this submission).

c) calculation of market shares

159. The notifying parties are required to calculate the market shares of the firms concerned and of the groups to which they belong within the markets concerned. For the markets affected, the notification must indicate the market shares of the firms concerned and those of their competitors. To quickly set aside any doubts regarding an anticompetitive effect, the parties are asked to present their market shares and those of their competitors while considering all possible segmentations, however fine.

160. As a general rule, a firm's market share is calculated by comparing its pre-tax turnover with that of the market. Nevertheless, in certain cases, it is not possible or not very relevant to have the analysis only consider the market share in terms of the value calculated from the turnover. Volume or capacity data can sometimes provide an alternative measurement of the position of the firms. For example, for retail trade, it is common to analyse the market shares calculated on the basis of the store surfaces, in addition to or in the absence of value-based market shares. As such, the parties are invited to propose alternative methods for calculating market shares, while justifying their proposals. For retail trade, the data in terms of store surfaces must be completed by the average sales figures per m², as determined by the notifying parties.

161. The appraisal of the market shares depends on the reliability of the data source used by the parties. The parties are requested to identify their sources and, if relevant, to include the corresponding data, whether such data consists of public data, professional statistics, market studies ordered by the parties or any other source.

162. The Autorité may find it necessary to compare the estimates provided by parties with information obtained from competitors, suppliers and customers. The Autorité carries out this comparison while protecting the business secrecy of the notifying parties and of any queried third parties. As such, it important for the firms to indicate if their employed sources are public and available to everyone (such as, for example, the data published by the Arcep in the telecommunications field), or if they are confidential.

d) simplified files

163. Several cases can lead to the submission of a simplified file.

164. Firstly, for operations in which no market is affected, the notification file is simplified: the most demanding part, in terms of required information being the detailed description of the markets affected.

165. Secondly, firms that carry out a significant number of concentrations subject to review in a year, such as investment funds or major actors in the retail trade sector, can, after closing their annual financial statements, provide the mergers unit with a core summary, preferably in electronic format, that
contains the general information that is likely to be repeated in all of the notifications throughout the year to come. They can then limit the content of their notification to the information that is specific to the operation.

166. Thirdly, when the operation has to be notified in application of (II) of Article L. 430-2 of the French Code of commercial law (Code de commerce) but not of (I) of the same Article, the definition of the upstream supply markets and the assessment of the buyer’s market shares and the target in these upstream markets can be omitted.

167. Finally, a simplified file can also be submitted in the following cases:

- when the buyer(s) is/are not present in the same markets as the ones in which the target(s) is/are operating, nor in upstream, downstream or related markets; however, a simplified file will only be accepted in this regard when the delimitation of the relevant markets concerned is sufficiently obvious such as to imply the absence of any overlap or of vertical and related links between these markets; in the simplified notification file, the declaring parties are also asked to give a sworn statement that the operation in question meets this condition;

- when the operation has to be notified in application of (II) of Article L. 430-2 but not of (I) of the same Article and it does not result in a change of the trade name of the retail store(s) in question;

168. For the operations described in paragraph 167, for which it is supposed, in principle, that they are unlikely to harm competition, the parties can, for the following points in the notification form indicated in appendix 4.3 of the regulatory part of the French Code of commercial law (Code de commerce):

- for point 2c, provide a recapitulative table of the financial data only for the last closed fiscal year;

- for point 2e, not provide the "list and description of the activity of the firms with which the firms or groups concerned and the groups to which they belong maintain significant and lasting contractual ties within the markets concerned by the operation, the nature and description of these ties";

- for point 3, simply provide a list of the activities of the parties.

169. Insofar as possible, the operations described in paragraph 167 undergo accelerated processing.

170. However, a complete file, compliant with the provisions of appendix 4.3 of the regulatory part of the French Code of commercial law (Code de commerce), can always be asked of the parties by the mergers unit, if required by the specifics of the matter. In this case, the submission of the additional requested information will be required prior to the sending of an acknowledgment of receipt for the file.

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40 Operations requiring notification in application of (III) of Article L. 430-2 cannot be the subject of a simplified file.

41 The buyer can be an investment fund.

42 Operations requiring notification in application of (III) of Article L. 430-2 cannot be the subject of a simplified file.
171. This practice will undergo an appraisal after one year of operation in order to verify, firstly, that it involves a sufficient number of files such as to reduce the administrative burdens weighing on firms and, secondly, that it does not lead to increased work for investigating the files.

**3. OMISSION OR INACCURATE DECLARATION IN THE NOTIFICATION AND PENALTY**

172. Article L. 430-8 (III) stipulates that “in case of omission or inaccurate declaration in a notification, the Autorité de la concurrence can apply a financial penalty to the people who filed the notification”\(^\text{43}\). In accordance with Article L. 430-8-I, this penalty can amount to 5% of the turnover for legal persons.

173. To determine the amount of the fine, the Autorité notably considers the circumstances that led to the omission or inaccurate declaration, as well as the behaviour of the firms in question relative to the Autorité de la concurrence. The implementation of this penalty system is the subject of inter partes proceedings.

174. Moreover, when the omission or inaccuracy affecting the notification is identified after the decision that authorised the operation's realisation, this penalty can include a withdrawal of this decision (Article L. 430-8). In this case, "unless they can return to the situation before the merger, the parties will be required to again notify the operation within one month of the decision's withdrawal", failing which they will be subject to the penalties that can be applied for the realisation of an operation without prior notification.

175. The minister therefore applied a penalty against Vico on the basis of omission, under the system that existed prior to the law on the modernisation of the economy. This company had failed to indicate its acquisition of another company that was active in the same product market. Moreover, the parties had incorrectly stated that the target was not present in certain business sectors included in the operation. However, the inaccuracies and omissions were identified by the parties, and before the operation had been completed, which was indicative of their involuntary nature. Moreover, the inaccuracies and omissions were not sufficient to modify the decision's outcome. The Minister considered these circumstances when calculating the fine. As the Minister had already issued an authorisation decision, on the basis of incorrect reasoning, the authorisation was then withdrawn.

**4. PUBLICATION OF A PRESS RELEASE RELATIVE TO THE FILING OF A NOTIFICATION**

176. Article L. 430-3 calls for the Autorité de la concurrence to publish a press release when receiving a notification, or within 5 working days of the total or partial referral of an operation with a Community dimension. This press

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\(^{43}\) Letter from the Minister for the economy, finance and industry dated 22 November 2006, to the board of the Vico company, relative to a merger in the food sector (C2006-139).
release is placed online on the Internet site of the Autorité, under the heading "Merger control / Operations undergoing examination".

177. It contains the elements anticipated in Article R. 430-4, namely: the names of the firms concerned and of the groups to which they belong, the nature of the operation (merger, takeover, creation of a joint venture), the economic sectors concerned, the timeframe in which interested third parties are invited to submit their observations, and the non-confidential summary of the operation provided by the parties, as well as a specific indication as to whether or not this is a referral of an operation having a Community dimension. It should be noted that the time limit indicated for interested third parties is not mandatory: all observations provided to the Autorité prior to this decision being made can be taken into account when examining the operation.

178. Firms are requested to take the consequences of this publication into account when organising the press release relative to their operation, particularly vis-à-vis the representatives of their personnel.

5. TIME LIMITS APPLICABLE TO MERGER REVIEW

179. Phase 1 begins on the working day following the day when the Autorité receives the complete notification file, and lasts for 25 working days (Article L. 430-5 I). This date is confirmed by means of an acknowledgment of receipt of the complete file which is sent to the notifying parties. It is automatically extended for 15 working days in the event that the Autorité receives commitments proposed by the parties (Article L. 430-5 II).

180. The 25 working day time limit is a maximum, which can be reduced when the circumstances so allow. However, it can never be shorter than the time limit provided to interested third parties in order to submit their observations as stipulated in the press release from the Autorité that is placed on its Internet site.

181. The parties can also request a suspension of the examination time limits for up to of 15 working days (L. 430-5). This request can be submitted "in case of special need, such as the finalising of commitments". The parties are therefore requested to submit their well-founded extension requests to the Autorité.

182. Working days include neither Saturdays, Sundays nor public holidays. The list of public holidays is as provided in Article L. 221-1 of the French Labour Code (Code du travail), in its version in force on the day of the submission of the notification.

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44 The time limits can also be suspended in the (rare) cases of the implementation of Article 22 of Regulation (EC) n° 139/2004. In this regard, see the section on referrals.
6. PERFORMANCE OF PHASE 1 REVIEW

183. Given its very short nature, which is justified by the desire to not delay unnecessarily the performance of operations that are subject to strong economic constraints, the phase 1 examination is necessarily carried out in a spirit of cooperation between the parties and the Autorité, such as to bring together the elements needed for a well-founded decision.

184. The operation is examined by the mergers unit, with one or more case officer(s) being appointed for each operation. Insofar as necessary, the mergers unit relies on the Autorité’s economic and legal services.

185. In compliance with Article L. 450-1, the agents of the Investigation Services within the Autorité de la concurrence, authorised for this purpose by the general rapporteur, can carry out any necessary inspection in application of the provisions of section III (economic merger) of the French Code of commercial law (Code de commerce), throughout the national territory. In particular, Article L. 450-3 stipulates that: "The agents mentioned in Article L. 450-1 can access all premises, lands or transportation needs of professional use, demand the provision of books, invoices and all other professional documents, and obtain or make copies, by all means and on all media, gather information and justifications on site or via summons. They can also request that the authority to which they report should designate an expert in order to carry out any necessary adversarial assessment."

186. In application of Articles L. 450-1 and L. 450-3 of the French Code of commercial law (Code de commerce), the case officers can therefore ask to be provided with any professional documents and they can gather the information and justifications that they consider necessary for the investigation of the cases assigned to them, whether this involves the parties or third parties. Supplementary information requests submitted to the parties do not suspend the time limit that began on the date mentioned in the acknowledgment of receipt of the complete file, but the parties are asked to respond as quickly as possible such as to remove any doubt possibly resulting from incomplete information.

187. Section V of Article L. 464-2 of the French Code of commercial law (Code de commerce) indicates that "when an undertaking or institution does not respond to a summons or does not respond, within the allotted time, to a request for information or the delivery of documents from one of the agents indicated in section (I) of Article L. 450-1 while exercising the powers entrusted to him by sections v and vi of book iv, the Autorité can, when requested by the general rapporteur, declare, against this undertaking or institution, an injunction together with a periodic penalty payment within the limits indicated in section (II).

When the undertaking obstructs the investigation, notably by providing incomplete or inaccurate information, or by providing documents that are incomplete or stripped of their relevance, the Autorité can, when requested by the general rapporteur and after having heard the undertaking in question and the representative of the minister of the economy, decide to apply a financial penalty against the undertaking. The maximum amount of the penalty cannot exceed 1% of the highest pre-tax worldwide turnover
during one of the fiscal years closed since the fiscal year that this is the one during which the practices were implemented”.

188. Moreover, Article L. 450-8 of the same code provides that "imprisonment for six months and a fine of 7,500 Euros will be the penalty in the event that anyone, in any manner whatsoever, should oppose the functions to which the agents mentioned in Article L. 450-1 have been assigned in application of the present book”.

189. The mergers unit checks if the operation is subject to notification and review pursuant to Articles L. 430-1 and L. 430-2 of the French Code of commercial law (Code de commerce), analyses if the delineation of the relevant markets proposed by the parties is suitable, assesses the operation’s effects on competition and, if relevant, the relevance of the proposed commitments. The objectives, methods and criteria used for the analyses on the merits are detailed in chapter V of the present guide.

190. The president, who can make a decision in the name of the Autorité during phase 1, can delegate a vice-president in order to issue a decision on a given operation. In all cases, the president can also appoint one or more persons, chosen from amongst the vice-presidents or members of the board, in order to contribute to the examination of the case by an informal opinion.

191. To carry out the analysis, the mergers unit relies on the data and arguments provided by the notifying parties. During the operation’s examination, it can ask the parties for additional information that is required in order to more closely examine certain aspects of the merger. The mergers unit compares this information with prior decisions taken by the competition authorities, with all available public information and with all information gathered from third parties.

192. The Autorité de la concurrence considers that early contacts and consensus reached with the merging parties on the appraisal of the competitive situation and an open and constructive exchange with the parties, notably when remedies can be envisaged, are key factors for success. This objective can be supported by the organisation of informal meetings with the parties at key moments during the procedure. Indeed, this voluntary and optional approach can help the Autorité to obtain all necessary information, provide it with an opportunity to review the file with the parties and allow the latter to anticipate the preparation of the procedure’s subsequent steps. The Autorité can therefore take the initiative to organise such meetings on a case-by-case basis.

193. Firms that operate in sectors in which a merger is envisaged are strongly advised to provide all information and all comments with regard to risks to competition that the operation could entail. Nevertheless, it should be recalled that the objective of merger control is to safeguard competition, and not competitors on an individual basis. Consequently, third parties cannot claim any right to have their observations included in the analyses carried out by the Autorité, nor any right to obtain certain remedies or certain types of decisions.
194. Interested third parties are invited to submit their observations by electronic mail (to the address: controle.concentrations@autoritedelaconcurrence.fr) or by fax to the mergers unit, at the number: +33 1 55 04 01 66. They can also contact the mergers unit by calling +33 1 55 04 01 72. The time limit for third parties to submit observations is indicated on the website of the Autorité, when the press release relative to the notification submission is published. It is generally 15 working days.

195. When required by the operation, for example when a market has never been analysed by the competition authorities or when such analysis is old, or when competitive concerns are likely to arise, the mergers unit carries out a market test. To this end, questionnaires are sent to the main customers, suppliers and competitors of the firms concerned, and specific meetings may be organised. This market test can be initiated as of the pre-notification provided the notifying parties agree so expressly.

196. The questionnaires cover all aspects of the merger and primarily relate to the relevant markets, their operation, the activity of the recipient firm in these markets and the effects expected from the merger operation. When the operation may result in an anticompetitive effect in a market, they can also touch on remedies.

197. In compliance with Article L. 430-10, third parties can request confidentiality for their responses to the questionnaires, as well as for their spontaneous observations submitted to the Autorité. Indeed, "when they query third parties relative to the operation, its effects and the commitments proposed by the parties, and publicly release their decision under conditions set down by decree, the Autorité de la concurrence and the Minister for the economy consider the legitimate interests relative to avoiding the non-disclosure of business secrets belonging to the notifying parties or the persons quoted". Consequently, queried third parties are asked to indicate which elements of their responses should remain confidential. Third parties can also request anonymity for their responses.

198. With regard to the handling of business secrecy, Article R. 463-15-1 contains a special treatment relative to merger control, which is different from the one that applies to other Autorité’s procedures, in order to avoid time limits that would not be favourable to the firms. This Article provides that:

"for the application of Article L. 463-4 as part of the examination of draft merger operations indicated in section (III), the people providing the Autorité de la concurrence with information simultaneously indicate to the latter which elements constitute business secrets. The general rapporteur sees to it that this information is only used by the Autorité and the Government Official, and that, if necessary, non-confidential versions of documents containing this information will be drafted.

The provisions of Articles R. 463-13 to R. 463-15 are not applicable."
199. As such, if third parties or the notifying parties have to be provided with documents or information that, in a complete version, would compromise business secrets identified as such by the people who provided these elements to the Autorité, the case officer(s) in charge of the file can personally prepare non-confidential versions of the documents in question, that will be provided to the third parties or notifying parties.

200. At the request of the parties, a summary of the third party responses to the market test is provided to them, while taking possible confidentiality requests into account. In any event, if the examination carried out by the mergers unit finds that serious doubts persist as to the operation's effects on competition, on the basis of the market test or any other assessment element, the mergers unit conveys its analysis to the parties and asks them to provide their points of view and possibly to support this analysis by providing additional elements. The parties are orally informed of the fact that the operation brings serious doubts to light within a reasonable time before the end of the time limit indicated in Article L. 430-5 of the French Code of commercial law (Code de commerce).

7. COMMITMENTS SUBMITTED IN PHASE 1

201. Article L. 430-5 of the French Code of commercial law (Code de commerce) provides that: "the parties to the operation can undertake to carry out measures that are notably intended to remedy, if relevant, the operation's anticompetitive effects, either at the time of the operation's notification or at any time before the end of the interval of twenty-five working days as of the date of receipt of the complete notification, provided that the decision indicated in (I) has not been made".

202. The parties can propose these commitments at any time during the examination. They can be discussed during the pre-notification, added to the notification file or proposed during phase 1.

203. When commitments appear to be necessary but when the parties have not proposed any, the Autorité asks them to do so.

204. As previously mentioned, the maximum timeframe for phase 1 is automatically extended by 15 working days when the parties propose commitments to the Autorité. Moreover, at the request of the parties, the examination time limits can be suspended for a maximum of 15 working days in case of special need, such as in order to finalise commitments.

205. The commitments proposed by the parties are in the form of a commitment letter. This letter must include a precise, detailed and exhaustive list of the commitments. In the event of the disposal of assets, the parties must anticipate the means needed to guarantee, for the transitory period between the operation's authorisation and the completion of the disposals, the independence, economic viability, value and competitiveness of these assets. For behavioural commitments, the parties will strive to demonstrate their operational feasibility and the means proposed in order to ensure their verification. Irrespective of the proposed commitments, the commitment
letter must explicitly refer to the means that the Autorité will use to monitor these commitments. For more details on the commitments’ nature, one should refer to the section on corrective measures, in chapter V below.

206. The mergers unit assesses the admissibility of the proposed commitments, on the basis of the competition issues the operation could raise. These commitments can be tested with actors in the markets concerned, in compliance with the business secrecy of the parties. To this end, the parties must submit a non-confidential version of their proposed commitments. If the proposal submitted by the parties must be amended before being communicated to third parties, the parties are informed of the version that will be used as the basis for querying third parties.

8. PHASE 1 DECISION

207. In phase 1, in accordance with Article L. 430-5-III of the French Code of commercial law (Code de commerce), “The Autorité de la concurrence can:

either ascertain, in a well-founded decision, that the operation notified to it does not fall within the field defined by Articles L. 430-1 and L. 430-2;
or authorise the operation, while possibly making this decision subject, on the basis of a well-founded decision, to the actual realisation of the commitments undertaken by the parties;
or, if it considers that there are serious doubts for competition to be harmed, it can initiate an in-depth examination under the conditions anticipated in L. 430-6”.

208. As stipulated in the fourth sub-paragraph of Article L. 461-3, the decisions anticipated in Article L. 430-5 can be taken by the president or by a vice-president appointed by him.

209. The decision is notified to the parties and to the Minister for the economy (Article R. 430-7). In accordance with Article L. 430-7-1-I, the Minister can ask the Autorité to initiate phase 2 within 5 working days. The deadline of this time limit is indicated to the parties in the notification slip sent by the mergers unit.

210. Moreover, in compliance with Article L. 430-5-IV, if the Autorité de la concurrence does not reach a decision within the allotted time, it so informs the Minister for the economy. The operation is then considered to have been the subject of an authorisation decision, at the end of the interval allotted to the Minister for the economy by (I) of Article L. 430-7-1 (authorisation referred to as "tacit approval").

211. In accordance with Article R. 430-6, the Autorité makes the outcome of the decision public within 5 working days. It indicates on its Internet website whether the concentration was subject or not to merger control, whether it has been authorised, authorised subject to commitments, tacitly approved of or whether a phase 2 examination has been initiated.
9. PUBLICATION OF DECISIONS

212. After receiving a decision, the firms concerned must inform the mergers unit of the indications covered by business secrecy within fifteen calendar days (Article R. 430-7), by e-mail or fax. Only non-confidential versions of decisions are published so as to respect the legitimate interests of the parties that their business secrets are not disclosed. The publication is also carried out in compliance with the legitimate interests of the people mentioned in the decision (Article D. 430-8).

213. The assessment of what information is or is not covered by business secrecy is made on a case-by-case basis. It is therefore crucial for the firms requesting the non-disclosure of certain data to submit this request in a precise and detailed manner. Elements for which the request has not been justified, or has been based on justifications considered to be insufficient will not be concealed. When requests for non-disclosure are not accepted in their entirety, the mergers units provides the parties with an amended version of the decision, prior to its publication, so that they can submit their observations.

214. In principle, certain elements cannot be concealed:

- information that must be published in application of the applicable Regulations in France or in another European Union country. If the firms are subject to a disclosure operation pursuant to the Regulations, but that they have not deferred to this obligation (e.g.: annual filing of the financial statements with the trade and companies register), the firms cannot claim their failure to act in order to justify the confidential nature of any data;
- information disclosed by the firm itself, over and above its legal and regulatory obligations: annual reports, Internet site;
- easily accessible information: information resulting from a restatement of public data (information contained in Internet databases, information accessible via institutes carrying out studies, etc.);
- information that has lost its commercial importance (by the passing of time or for any other reason). In principle, there is no reason to conceal data that is more than five years old;
- information that is part of the competitive analysis or of the definition of the perimeter of the commitments approved by the parties. In particular, the publication of behavioural commitments (description and time limits) constitutes a guarantee of proper completion, by promoting, over and above the follow-up carried out by the mergers unit within the Autorité, surveillance by the market.
215. Requests for non-disclosure can notably relate to:

- non-quantified information that could, for example, relate to manufacturing or industrial secrets, the internal organisation or the firm's commercial strategy;

- quantified data: turnover data that are not public, market shares, number of employees, financial information (production cost, cost price, margins, investment projects...), time limits for the realisation of the structural commitments; except in special cases, market shares are replaced by the following ranges:
  
  - between 0 and 4.99%: [0-5]%
  - between 5.0 and 9.99%: [5-10]%
  - between 10.0 and 19.99%: [10-20]%
  - between 20.0 and 29.99%: [20-30]%
  - between 30.0 and 39.99%: [30-40]%
  - etc …

- to account for the legitimate interests of third parties who do not want to have their business secrets disclosed, the mergers unit can also conceal, or replace with ranges, indications that may not have been pointed out to it by the notifying parties.

216. Information other than as listed above can be concealed if the request is justified, whereas a non-disclosure request relative to one of the above-mentioned elements but that is lacking justification will not be admissible.

217. In any event, the Autorité is not bound by the requests for non-disclosure submitted by the parties, and it must reconcile the legitimate interests of the parties relative to protecting their business secrecy and the interests of third parties and of the market to be correctly informed regarding its decisions. In particular, it is not possible to defer to requests for the non-disclosure of elements that provide the necessary support for the decision and the non-disclosure of which would deprive the decision of its meaning in the eyes of third parties.

E. PHASE 2 OR IN-DEPTH EXAMINATION

1. PHASE 2 INITIATION

218. Phase 2 can be launched:

- either at the initiative of the Autorité, in compliance with Article L. 430-5 III, when serious doubts of anticompetitive effects persists at the end of the first phase;
• or at the request of the Minister for the economy. Indeed, Article L. 430-7-1 (I) indicates that "Within a time limit of five working days as of the date when it received the decision of the Autorité de la concurrence or was informed of it in accordance with Article L. 430-5, the Minister for the Economy can ask the Autorité de la concurrence to carry out an in-depth examination of the operation under the conditions anticipated in L. 430-6 and L. 430-7". As the decision from the Autorité at the end of phase 1 is simultaneously provided to the parties and to the Minister by fax, the date on which the Minister receives the decision is the same as that of the notification to the parties.

219. With regard to the Minister's request for an in-depth examination, the Autorité, which has the status of an independent administrative authority, will examine the merits of this request, but is not required to comply with it. The Autorité will take a decision on a possible request within five working days of receiving it. It will inform the parties of the existence of this request upon receiving it, and provide them with its response at the same time as it responds to the Minister. On the other hand, the Autorité will not systematically inform parties of the absence of the initiation of this mechanism by the Minister.

220. Serious doubts of anticompetitive effects may notably remain, when:

• the decisional practice is not sufficiently settled in the markets concerned and the competitive analysis must go further, for example with regard to the delineation of the relevant markets, the size of entry barriers, the existence of anticompetitive effects or of efficiency gains;

• significant and recent developments in the markets concerned are likely to justify a significant modification of the decisional practice;

• despite the anticompetitive effects identified in phase 1, the parties have not proposed commitments or have proposed insufficient commitments, or commitments whose actual implementation is uncertain.

221. In certain cases, the initiation of phase 2 by the Autorité can have the effect of rendering the concentration null and void. Indeed, Article 231-11 of the General Regulation of the French Financial Markets Authority (Autorité des marchés financiers) allows firms to stipulate, in their takeover offers, clauses requiring that an authorisation is obtained by the Autorité de la concurrence during the first phase. Should such a condition has been stipulated, the decision to initiate phase 2 automatically results in the offer's lapse. Despite this lapse, the investigation of the merger can continue in the event that the supplier informs the Autorité of its intention to continue with the project.

2. TIME LIMITS FOR REVIEW AND “STOP THE CLOCK” MECHANISM

222. Article L. 430-7 lists the rules that apply to time limits in Phase 2:
"I. - When a merger operation is the subject of an in-depth examination, the Autorité de la concurrence makes its decision within an interval of sixty-five working days as of the opening of the procedure.

II. - After learning of the initiation of an in-depth examination in application of the last sub-paragraph of (III) of Article L. 430-5, the parties can propose commitments such as to remedy the operation's anticompetitive effects. If conveyed to the Autorité de la concurrence less than 20 working days before the end of the time limit indicated in (I), this time limit will expire 20 working days after the receipt date of the commitments.

In case of special need, such as the finalising of the commitments mentioned in the previous sub-paragraph, the parties can ask the Autorité de la concurrence to suspend the operation's examination time limits for a maximum of 20 working days.

These time limits can also be suspended at the initiative of the Autorité de la concurrence, when the notifying parties have failed to inform it of a new fact as of its occurrence, or to provide it with all or part of the information requested within the allotted time, or that third parties have failed to provide it with the requested information, for reasons attributable to the notifying parties. In this case, the time limit resumes as of the exit of the cause that had justified its suspension."

223. As in phase 1, the parties can seek a suspension of the examination time limits. On the other hand, only for phase 2, the legislator has introduced a "stop the clock" procedure into the last sub-paragraph of the aforesaid Article, which can be used at the discretion of the Autorité. This mechanism is used to suspend the operation's examination time limit in two cases:

- firstly, the parties are required to inform the Autorité of any new fact as of its occurrence. When the parties fail to meet this information obligation, the time limit can be suspended as of the occurrence of the new fact and until the date when the parties inform the Autorité of it. This mechanism is similar to the one that applies in Community law. Indeed, Article 9, paragraph 3, c) of Regulation (EC) n° 802/2004 stipulates that when the parties fail to inform the European Commission of modifications of facts or new information, the time limits are suspended "for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information". Article 9, paragraph 4, of the same Regulation also stipulates that: "The suspension of the time limit shall begin on the working day following the date on which the event causing the suspension occurred. It shall expire with the end of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time-limit shall expire with the end of the following working day";

- secondly, if the parties do not provide the Autorité, in whole or in part, with the information requested of them within the timeframe allotted during the investigation, or if the parties in any way whatsoever prevent third parties from responding to information requests submitted by the Autorité, the timeframes can be suspended for the period between the end of the time limit set down in the
information request and the reception of the complete and exact information required pursuant to this request.

224. When either of these situations justifying the implementation of the "stop the clock" procedure arises, the parties are informed of the start of the suspension of the time limits.

225. In all cases, the time limits will only resume when the cause that generated the suspension will have disappeared, with complete and exact information having been provided to the Autorité. The parties will be informed of the end of the suspension of the time limits.

3. PHASE 2 EXAMINATION

226. The course of phase 2 is governed by Article L. 430-6, which indicates:

"When a merger operation is subject, in application of the last subparagraph of (III) of Article L. 430-5, to an in-depth examination, the Autorité de la concurrence considers whether or not the operation may harm competition, notably through the creation or strengthening of a dominant position or through the creation or strengthening of purchasing power that places suppliers in a situation of economic dependency. It assesses whether the operation makes a sufficient contribution to economic progress to compensate for the anticompetitive effects. The procedure applicable to this in-depth examination of the operation by the Autorité de la concurrence is as indicated in the second sub-paragraph of Article L. 463-2 and in Articles L. 463-4, L. 463-6 and L. 463-7. However, the notifying parties and the Government official must, within an interval of 15 working days, produce their observations in response to the delivery of the report.

Before issuing a ruling, the Autorité can hear third parties in the absence of the notifying parties. The works councils of the undertakings taking part in the merger operation are heard at the request of the Autorité, under the same conditions".

227. During this second phase, the mergers unit delves more deeply into the key points of the competitive analysis relative to which a conclusion could not be reached in phase 1. The objectives, methods and criteria used for the analysis on the merits are detailed in chapter 5 of the present guide.

228. The parties can also propose commitments during phase 2. Article L. 430-7-II indicates that "after learning of the initiation of an in-depth examination in application of the last subparagraph of (III) of Article L. 430-5, the parties can propose commitments such as to remedy the operation's anticompetitive effects".

229. As previously indicated, if the parties convey them to the Autorité less than 20 working days before the end of the investigation time limit, this time limit will expire 20 working days after the receipt date of the commitments.
230. The formalism that must be respected and the procedure for testing the commitments are the same as in phase 1. The potential commitments are explained in chapter 5 of the present guide, relative to corrective measures.

231. The phase 2 investigations can include the querying of third parties using the same provisions as in phase 1, notably with regard to protecting business secrecy.

232. The Autorité de la concurrence also obtains an opinion from the competent sector-specific Regulation authority. This procedure specifically applies to the audiovisual sector (the broadcasting regulator [Conseil Supérieur de l'Audiovisuel]), which is consulted in accordance with Article 41-4 of law n° 86-1067 of 30 September 1986, the banking sector (the French Credit Institutions and Investment Undertakings Committee [Comité des établissements de crédit et des entreprises d'investissement - CECEI]), which is consulted in accordance with Article L. 5121-4 of the French monetary and financial code (Code monétaire et financier), and the insurance sector (the French Insurance Companies Committee [Comité des Entreprises d'Assurance]). The Autorité de la concurrence applies to these administrative authorities by sending a document that presents the operation. This consultation serves to clarify certain operational aspects of the markets concerned, which are subject to specific Regulations, but also to ensure better articulation between merger control and the Regulation procedures specific to these sectors. The queried sector-specific Regulation authority then has a reduced time limit of one month, due to urgency, in which to provide its possible observations. The observations are included in the file. The Autorité is not required to obtain this opinion in order to issue its decision. This consultation procedure has no impact on the time limits applicable to the Autorité.

233. Article R. 463-9 also stipulates that "the Rapporteur General informs the administrative authorities listed in appendix 4-6 of the present book regarding any referral relative to the sectors falling into their spheres of competence. These administrative authorities have two months, which can be reduced by the general rapporteur in the event of urgency, in which to submit their possible observations. These observations are included in the file". Appendix 4-6 lists the following authorities:

- The French Financial Markets Authority (Autorité des marchés financiers - AMF)
- The French National Information Technology and Freedom Commission (Commission nationale de l'informatique et des libertés - CNIL)
- The French Cinema mediator (Médiateur du cinéma)
- The French Banking commission (Commission bancaire)
- The French Broadcasting regulator (Conseil supérieur de l'audiovisuel - CSA)
- The French Telecommunications and Posts Regulator (Autorité de régulation des communications électroniques et des postes - ARCEP)
- The French Energy Regulation Commission (Commission de régulation de l'énergie - CRE)
234. Under the system that predated the Autorité de la concurrence, the institutions listed above could submit their opinions after being informed of the ministerial referral leading to phase 2, by the Conseil de la concurrence. This mandatory mechanism is obsolete since 2 March 2009. However, the Autorité reserves the right to obtain opinions from the relevant institutions (the case of the CSA falls under a different system, in application of the law) whenever it considers that this consultation would be useful.

235. The in-depth examination results in the drafting of a report that presents the parties, the operation, the relevant markets, the operation's competitive analysis and, if relevant, its economic efficiency gains and an assessment of the commitments proposed by the parties, as well as the corrective measures envisaged by the Autorité. When drafting the report, the mergers unit ensures the protection of the business secrecy of the parties, as well as that of third parties, in compliance with the provisions of Article L. 463-4.

236. This report is then provided to the notifying parties and to the Government official, who have 15 working days in which they submit their observations in response. In compliance with Article L. 463-2, the report is accompanied by the documents upon which the mergers unit has based itself.

237. The president of the Autorité then assigns the case, once it is ready to be examined by the board, to one of the groups listed in the second subparagraph of Article L. 461-3 of the French Code of commercial law (Code de commerce)”. A hearing is then organised according to the provisions indicated in Article L. 463-7 of the French Code of commercial law (Code de commerce) and section IV of the rules of procedure of the Autorité de la concurrence. During the hearing, the case officers first of all present the conclusions of their investigations. The Rapporteur General or the deputy rapporteur general as well as the representative of the Minister of the economy (“commissaire du gouvernement”) then present their observations. During the hearing, the Board can also hear third parties as well as the work committees of the firms taking part in the operation. These witnesses, who are asked to answer questions from the board members, do not attend the entire hearing. These witnesses are heard in the absence of the parties, who are asked to leave the hearing room. Finally, the board hears the parties, that can present their own analysis and answer questions from the members of the panel.

4. PHASE 2 DECISION

238. At the end of the in-depth phase 2 examination, in compliance with Article L. 430-7, "III – The Autorité de la concurrence can, on the basis of a well-founded decision:

   a) either prohibit the merger operation and, if relevant, require the parties to undertake all measures that will serve to re-establish sufficient competition;
b) or authorise the operation while requiring the parties to undertake all measures in order to ensure sufficient competition or obliging them to observe provisions that will serve to make a sufficient contribution to economic progress to compensate for the anticompetitive effects.

c) The injunctions and provisions mentioned in the previous two subparagraphs apply irrespective of the contractual clauses possibly signed by the parties.

d) The draft decision is sent to the interested parties, who are allotted a reasonable timeframe in which to submit their observations.

IV.- If the Autorité de la concurrence intends to take none of the decisions anticipated in (III), it authorises the operation on the basis of a well-founded decision. The authorisation can be subject to the actual realisation of the commitments undertaken by the notifying parties".

239. The Autorité panel deliberates according to the rules defined in section (V) of the rules of procedure.

240. The Autorité conveys the draft decision to the interested parties so that they can submit their observations within a reasonable timeframe. This timeframe is assessed while taking into account the date on which the parties provided the last information required for the Autorité to make its decision.

241. The Autorité then indicates its decision to the parties and to the Minister for the economy. As with phase 1 decisions, after receiving the decision, the parties have a time limit of 15 calendar days in which to indicate the elements that should be subject to business secrecy, and that they would like to have concealed (Article R. 430-7). As with phase 1 decisions, publication is carried out in compliance with the legitimate interests of the parties and of third parties.

242. Moreover, in compliance with (V), if the Autorité de la concurrence does not reach any of the decisions anticipated in (III) and (IV) within the allotted time, it so informs the Minister for the economy. The operation is then considered to have been the subject of an authorisation decision, at the end of the interval allotted to the Minister for the economy by (II) of Article L. 430-7-1 (decision referred to as "tacit approval").

243. Irrespective of the decision taken in application of Article L. 430-7, the Autorité makes it public within 5 working days of the decision (Article R. 430-6): authorisation, authorisation subject to commitments, authorisation subject to injunctions and provisions, prohibition, tacit approval.

244. Finally, the Autorité ensures the publication of its decisions by placing them online on its Internet site, including for tacit approvals.

5. MINISTER FOR THE ECONOMY’S POWER TO EVOKE A CASE

245. Article L. 430-7-1 (II) indicates that, for phase 2 decisions:
"within twenty-five working days of the date of receipt of the decision from the Autorité de la concurrence or of being informed of it pursuant to Article L. 430-7, the Minister for the economy can call the case and issue a decision on the operation for reasons of general interest other than maintaining competition and, if relevant, that offset the anticompetitive effects resulting from the operation.

The reasons of general interest other than maintaining competition that can lead the Minister for the economy call the case are, in particular, industrial development, the competitiveness of undertakings relative to international competition, or the creation or maintenance of jobs.

When, pursuant to the present (II), the Minister for the economy calls a case, he issues a well-founded decision relative to the operation in question after having heard the observations of the parties to the merger operation. This decision can possibly be conditioned by the actual implementation of commitments.

This decision is transmitted to the Autorité de la concurrence without delay."

246. Within 5 working days of the decision, the Minister of the economy makes it public (Article R. 430-6).

247. The Minister's well-founded decisions are also released to the public in the electronic edition of the Official Bulletin on Competition, Consumer Affairs and Fraud Control (Article D. 430-8). The Minister's decisions are published while respecting the legitimate interests of the notifying parties and of the people mentioned therein to see to it that their business secrets are not disclosed (Article D. 430-8).

6. WITHDRAWALS OF NOTIFICATION

248. At any time during the procedure, the notifying parties can withdraw the notification by submitting any document that confirms that the project is being abandoned.

F. JUDICIAL REVIEW

249. The French Administrative Supreme Court (Conseil d’État) is the competent court to review the decisions of the Autorité de la concurrence in consideration of its legal nature (independent administrative authority) and of Article R. 311-1 (4°) of the code of administrative justice. Notwithstanding this rule, Article L. 464-8 of the French Code of commercial law (Code de commerce) lists the decisions of the Autorité de la concurrence that fall within the jurisdiction of the Court of Appeal of Paris, from which decisions taken pursuant to Articles L. 430-5, L. 430-7 and L. 430-8 of the French Code of commercial law (Code de commerce) are excluded. The French administrative Supreme Court (Conseil d’État) is also competent for any appeal relative to a decision by the Minister taken within the framework of his power to evoke a case.

250. All decisions relative to the authorisation or prohibition of merger operations, but also certain related decisions, notably in terms of the publication or approval of an upfront buyer of assets, are subject to appeal.

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An appeal can be lodged by the parties to the operation, and by any interested third party. The rules relative to the admissibility and procedure for appeals relative to merger decisions are subject to the ordinary law of administrative dispute before the French administrative Supreme Court (Conseil d’État).

1. TIME LIMITS FOR CHALLENGING THE DECISIONS

251. The time limit for challenging a merger control decision of the Autorité is two months. This time limit is a clear period. A clear period is counted in months from calendar date to calendar date, and includes neither the notification or publication dates (dies a quo), nor the expiry date (dies ad quem). When the expiry day is a Saturday, a Sunday or a public holiday, the appeal can be filed on the next working day. For example, for a decision notified by letter with acknowledgement of receipt on 1st October 2007 at 10:30 AM, the time limit will start on 2 October 2007 at 12 AM and will end on 2 December 2007 at 12 AM, but since an appeal cannot be launched on the day of Sunday 2 December 2007, it will expire on the first working day thereafter, i.e. Monday 3 December 2007.

252. The starting point of the appeal time limit varies according to the status of the applicant, as a party or a third party. A merger control decision of the Autorité is an individual act; it is therefore made enforceable against the person to whom it applies by means of notification. Consequently, for the parties, the appeal time limit begins on the day when the decision is notified to the party by the Autorité.

253. For third parties, the starting point of the time limit corresponds to the date of publication of the decision, as provided by Article R. 464-28 of the French Code of commercial law (Code de commerce). Pursuant to Article D. 430-8 of the French Code of commercial law (Code de commerce), the Autorité ensures publication through its website. The publication of the outcome of the decision outcome prior to the publication does not constitute the starting point for the time limit for third parties for challenging the decision.

2. APPEAL FOR ANNULMENT

254. Appeals against merger control decisions are primarily intended to obtain the annulment of these decisions. The French administrative Supreme Court (Conseil d’État) examines the “external legality” (competence, compliance with certain procedural or substantive guarantees) and the “internal legality” (violation of law, legal or factual errors, including the legal qualification of the facts) of the decisions.

255. For example, in its previous rulings, the French administrative Supreme Court (Conseil d’État) has been called on to examine the legality of the procedure⁴⁶, the fact that an operation was subject to merger control⁴⁶, the

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⁴⁶ Notably see the decision of the French Supreme Court for administrative law (Conseil d'État) 278652 of 27 June 2007 on the TF1 / AB / TMC operation, and decision 249267 of 6 February 2004 relative to the Seb / Moulinex operation.
delineation of the relevant markets, the appraisal of effects of the concentration on competition, the consideration of the contribution to economic progress that is likely to offset the identified anticompetitive effects, the consideration of the failing firm defence and even the sufficient contribution of commitments accepted by the competition authority to remedy the anticompetitive effects of a concentration.

256. The French administrative Supreme Court (Conseil d’État) exerts full review. As such, in its Fiducial ruling of 13 February 2006, the French administrative Supreme Court (Conseil d’État) upheld the Minister’s authorisation after having reviewed the market shares of the parties in the merger, the countervailing client power, the competitive assessment and the efficiency gains. This economic approach to the examination of the legality of a decision relative to mergers led the French administrative Supreme Court (Conseil d’État) to review not only the legal and factual situation on the day when the decision was taken, but also the identified or potential effects of the authorised operation, including the impact of events, such as, for example, a new entry.

257. The French administrative Supreme Court (Conseil d’État) also checks whether third parties’ rights have been respected. As such, the Conseil d’État cancelled the decision that authorised the Heineken / Fischer concentration for the reason that the rights of Interbrew, that was not a party of the operation, had not been respected. In this case, the commitments submitted by Heineken anticipated the sale of a significant number of warehouses to buyers who were legally and financially independent of certain major brewers, including Interbrew. This decision therefore deprived Interbrew of the possibility of buying the warehouses sold by Heineken. The French administrative Supreme Court (Conseil d’État) cancelled the decision, on the basis of the general principle of the rights of the defence, as Interbrew had not been given the opportunity to present its observations.

3. THE INTERIM INJUNCTIONS

258. At the same time as an appeal on the merits, the petitioner can seek interim injunctions in order to stop the effects of the decision at hand. For this purpose, there are several interim injunction procedures. Two types of interim injunctions have already been implemented before the French administrative Supreme Court (Conseil d’État) in the area of mergers: the "suspension" interim injunctions and the "protective" or "useful measures" interim injunctions.

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47 Notably see decision 294896 of 31 January 2007 relative to the acquisition of Delaroche by Ebra, and decision 201853 Coca Cola of 9 April 1999.
48 Notably see decision 278652 of 27 June 2007 relative to the takeover of TMC by TF1 and AB, decision 283479 Fiducial of 30 June 2006, and decision 278796 of 13 February 2006 relative to the Seb / Moulinex operation.
49 Notably see decision 278652 of 27 June 2007 relative to the takeover of TMC by TF1 and AB, decision 283479 Fiducial of 30 June 2006, decision 278796 of 13 February 2006 relative to the Seb / Moulinex operation, and decision 201853 Coca Cola of 9 April 1999.
50 Notably see decision 201853 Coca Cola of 9 April 1999.
51 See decision 249267 of 6 February 2004 relative to the Seb / Moulinex operation.
52 See decisions 278652 of 27 June 2007 on the TF1 / AB/ TMC operation, 201853 of 9 April 1999 Coca Cola.
54 FSCAL, n° 191654, litigation division, 9 April 1999.
259. The "suspension" interim injunctions is described in Article L. 521-1 of the French code of administrative justice (CJA). This interim injunctions must be accessory to a main application, which means that an appeal for annulment must have been initiated prior to the request for suspension. Three conditions must simultaneously be met for the interim injunctions application:

- **A condition of urgency.** For example, in the ordinance of 19 May 2005 that suspended the decision to authorise the acquisition of the company CCMX Holding by the company CEGID, the judge responsible for dealing with urgent matters justified the urgency "in view of the subject of the disputed decision and its effects on the market, which would be difficult to reverse" and "equally in terms of the public interest in question that consists of the maintenance of effective competition in the market(…), and in terms of that of applicant companies that are present in the same market, both as competitors and potential customers(…)".

- **The existence of a plea that can cast, at the stage of the investigation at hand, a serious doubt as to the legality of the decision.** In the aforesaid ordinance, the judge responsible for dealing with urgent matters said that the Minister's argument was insufficient "in view of the probable, sufficiently quick, lasting and sufficient nature of the arrival of newcomers that could prevent the potential anticompetitive effects of the operation in question", which created a major doubt as to the legality of the decision.

- **Finally, the decision of the competition authority at hand must still be capable of producing legal effects on the day of the request and not have been executed yet.** For example, in the ordinance of 1st June 2006, the judge responsible for dealing with urgent matters ruled that the request for a suspension was not admissible and rejected it, considering that the authorisation decision had been entirely executed on the date of the request. Similarly, in the ordinance of 25 July 2006 “France Antilles”, the judge responsible for dealing with urgent matters considered that this request was not admissible since the decision to authorise the acquisition, by the Est Républicain group of the German company Delaroche from the Swiss company Socpresse had been entirely executed on the day when France Antilles company had submitted its request seeking the suspension of the decision.

260. The "active" or "useful measures" interim injunctions is described in Article L. 521-3 of the French code of administrative justice: “In case of urgency and based on a simple request that will be admissible even in the absence of a prior administrative decision, the judge responsible for dealing with urgent matters can order all useful measures but without preventing the execution of any administrative order”. As such, in its ordinance of 18 February 2008, “Fédération Nationale des Transporteurs Routiers”, the judge of the French administrative Supreme Court (Conseil d’État) responsible for dealing with urgent matters recalled "this procedure is likely to apply when a merger operation has been carried out without having been notified, and the Minister for the economy is required, pursuant to the

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55 n° 293198, request from the company Fromaget Vins and from the Société Centrale Européenne de Distribution Groupe C10.
aforesaid provisions of Article L. 430-8 of the French Code of commercial law (Code de commerce), to order the operation’s notification”.

4. LEGAL CONSEQUENCES OF ANNULMENT BY THE FRENCH ADMINISTRATIVE SUPREME COURT (CONSEIL D’ÉTAT)

261. Article R. 430-9 of the French Code of commercial law (Code de commerce) indicates that “in case of total or partial cancellation of a decision taken by the Autorité de la concurrence or by the Minister for the economy on the basis of Articles L. 430-5, L. 430-7, L. 430-7-1, L. 430-8 or L. 430-9 and in the event that the file must be re-examined, the undertakings concerned that had carried out the notification will submit an updated notification within two months as of the date of notification of the decision of the administrative Supreme Court (Conseil d’État)”.

262. As such, when the decision of the Autorité or of the Minister has been cancelled, the firms concerned must submit a new and updated notification relative to the operation. In its decision, the administrative judge may nevertheless rule, as part of his general powers, that the cancellation of the Minister’s decision taken pursuant to its power to evoke a case, will serve to revive the decision of the Autorité de la concurrence that had been replaced by the ministerial decision. In this case, a new notification will therefore not be necessary.

G. IMPLEMENTATION OF REMEDIES

1. MONITORING OF THE IMPLEMENTATION OF REMEDIES

263. To ensure the efficiency of merger control, the mergers unit monitors carefully the implementation of injunctions, provisions and commitments that are included in a decision from the Autorité, or from the Minister for the economy prior to the transfer of responsibilities to the Autorité as of 2 March 2009. As regards commitments, “commitments letter” of the parties must specify how their execution will be monitored. The parties can notably stipulate that they will have recourse to a monitoring trustee, who will to monitor the proper implementation of the commitments and report to the Autorité, or even carry out the divestiture of certain assets. The trustee will be approved by the Autorité if he/she meets two conditions. He/She must be independent from the parties and have the necessary skills to properly carry out his/her task. These conditions, like the ones relative to injunction and provisions, are provided in the text of the decision issued by the Autorité, subject to the non-disclosure of indications that would be protected as part of the business secrets of the parties. In the case of behavioural commitments, any non-disclosure accepted by the Autorité will remain very limited insofar as market surveillance contributes to the proper implementation of this kind of commitments.

264. In order to verify the compliance to the injunctions, provisions and commitments, the Investigation Services of the Autorité can also submit
information requests to parties and third parties, and make use of any information spontaneously provided by third parties.

265. If the information gathered in this way brings to light serious doubts as to the non-implementation of the commitments, injunctions or provisions, the Rapporteur General can suggest that the Autorité launch a procedure for non-compliance with the obligations imposed on the parties. Such a procedure can be initiated both for operations authorised by the Autorité de la concurrence, and for operations authorised under the system which existed prior to the entry into force of the new provisions of Articles L. 430-1 et seq of the French Code of commercial law (Code de commerce) on 2 March 2009.

266. Pursuant to the last sub-paragraphs of Article L. 430-8-IV, the applicable procedure is "the one indicated in the second sub-paragraph of Article L. 463-2 and in Articles L. 463-4, L. 463-6 and L. 463-7. However, the notifying parties and the Government official must, within an interval of 15 working days, produce their observations in response to the delivery of the report. The Autorité de la concurrence issues a ruling within seventy-five working days".

267. One or more case officers are assigned by the Rapporteur General to investigate possible non-compliance of the obligations incumbent upon the parties. A report is drafted pursuant to the second sub-paragraph of Article L. 463-2. This report is notified to the parties, to the representative of the Minister of the economy ("commissaire du gouvernement") and to the relevant Ministers. It is accompanied by all of supporting evidence. The parties and the "commissaire du gouvernement" must submit their possible reply within 15 working days. Inter partes proceedings are thereafter organised before the board of the Autorité pursuant to the provisions listed in Article L. 463-7 of the French Code of commercial law (Code de commerce) and to the rules of procedure of the Autorité.

268. At the end of this procedure, the Autorité takes a decision pursuant to Article L. 430-8-IV: "IV.- If it considers that the parties have not carried out, within the allotted time, an injunction, provision or commitment contained in its decision or in the decision of the Minister who gave a ruling on the operation in application of Article L. 430-7-1, the Autorité de la concurrence ascertains the non-performance. It can: 1° Withdraw the decision that authorised the operation's realisation. Unless they can return to the situation before the merger, the parties will be required to again notify the operation within one month of the decision's withdrawal, otherwise they will be subject to the penalties anticipated in (I); 2° Order, subject to periodic penalty payment within the limits indicated in (II) of Article L. 464-2, the parties upon whom the non-performed obligation was incumbent to do so within a timeframe that they will set, the injunctions, provisions or commitments. Moreover, the Autorité de la concurrence can apply, to the people upon whom the non-performed obligation was incumbent, a financial penalty that cannot exceed the amount defined in (I)".

269. For legal persons, the financial penalty is capped to 5% of their pre-tax turnover generated in France during the last closed tax year, plus, if
relevant, the pre-tax turnover generated by the acquired party in France during that same period.

270. Daily penalty payments may not exceed the limit of 5% of the average daily turnover.

271. Prior to the entry into force of the new provisions of Articles L. 430-1 and seq of the French Code of commercial law (Code de commerce) on 2 March 2009, the Minister had, for example, imposed a fine on Carrefour for non-compliance with commitments submitted in the course of the acquisition by its subsidiary, Erteco, of Sonnenglut Weinkellerei (hereinafter "Sonnenglut"), owner of discount food stores under the name Treff Market. In a decision dated 7 November 2003, the Minister had made the merger's authorisation subject to Carrefour's divestiture of one of the two businesses located in the Belfort territory, either the Treff store or the ED store. Carrefour carried out the sale of one of the two businesses but did not ask the Minister's upfront approval of the buyer and the divestiture ultimately resulted in the closing of the business that had been sold. On the basis of Article L. 430-8 of the French Code of commercial law (Code de commerce), in its version prior to the entry into force of the law on the modernisation of the economy, the Minister referred to the Conseil de la concurrence a request for an opinion relative to the non-implementation of the commitments that bound Carrefour. The Conseil ascertained that the commitments had not been carried out. Consequently, the Minister ordered Carrefour to sell its second store in the territory of Belfort, i.e. the ED Belfort store, and imposed a penalty on Carrefour.

272. This provision of the French Code of commercial law (Code de commerce) was also applied to TF1 and AB Group, which have been fined for having failed to meet their commitments. These commitments consisted of running the TMC network of advertising spaces independently from the other activities of the group, and of marketing the advertising spaces independently from the company TF1 Publicité, and of not bundling offers with TF1(order of 17 November 2008). After an opinion from the Conseil de la concurrence, the Minister applied a penalty on TF1 and AB. He also ordered them to implement, within one month, the measures proposed on 31 July 2008 in order to ensure the implementation of their first and second commitments, subject to a periodic penalty payment. In this case, this consisted of modifying governance and management rules of TMC Régie.

273. In the event of prohibitions, Article L. 430-8-V indicates that if "a merger operation has been carried out in violation of the decisions made in application of Articles L. 430-7 [in-depth examination procedure or phase 2] and L. 430-7-1 [procedure for the Minister to take up the case], the Autorité de la concurrence orders the parties, subject to periodic penalty payment within the limits of (II) of Article L. 464-2, to return to the situation prior to the merger". The amount of the penalties can be up to 5% of the average daily turnover for each day's delay as of the decision date and as long as the parties do not return to the situation prior to the merger. Moreover, the parties are subject to the penalty indicated in the second sub-paragraph of Article L. 430-8-1, namely, for legal persons, a fine of up to "5% of their

56 Subsequent to the Minister's decision TF1/AB /TMC of 27 October 2004.
pre-tax turnover generated in France during the last closed fiscal year, plus, if relevant, the pre-tax turnover generated by the acquired party in France during that same period and, for natural persons, up to 1.5 million euros”.

274. Irrespective of the outcome of the decision taken in application of Article L. 430-8, the Autorité makes it public within 5 working days (Article R. 430-6). The date and outcome of the decision are indicated on the website of the Autorité. Moreover, the Autorité notifies its decision to the parties and to the Minister of the economy. The firms concerned must specify what information contains business secrets within fifteen calendar days (Article R. 430-7). Indeed, decisions are published while respecting the legitimate interests of the parties in keeping their business secrets undisclosed. The publication is also carried out in compliance with the legitimate interests of the people mentioned in the decision (Article D. 430-8). Finally, the Autorité ensures the publication of its decisions by placing them online on its Internet site (Article D. 430-8).

2. RE-EXAMINATION OF REMEDIES

275. In exceptional circumstances, parties that have submitted commitments can require the Autorité re-examine them.

276. If parties that had committed to selling a business within an allotted timeframe now plan to ask for an extension of this timeframe, they must prove that the non-compliance with this commitment results from reasons that are totally independent of their control, and that they remain able to sell the business quickly. If not, they will be subject to a fine for non-compliance with their obligations.

277. In the event of behavioural corrective measures that extend over a long period, the parties may find, after having implemented them for several years, that the intended objectives of these measures could be better satisfied by means of different measures, or that the evolution of competition in the markets has rendered them obsolete. They must then demonstrate the merits of their request to have the Autorité re-examine the remedies, and propose alternative measures.

278. Requests for re-examination can relate both to commitments made to the Autorité de la concurrence and to commitments made to the Minister for the economy prior to the transfer of responsibilities. A reasoned letter must be sent to the President of the Autorité in that end.

H. IMPLEMENTATION OF ARTICLE L. 430-9 OF THE CODE OF COMMERCE

279. Article L. 430-9 provides that: "the Autorité de la concurrence can, in case of abusive exploitation of a dominant position or of a state of economic dependency, order, in a well-founded decision, the undertaking or group of undertakings in question to modify, complete or terminate within a fixed time limit, all agreements and actions resulting in the merger of economic
power that have allowed the abuses, even if these actions had been the subject of the procedure described in the present section”.

280. This article applies to any abuse made possible by a merger operation, whether or not it had been authorised by the Autorité de la concurrence or, under previous legislation, the Minister.

281. Only one has required so far the implementation of Article L. 430-9, in its version prior to the entry into force of the law on the modernisation of the economy. In this case, the Conseil de la concurrence, after having started ex officio antitrust proceedings relative to the water and sanitation markets, determined, in its decision 02-D-44 of 11 July 2002, that the Compagnie générale des eaux (CGE) and the Société Lyonnaise des Eaux (SLDE) jointly held a dominant position in these markets57 and that they had abused it58. On the basis of the provisions of Article L. 430-9 in its version prior to the law on the modernisation of the economy, the Conseil asked the Minister for the economy to order the parties in question to modify, complete or terminate the agreements that they had signed in order to associate their resources within common subsidiaries. It should be noted that the Cour de cassation (French Supreme Court for private law) indicated that the implementation of the powers allotted to the Conseil by Article L. 430-9 of the French Code of commercial law (Code de commerce) and the decisions taken on the basis of this Article had to be challenged before the administrative judge, and not before the judicial judge.

V. Review on the merits

A. MAIN NOTIONS

282. The test applied by the Autorité to assess the effects of a concentration on competition is defined in Article L. 430-6 of the French Code of commercial law (Code de commerce), which provides that the Autorité examines if the operation “may harm competition, notably through the creation or strengthening of a dominant position or through the creation or strengthening of purchasing power that places suppliers in a situation of economic dependency”. The fact that the concentration must significantly impede competition is not mentioned in French law, but a proportionate treatment of adverse effect on competition is required.

283. Merger control pursues an objective of general interest which consists of protecting competition and its positive effects on welfare and on the purchasing power of consumers. As already indicated above in paragraph 2,

57 The CGE and SLDE held approximately 85% of these markets, and over the passage of time, these two groups had created seven common subsidiaries at the request of the local and regional administrations in question. In 2009, the process to untangle all of these common subsidiaries was implemented.

58 During several public invitations to tender launched by local and regional administrations starting in June 1997, the parent companies had refrained from bidding and thus from competing with their common subsidiaries, thereby limiting the intensity of the competition.
merger control is therefore not intended to safeguard the individual interests of the parties’ competitors or suppliers. It can nevertheless lead to the development of measures that will protect them in the event that this proves useful for maintaining effective competition in the various markets concerned.

284. The analysis of the effects of a concentration is forward-looking. However, only the situation prior to the operation can be observed, and the operation's probable effects must be presumed. This analysis is based on the market's characteristics and on how competition operates within it, as these elements existed at the time of the control, but also in view of the foreseeable evolutions.

285. The examination of a merger operation starts with the delineation of the relevant markets on which the firm resulting from the merger is active or may have influence.

286. A merger can have horizontal, vertical or conglomerate effects:

- horizontal, when the parties to the operation are current or potential competitors in one or more relevant markets;
- vertical, when the parties are active on markets that are located at different points in the value chain, for example when a manufacturer merges with one of its distributors;
- conglomerate, when the new entity extends or strengthens its presence on various markets that are related in such a manner as to possibly allow it to increase its market power.
- When it involves groups with various activities, a single merger can have horizontal, vertical and conglomerate effects.

287. A concentration can constitute a significant impediment to effective competition in the affected markets in two ways:

- through non-coordinated effects, i.e. effects resulting from the behaviour of market's operators, who are acting independently of one another;
- through coordinated effects, when the merger is likely to change competition on the market in such a way that firms that had previously not coordinated their behaviour would now be capable of doing so. We then refer to the creation or strengthening of a collective dominant position.

288. In terms of non-coordinated effects, a horizontal merger produces unilateral effects when it allows the firm that results from the operation to establish or to strengthen its market power. As recalled by the Commission in its guidelines on the assessment of horizontal mergers, by market power "is meant the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition". Unilateral effects can extend to the establishment or strengthening of a dominant position that would allow the firm to act independently of any competitive pressure.
More rarely, unilateral effects can be considered to harm competition even without the creation or strengthening of a dominant position.

289. A vertical or conglomerate merger produces non-coordinated effects when it allows the firm resulting from the operation to limit or to prevent access to one or more markets. In a vertical merger, the firm resulting from the operation is present at various points in the value chain. In certain cases, this position may allow it to prevent competitors located downstream in the value chain from accessing an essential resource that it controls upstream, or inversely, to foreclose the commercial outlets of its upstream competitors as a result of its downstream position. In a conglomerate concentration, a firm with a strong position can find itself able to foreclose the market if the operation provides it with a product range (we refer to range effects) or a brand portfolio (we refer to portfolio effects) that the competitors do not have and that constitutes a decisive sales argument for customers.

290. To determine if an operation has a significant anticompetitive effect through its non-coordinated effects (horizontal, vertical or conglomerate), the Autorité must analyse the ability of customers to switch to alternative products or services offered by competitors. To this end, it conducts a prospective analysis of the supply and demand, and studies how customers and competitors would probably behave very shortly after the operation. Competition can originate with firms that are already present within the market, but also from potential competitors that may be able to quickly enter the market. Their ability to do so depends on entry barriers, i.e. obstacles that they will have to overcome in order to penetrate the market. For example, these obstacles can be of a regulatory or financial nature, or tied to intellectual property rights, or to the difficulty of acquiring know-how, or result from the attachment of customers to certain offers.

291. In certain particular cases, an operation can have a significant anticompetitive effect as a result of the exit of a potential competitor. In such cases, actually rare, one of the acquired companies exerts potential competitive pressure on one or more markets concerned.

292. An operation can also have a significant anticompetitive effect through the creation or strengthening of purchasing power that would distort open competition on the supply markets.

293. In terms of coordinated effects, a merger can also create or strengthen incentives for firms present in the market to coordinate their behaviour, without actually having to go so far as to sign a formal agreement.

294. In the specific case of the creation of a joint venture, the Autorité also analyses the risks of coordination of the parent companies, as the creation of a joint venture can encourage its co-shareholders to coordinate their competitive behaviour.
295. **A merger is generally expected to provide gains in terms of economic efficiency.** When the first part of its analysis indicates to the Autorité that the operation may harm competition in a market, it then assesses the degree to which the expected efficiency gains may be of benefit to consumers, and whether or not they are sufficient to offset the identified anticompetitive effects.

296. In exceptional cases, an operation that has an anticompetitive effect and in which the economic efficiency gains are insufficient to offset this adverse effect may nevertheless be authorised if the purchased firm is a failing firm, if there is no better buyer from the viewpoint of the competitive analysis and if the anticompetitive effect would not be no lesser if the firm were to disappear.

297. When the competitive assessment of a concentration is negative, when the economic efficiency gains do not offset the identified anticompetitive effects, and when the failing firm defence does not apply, the notifying firms are invited to propose remedies.

298. Seeking **structural remedies**, which aim, through divestitures of activities or of certain assets to an appropriate buyer that is likely to exert true competitive pressure, or through the elimination of cross-holdings between competitors, at ensuring that the structure of competition is effective, is a priority. Structural measures can be supplemented by **behavioural remedies**, which aim at regulating the competitive behaviour of the new entity born from the concentration. For example, this can include an obligation to allow competitors to get access to infrastructures in a transparent and non-discriminatory manner, or to terminate exclusivity contracts. In particular cases, behavioural measures may serve to resolve the identified competition problems on a stand-alone basis.

299. Remedies may be stipulated by commitments proposed by the parties. The concentration will then be authorised only if the commitments are carried out. Remedies may also result from injunctions or provisions imposed by the Autorité, which will then be the condition for the authorisation of the concentration. If no remedy to the anticompetitive effects can be found, the Autorité prohibits the concentration.

300. For its review on the merits, the Autorité uses a systematic approach that begins with a delineation of the relevant markets (B). It assesses thereafter the possible anticompetitive effects of the concentration in view of the degree of concentration in the relevant markets (C). It deepens then its analysis by establishing possible non-coordinated effects, whether horizontal (D), vertical (E) or conglomerate (F). In relevant cases, the Autorité analyses the risks of exit of a potential competitor (G) or the risks of the creation or strengthening of purchasing power that would place suppliers in a situation of economic dependency (H). The Autorité also analyses the operation's coordinated effects (I). In the specific case of the creation of a joint venture, it analyses the risk of coordination between the parent companies (J). It can also be required to issue a decision on ancillary restraints (K). It takes into account the proven efficiency gains that the
concentration passes on to consumers (L) as well as, if relevant, the failing firm defence (M). If the competitive assessment remains negative at the end of this analysis, the Autorité examines the remedies proposed by the parties (N).

B. Delineation of Relevant Markets

1. Objective

301. The delineation of relevant markets is an essential step in merger control insofar as it makes it possible to identify the perimeter within which competition plays, and thereafter to assess the market power of the firms that operate in this market. This analysis covers the markets in which the parties are simultaneously operate, but it can also extend to markets that are in some ways related, and that could add to the new entity's market power.

302. The Conseil de la concurrence has defined a relevant market in the following terms: "A relevant market is defined as the place in which supply and demand meet for a specific product or service. In theory, in a relevant market, the units offered are perfectly substitutable for consumers who can thus arbitrate between the suppliers when there are several of them, which implies that each supplier is subject to competition through the prices of the others. Conversely, a supplier in a relevant market is not directly limited by the price strategies of suppliers in different markets, since the latter market products or services that do not respond to the same demand and that, for consumers, therefore do not constitute substitutable products. Since perfect substitutability between products or services is rarely seen, the Conseil considers as substitutable and available within the same market those products or services for which it can reasonably be thought that consumers will consider them as alternatives to one another, amongst which they can choose in order to satisfy a given demand"

303. On such a series of products and services, a company that is the only one to offer them or that offers a significant part of them would be able to exercise market power, for example by increasing its prices independently of its customers and competitors. The reasoning is the one that is used in the hypothetical monopolist test. As recalled by the Commission, in this test, the question is to determine "whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable". In other words, the aim is to assess to what degree a small but

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60 The test is also called "SSNIP" (Small but Significant Non-transitory Increase in Price).

61 European Commission notice on the definition of relevant market for the purposes of Community competition law, OJEC C372 of 9 December 1997.
significant and non-transitory increase of the price of a product that is
offered only by a single supplier (monopolist) would be profitable for the
latter on the basis of the reactions of its customers to this price increase. If a
sufficient share of customers choose a substitute, then the price increase will
not be profitable.  

304. If the customers of the firm resulting from the concentration cannot switch
to alternative products or services offered by competitors, the operation may
significantly impedes effective competition. It is therefore necessary, when
preparing the assessment of the effects of the concentration on competition
to delineate the relevant markets that cover the products or services offered
by the firm that results from the merger and those of its competitors that
customers would view as substitutable.

305. The delineation of the product or services market also involves identifying
the geographical zone in which a firm that has market power will actually be
able to wield this power without being exposed to significant competition
from other firms located in other geographical zones.

306. When the delineation of the relevant markets is not indispensable for
reaching a conclusion, for example when, irrespective of the delineation, it
appears that the concentration is not likely to harm competition, the Autorité
can leave matters related to the delineation of markets open in its decision.

2. CRITERIA USED BY THE AUTORITE

307. Delineation of markets involves a prospective analysis: the decision must
take into account evolutions in progress or that can be anticipated in the
reasonable future. The exercise is different from the delineation of markets
in antitrust activities, where the analysis is retro-active: it attempts to
describe the market at the time the practices were performed.

308. As indicated in the above definition of the relevant market, substitutability
between various products or services from the point of view of the
demand is the decisive criterion for delimitation.  

309. In specific cases, the Autorité can nevertheless use the criterion of the
substitutability from the supply-side as the main element for delineating
the relevant markets. Considering the supply’s substitutability in order to
extend a market defined from the point of view of the demand is justified
insofar as it is the firm's market power that the Autorité tries to assess. If
competitors can enter the market very quickly, i.e. in less than a year, at
little cost, then the firm will not be able to exercise market power. The fact
that most suppliers in a market already manufacture different products
generally suggests that the analysis of supply substitutability is adequate.
For example, in the perfume manufacturing sector, the Minister considered

62 However, one must also consider the effect on the monopolist's profitability from the lower costs resulting from decreased activity
related to a shift of part of the demand to competing products.

63 Analysing the substitutability of products from a demand viewpoint does not prevent considering the characteristics of the supply,
insofar as they can explain the behaviour of the demand. For example, the marketing strategies implemented by the firms, just like
the differentiation of the products or that of the distribution methods, can have a direct impact on the substitutability as seen by
customers, and therefore establish a distinction of the markets.
the substitutability of the supply: “the types of products used in the composition of perfumes are fairly close, notably in terms of the manufacturing techniques and of the installations that are used, which prove to be identical. The result is that the aforesaid segments all belong to a single market: namely that of perfume composition”

In the catering sector, the Conseil recalled that “the differences in the service performed, depending on whether the end-consumers are schoolchildren, employees or patients in a healthcare facility, were insufficient to isolate these markets from contract group catering: indeed, it is constant that this sector’s major companies adapt their offers to the various types of customers without specialising in order to respond to the specific needs of a given customer group. While considering the competition between the various suppliers in order to delimit the relevant market, the Conseil concluded that in view of the economic evolution in the sector, the market that had to be taken into consideration was that of contract group catering in its entirety”.

310. In its analysis, the Autorité takes into account previous decisions from Community and national competition authorities relative to the markets concerned, or the delineations of relevant markets as developed in the opinions from the national sectoral regulators. However, changes to the markets can render a prior delineation obsolete, for example when new products have appeared, or when the markets have become international, or when major technological evolutions have taken place. It is for this reason that the Autorité checks that the previous decisions and analyses remain relevant and can be used in order to delineate the relevant markets for a different purpose. In many cases, previous decisional practice has left the question of the exact delineation of markets open, given that, even if one were to use the narrowest limitation, the operation would not bring any competition issues to light. The proposed delineation is then no more than an initial estimate that must be further clarified, should competition issues arise in this specific case.

311. The implementation of the SSNIP test requires a knowledge of the crossed elasticities of the various products or services, in order to select the products that could fall into the same relevant market, simple elasticities as well as the margins on variable costs of the hypothetical monopolist. As the data that would allow these measurements are rarely available, the Autorité generally assesses the substitutability of the products and services by analysing all of the available positive and qualitative indices.

64 Minister’s decision Bayer / Florasynth of 5 May 1995.
65 Crossed elasticity is the percentage of change for a product’s demand relative to the percentage of change for the price of another product.
66 Simple elasticity is the percentage of change for a product's demand relative to the percentage of change for its own price.
312. In order to gather these indices, the Autorité relies on:

- the information, studies and analyses provided by the parties,
- and those obtained from other firms as part of a market test,
- all available public information or market studies and analyses.

3. DELINEATION OF PRODUCT AND SERVICES MARKETS

a) Qualitative indices

313. Given markets diversity, it is not possible to draft an exhaustive list of the indices the Autorité may consult in order to delineate the relevant markets. However, markets’ characteristics that are most commonly used to carry out this analysis are given below:

314. The physical characteristics of the products and services: the characteristics of a product essential elements of the customers’ choice and, as such, are analysed in order to understand their behaviour.

315. However, products that are different from a physical or technical point of view, but that have the same function or are intended for the same purpose, may be viewed by customers as substitutable. As such, in a decision relative to the practices implemented by France Telecom, cable and ADSL were considered to be Internet access means that were part of a single relevant market, since these two technologies offer the same functionalities from the consumers’ view point.

316. Conversely, products that have physical or technical similarities but which are not used for the same purpose do not fall into the same market. As such, in an opinion relative to Boeing’s acquisition of Jeppesen, the market for the supply of maps to airline companies was separated from that of the supply of electronic navigation data to the manufacturers of avionics and to airline companies. However, both types of products could be prepared from the same raw data. However, as these two types of products are not substitutable from the user’s point of view, as these two items fulfil significantly different functions and as the presence of one could not compensate for the absence of the other, it was considered that they belonged to different product markets.

317. In the services industry, the physical characteristics of the supply are commonly taken into account when delimiting relevant markets. For example, the Conseil recalled, in an opinion relative to retail distribution that "the store format and size are also important criteria for the delineation of markets given that, in particular, they determine the aptitude of the point-of-sale in question to market a greater or lesser number of products, or to

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67 Conseil de la concurrence decision 07-D-33 of 15 October 2007.
offer certain related services (parking, etc.). Specialised department stores can therefore be distinguished from large grocery stores, and from local shops. Indeed, such specialised department stores offer greater ranges of products and assortments, as well as services intended to receive and advise consumers. Small-scale shops generally represent only a marginal share of purchases, while primarily fulfilling a convenience function or being intended for only a fraction of the clientele (people without motor vehicles, etc.).

318. **Customer needs**: for example, in its opinion relative to the acquisition of Unibail by the CCIP, in the sector of conferencing facility management, the Conseil noted that "the only discriminating element between the sites intended for general public or mixed trade fairs and those accommodating professional trade fairs could be the constraints regarding accessibility to the sites. Indeed, a general public trade fair must, by necessity, be held in a venue that can accommodate the general public within the local trade area, such that a site that is poorly serviced by public transportation or that is difficult to access by car will have trouble attracting the general public. Inversely, a national trade fair that attracts exhibitors and visitors from throughout France and even, for some of them, from throughout Europe or the world, must be held on a site that is near motorway, rail or air transport infrastructures that will be able to attract exhibitors and visitors while providing sufficient hotel infrastructures in order to accommodate them". After noting that most sites can indiscriminately accommodate professional and general public trade fairs, the Conseil considered "that the segmentation of the site management markets according to whether they accommodate general public or professional trade fairs, is not justified".

319. **Price differences**: a lasting and substantial price gap between different products is a hint of imperfect substitutability between the latter, and therefore of non-attachment to the same market. A price gap can be the cause or consequence of the absence of substitutability. As such, in the lifts market, the Conseil noted that there were considerable price differences between equipment categories, and that the demand for the most expensive products would be unexplainable if the less expensive products represented satisfactory substitutes. Similarly, the 1 to 10 ratio noted between the price of a remote surveillance service and that of an agent-based surveillance service prompted the Conseil to distinguish two markets. Within the market for marketing olive oil through mass retail distribution channels, the Minister, while leaving the question open, considered bringing together the manufacturer brands and the distributor brands (MB and DB) within a single market, but while excluding low priced brands and "hard discount" brands (LPB and HDB), while noting that "the prices, packaging and quality of these two categories are well below those of the MB and DB. As such, the average price of DB and MB is 60% higher than that of HDB and 80% higher than that of LPB. With regard to the product's quality, the

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specifications drafted for the supply of LPB and HDB by the large-scale stores are much less demanding than the ones intended for DB suppliers."

320. However, price levels only provide a hint, and require corroboration with the market's other characteristics. Indeed, price comparisons are only relevant if the quality and durability of the products are equivalent. Also, products can have different prices and be within the same market, notably when they are vertically differentiated. Finally, companies that have information on the willingness of their customers to pay can use different prices according to the customer categories.

321. **Distribution channels**: the distribution strategies of firms can have a direct impact on the substitutability of the products from the point of view of their customers, and can therefore provide an element for distinguishing markets. For example, competition questions related to the manufacturing and distribution of beverages such as beer or carbonated cola-tasting beverages prompted the Conseil to determine that the manufacturers of these beverages did not have the same market power according to whether they were distributed to the end consumer via the mass retail distribution channel, for consumption at home, or via the café / hotel / restaurant channel, for consumption outside of the home.

322. **Brand image**: brand image can be considered as a decisive criterion for market delineation. For example, in a decision relative to the markets for sports footwear, the Conseil isolated football boots within the sports footwear market, while considering "that in order to increase or maintain the renown of their brands, it is customary for the manufacturers of branded football boots to sign sponsorship contracts with professional football clubs, which accept the usage of their image in exchange for the relevant manufacturer's supply of footwear and accessories, as well as, if relevant, the payment of a "financial allocation" that can vary according to the club's renown".

323. **The legal environment**: the existence of a legal standard or specific regulations is also likely to influence the behaviour of demand, insofar as it can influence the prices of products, the quality or the perception that users have of them. For example, in an opinion on the acquisition of Poma by Leitner, the Conseil considered that the various types of mechanical lift systems for ski resorts (drag lifts, single cable, cable cars and funicular railways) were not substitutable with one another, notably in view of the constraints relative to the regulations and the very strict safety and maintenance standards.

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The subjective preferences of customers: in addition to the objective needs of the customers, the Autorité can also consider their subjective preferences. For example, in decision in the weed-killer market, the Conseil noted that "while even admitting that the intrinsic functions of chlorate of soda were objectively not very different from those of other weed killers and that its usage cost is not, for a certain number of applications, a decisive advantage, it is a constant that a majority of consumers consider, as pointed out by many distributors, that chlorate of soda cannot be substituted for other total weed killers". On the other hand, in an opinion relative to an acquisition in the market for the production, processing and sale of salmon, the Conseil noted that "Scottish salmon enjoys, amongst consumers, a better image and greater quality appreciation than salmon from Norway, and that they are willing to pay a higher price for this additional perceived quality", but concluded, after having analysed and weighed all of the criteria likely to serve as the basis for a market distinction, that "the fact that a group of consumers may fail to consider all of the products that meet the same needs as substitutable nevertheless does not prevent these products from belonging to the same relevant market. Given the stability and interdependency of the relative prices, the absence of a truly objective difference and of the possibility of a sufficient proportion of buyers shifting all or part of their demand for one origin to another, the Conseil considers that the various origins of farmed Atlantic salmon belong to the same relevant market".

The fact that the products are targeted to different customer groups: when products are marketed to customers whose needs differ, competition authorities may have to consider different markets by clientele type. Sometimes, it is specific characteristics of the product that are different according to the clientele types for which it is intended, but the specifics may also only relate to the methods for the product's marketing, delivery and packaging, and they may justify different prices. For example, with regard to the manufacturing of foodstuffs, a distinction is generally made depending on whether the products are intended for large or medium-sized stores, meal services outside the home or agri-foodstuffs industries. In the beverage market, the market power of suppliers is assessed in a distinct manner, firstly within the market of consumption outside of the home, and secondly within the market of cafés, hotels and restaurants.

77 Conseil de la concurrence decision 00-D-85 of 20 March 2001.
78 Conseil de la concurrence opinion 06-A-20 of 20 October 2006.
79 See for example, Autorité de la concurrence decision 09-DCC-48 of 22 September 2009, LDC/Marie.
80 Opinion n° 04-A-07 of 18 May 2004 relative to several warehouse acquisitions carried out by the Sogebra-Heineken group in the beer distribution sector for the café, hotel and restaurant circuit and n° 99-A-14 of 28 September 1999 relative to the project for The Coca-Cola Company to acquire the assets of the Pernod Ricard company relative to the 'Orangina' brand beverages.
b) Quantitative methods

326. Beyond the treatment of various indices mentioned above, the delineation of the relevant product markets can also rely on more in-depth **quantitative methods**, though their usage is rare in practice as their rigorous use requires the collection of a large quantity of data.

327. The observation of **price evolutions** can provide precious indications with regard to the substitutability of products, since different products that respond to the same demand should theoretically evolve in a similar manner over time but may display price differentials. The computed data must cover a sufficiently long period (for example, at least two years for monthly data). They must be corrected for seasonal variations that may affect certain markets (such as, for example, temperature changes for certain energy markets, or seasons for tourism).

328. Products’ substitutability is primarily analysed by means of **simple price elasticities** and **price crossed elasticities**\(^1\) of the demand functions. For a "normal" item\(^2\), when its price increases, its demand decreases, the demand for complementary goods decreases, while the demand for substitutable goods increases.

329. As mentioned above, the **hypothetical monopoly test** can be subject of quantitative modelling in order to help with the definition of the relevant market. It should be noted that the hypothetical monopoly test is suitable when the observed prices, on which basis price increase simulations are carried out, are sufficiently competitive prices. On the other hand, its usage becomes increasingly difficult as the observed prices deviate from competitive prices. The typical example (known as the "Cellophane fallacy") is that of a product monopoly for which one must verify whether or not it constitutes a distinct relevant market. A monopoly is capable of applying its monopoly price, i.e. the price that maximises its profit. At this price, any price increase is likely to reduce the profit. The test automatically leads to expand the market beyond its real dimension and therefore to underestimate the firm’s market power and the effects of the concentration operation.

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\(^1\) Crossed elasticity is the percentage of change for a product’s demand relative to the percentage of change for the price of another product.

\(^2\) Simple elasticity is the percentage of change for a product's demand relative to the percentage of change for its own price.

\(^2\) As opposed to so-called "superior" goods or Veblen goods, such as luxury products, for which demand increases the price.
330. For all econometric modelling proposed by the parties in support of a notification, they are asked to provide the methodology that has been followed, and to enclose the source data. The provided elements will be analysed by the economic service within the Autorité.

331. Moreover, when the usual qualitative and quantitative criteria do not allow the delineation of a market with sufficient certainty, particularly in the event of oligopolistic sectors where the supplied products are differentiated, it may be possible to directly identify the closest substitutes to which the demand would shift in the event of a price increase affecting the products concerned. This method was notably used by the Minister in the case of the acquisition of Milan by Bayard\(^3\) in view of the differentiated and heterogeneous nature of the press titles for young people and of the oligopolistic structure of supply. An inventory of the press titles published by competing operators that would constitute close or distant substitutes relative to the titles of the parties was built. This analytical framework made it possible to group press titles for young people according to criteria as to the age of the targeted audience and the topic of the magazine. The categories identified in this way do not correspond with relevant product markets but rather with provisions for grouping magazines according to their degree of substitutability (assessed according to the price, the format, the editorial content, the positioning, the seniority within the market and the paid distribution that serves to measure the title's renown, the distribution network, etc.) in order to determine towards which magazine the demand would shift in case of a unilateral price increase for a category by the new entity. This analysis will be explained below in the analysis of unilateral effects.

4. GEOGRAPHICAL DIMENSION OF THE RELEVANT MARKETS

332. The reality of trade flows, of the distance actually travelled by suppliers or by consumers up to the point where supply and demand are meeting, of the availability of the goods in question for consumers in a geographical zone, and even of the price differences from one zone to another, can serve as market distinctions in geographical terms. For the geographical delimitation of the markets, the Autorité can take various characteristics into account.

333. **Transport costs:** physical constraints can often be tied to the transport cost relative to the value of the products, as is the case for bulk products. As such, in a ruling dated 29 June 1993, the Cour de cassation (French Supreme Court for private law) confirmed the analysis by the Conseil and of the Appeals court, indicating "that tiles and bricks manufactured on-site in the Alsatian region" are not substitutable for others "as a result of the restrictive effect of the transport cost "on bulk construction elements of low value".

334. **The travel distance or time for consumers** is a significant element in the delimitation of geographical markets, such as, for example, the "trade

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areas" in distribution business lines. In an opinion relative to mass retail distribution, the Conseil noted that "if we account for the attractiveness differences related to the size criterion, the times that are normally considered can be set, for supermarkets with an area of less than 1,500 m² at a maximum of 10 minutes, for supermarkets measuring 1,500 m² to 2,499 m², at approximately 15 minutes; that, for hypermarkets of less than 10,000 m², the average travel time can be estimated at 15 to 20 minutes, when they are on an isolated site, and at 30 minutes when part of a shopping centre; and then finally, for hypermarkets of more than 10,000 m², the average time can be set at 30 minutes". The assessment of the distance or travel time can be weighted according to the quality of the road network, the frequency of the necessary trips, the attractiveness inherent to a point-of-sale as a result of its size, the extent of the various available ranges and the quality of the infrastructures attached to it (other services near the point-of-sale, parking).

335. Considering this criterion may make it possible to distinguish different markets according to consumer categories. The demand from firms may as such target suppliers located in a larger geographical zone than the one that would result from the demand from individuals. Similarly, the Minister considered that, in the business travel sector, while the geographical market remains national for SME/SMI, there are grounds to wonder about a larger market dimension for multinational firms insofar as they attempt to have a single supplier for their entire group, one that is capable of providing a service that covers several European countries ("one-stop shopping").

336. Legal and regulatory constraints: some markets are also geographically limited by legal or regulatory constraints. For example, in a decision relative to funeral services, the Conseil noted that "subject to the applicable legislation at the time of the facts, the families could only turn, from the moment that the external service had been organised by the municipality, to the holder of the monopoly, whether directly or through a funeral agency, and that the exemptions anticipated by the law of 9 January 1986 could only apply when the municipality of the location where the laying in the coffin took place was not that of the home of the deceased or of the location of interment or cremation". The applicable national standards can also constitute a criterion for markets delineation. For example, the Conseil noted that, for the market of mechanical units, the cost for adapting foreign devices to the national safety standards was very low relative to the value of the equipment in question, and also given the ongoing harmonisation of the European safety regulations.

337. The subjective preferences of customers: subjective considerations regarding the behaviour of demand, such as regional or national preferences and habits, and the attachment to brands, can also explain why certain products of different geographical origins are not, from the point of view of demand, substitutable for local products. The crossed elasticity of demand between two products can also be different from one geographical zone to

86 Conseil de la concurrence decision n° 00-D-59 of 6 December 2000.
another as a result of local habits. Indeed, as a result of the preferred usage of bricks in residential construction in Alsace, this material is not considered to be substitutable by concrete blocks in this region, although this may well be the case in other regions in France. Also, the Conseil estimated that there was a vanilla market on Reunion Island for tourists who, while visiting the island, consider the product’s local origin as being a decisive criterion when purchasing vanilla, provided that they are purchasing vanilla only because it is a local product.

338. Defined in this way, the markets are sometimes of very limited geographical dimensions (radius of a few dozen kilometres for ready to use concrete or bituminous coated materials; 30 minutes of transportation for the trade areas of hypermarkets; the city of Paris for the presentation of films in cinemas). On the contrary, the effects of European harmonisation, the concentration of firms and the globalisation of exchanges are increasingly leading to the definition of European and even worldwide markets.

339. Certain markets can be the subject of an analysis on several levels. As such, at the time of the examination of the merger of the Banques Populaires and Caisses d'Epargne groups, the Autorité confirmed that the competitive analysis of the retail banking markets and of certain markets of the commercial bank, relative to SME, could be carried out both at national and at local levels. Indeed, the Autorité considered that the market power of banks relied firstly on the size of the groups, as many banking services are characterised by economies of scale and range that favour banks with a very large clientele base and, secondly on their proximity and the quality of their relationship with the customer. Moreover, the Autorité noted that, unlike what had been ascertained by the European Commission in other national markets, these markets have, in France, a certain degree of geographical heterogeneousness, both in terms of the establishment of the various groups and of the interest rates and conditions applied within a given group.

C. ASSESSMENT OF THE DEGREE OF MARKET CONCENTRATION

1. OBJECTIVE

340. After having delineated the relevant markets, the Autorité carries out a preliminary analysis of the market shares and the degree of market concentration. This very useful initial estimate of the market structure and of the importance of the parties involved in the concentration and of their competitors is just the first step of merger analysis. It does not provide indeed an assessment of the state of play of competition, in particular of entry barriers and potential entry. This preliminary analysis does not consider either a possible countervailing buyer power.

88 Autorité de la concurrence decision n° 09-DCC-16 of 22 June 2009.
2. CRITERIA USED BY THE AUTORITÉ

341. The Autorité examines two criteria:

- **the market shares**: the higher the market share of the company resulting from the operation compared to that of its competitors, the greater the probability that the operation creates or strengthens market power;

- **the concentration degree**: the more concentrated the market, the greater the risks of harming competition through coordinated or non-coordinated effects.

342. In practice, the Autorité uses the same thresholds as the European Commission for determining whether or not an operation justifies an in-depth analysis.

343. When the market share of the entity resulting from a horizontal merger is less than 25% or 30%, in case of a vertical or conglomerate merger, the Autorité considers that harmful effects on competition are unlikely, except in special cases.

344. To assess the degree of market concentration, a Herfindahl-Hirschman index (HHI) may be calculated. This index is equal to the sum of the squares of the market shares of each of the firms present in the market. When it is not possible to include all present firms in the calculation due to a lack of information, the calculation may be limited to the main operators with market shares that can be identified, as small actors have a limited impact on the HHI value. The index level after the operation and its variation relative to the previous situation (called the delta) are taken into account.

345. For horizontal mergers, as the Commission recalls it in its guidelines, it is unlikely that an operation will raise horizontal competition issues in a market where the HHI after the merger will be less than 1,000. These markets normally do not require an in-depth investigation. It is also unlikely that the Commission will determine the existence of horizontal competition issues, when the HHI at the end of the operation is between 1,000 and 2,000 and the delta is less than 250, or when the HHI at the end of the operation is higher than 2,000 and the delta is less than 150. For vertical or conglomerate mergers, it is unlikely that an operation will raise competition issues if the HHI after the operation is less than 2,000.
346. However, the Commission recognises the possibility that an operation may harm competition even below these thresholds, in exceptional cases such as:

- one of the parties to the operation is a potential newcomer or a competitor that recently entered the market and whose market share is low but likely to grow quickly,
- one or more parties to the operation are significant innovative firms, which their market share does not bring to light,
- there are significant cross-shareholdings between the firms operating in the market,
- one of the merging parties is a maverick that is likely to undermine coordination between competitors,
- there are clues of past or current coordination, or of practices facilitating coordination,
- one of the merging parties holds, before the merger, a market share greater than or equal to 50%.

347. The Autorité uses the most recent available market shares. If they have changed considerably, it may also consider the market shares during the last two years. The market share of the firm resulting from the operation is calculated by adding up those of the parties to the merger. It can possibly be corrected for market evolution estimates, particularly when the market is growing rapidly.

348. Market shares are analysed in value and volume. The Autorité uses usual volume indicators of the industry, such as the surface areas in $\text{m}^2$ in the distribution sector, or the number of registered vehicles relative to new car sales. In the banking and real estate sectors, the Autorité has also based its analysis on the positions of the firms on the local level using, in the absence of data that would allow for a more detailed assessment of the activity of these agencies, the number of sales offices.

349. The Autorité uses the market shares supplied by the parties in their notification file. It can put into question the provided estimates by leaning on other sources.

D. NON-COORDINATED EFFECTS OF HORIZONTAL MERGERS OR UNILATERAL EFFECTS

1. NATURE OF THESE EFFECTS

350. A competition infringement, for the purposes of Article L. 430-6 of the French Code of commercial law (Code de commerce), may be ascertained first of all when the concentration provides market power to the acquiring firm or the new entity resulting from the operation, or strengthens the market power it already held. When the firms involved in the concentration are current competitors in one or more relevant markets, this effect can go
so far as to create or strengthen a simple dominant position for the benefit of this firm, i.e. the power to prevent the continuation of effective competition within the market in question by providing it with the possibility to act independently from its competitors, its customers and, finally, from end-
consumers. For example, this firm would be able to significantly increase its prices, to reduce the diversity of the products or services available in the market, or its innovation pace. In recent times, competition authorities have examined several operations that resulted in the establishment of monopolies, i.e. an extreme case of strengthening a dominant position. These operations were only authorised subject to commitments limiting their effects on prices or on access conditions for newcomers.

351. Even if a dominant position is neither created nor strengthened to the profit of the newly created firm, a merger between two firms within the same market may harm competition when taking into account the only fact that competition between them disappears. It is indeed possible that, after the operation, the new entity might be able to profitably increase its prices or reduce the volume or quality of its production, whereas before the concentration such behaviour would have led to an excessive carryover of sales to the benefit of other market players. Such an effect has been brought to light on several occasions in the retail sector, for example. The Minister for the economy considered that the acquisition of additional outlets in the local trade areas where the merging parties already controlled some sales points could allow them to profitably increase prices in some shops, as the sales carryover resulting from the price hike would be “caught” by the other outlets that they own anyway.

352. Moreover, the reaction of other firms in the same market and that are not taking part in the merger may, in certain market situations and independently of any coordinated behaviour, contribute to weaken competitive intensity. Indeed, a competitor’s exit can significantly shift competition play in all or part of the market in question, with all of the firms present in the market then being able to benefit from higher prices. The resulting consumer welfare loss may be taken into account by the competition authorities even if the concentration does not create or does not strengthen a dominant position. For example, the *Conseil de la concurrence* considered that a merger in the Atlantic salmon farming industry was likely to have a harmful effect on the prices and quantities of salmon produced in Scotland.

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90 Ref. TPS/Canal Plus and CCIP/Unibail.
91 *Conseil de la concurrence* opinion n° 06-A-20 of 20 October 2006.
2. ANALYSIS CRITERIA

353. The probability that a merger operation will lead to the above-described unilateral effects depends on how competition works in the markets concerned and, in particular, on the analysis of the market power already held by the firms prior to the concentration. All factors that are likely to contribute to such market power may therefore be taken into account: the result of the addition of the market shares of the merging parties; the nature of current competition in the market; the position of the parties towards one another; the constraints to market power that current competitors are able to exert; the probability that other operators, which are not active yet on the market, enter in competition with the current operators; the buying power of customers.

354. In the first step of the analysis, these effects are assessed independently of the efficiency gains that the operation is likely to generate (cf. below, part L).

a) The result of the addition of the merging parties’ market shares

355. A preliminary indication of the effects of a horizontal merger is provided by adding up the market shares of the merging parties, calculated as indicated above starting in paragraph 342, in the markets in which they are both operating.

356. This addition of the market shares generated by the parties before the operation does not consider carryover effects to other competitors, of the demand which initially was addressed to the parties. Indeed, while the importance of this shift can be described, based on the type of competition between the firms before the operation (cf. below in paragraph 365), a quantified estimate of the effect of this shift on the future market shares of the entity resulting from the operation is rarely possible.

357. The existence of very large market shares is an important element in assessing the market power of a firm. High post-concentration market shares, at 50% or more, can lead to a presumption of the existence of significant market power. However, such a presumption is rebuttable. When examining the effects of the acquisition by Seb of certain Moulinex’s assets, the Conseil de la concurrence estimated that "the market shares now held by SEB in certain markets are significant, but the market share is nevertheless only one of the factors that is likely to provide an undertaking with a dominant position (...) Other factors can hinder any exercising of this market power. In particular, the competitive pressure to which the SEB group will be subject after the operation’s completion will depend not only on the current state of the markets but also on the growth potential of other

92 However, certain models intended to quantify such effects can, depending on the form of the adopted production function, directly take the efficiency gains into account.

operators, and therefore on the facilities for accessing the markets concerned”.

358. The significance of market shares can also be assessed differently when competition plays through calls for tender. As such, in the Bombardier / Adtranz decision, the Commission considered that a 50 to 60% market share did not constitute an indicator of a dominant position for the entity resulting from the operation, given that "the markets in question were subject to invitations to tender". Similarly, in the Ernst & Young / Andersen France decision, the Commission considered that a 40 to 55% market share did not constitute an indicator of a dominant position for the entity resulting from the operation on the French market for audit and accounting services for larger businesses, given that "the market for audit services is based on invitations to tender".

359. In the event that one of the parties to the operation holds extremely low market shares (less than 2%), the operation will in principle not harm competition, unless these additional market shares serve to reinforce an already strong position.

360. When the added market shares of the merging parties in the markets where they operate stay below 25%, it is presumed that the operation will not harm competition.

b) The nature of competition operating within the market

361. The nature of competition within the market(s) in which the parties are both operating is also a significant element when analysing the unilateral effects of a merger.

362. For example, even when the entity resulting from the merger will not hold a dominant position, the fact that the market in which the concentration takes place has an oligopolistic character may be a source of concern. In such a configuration, each of the actors has high market shares and the merger of two of them is likely to significantly reduce the competitive constraints that the new entity and the remaining operators are subject to. In general, the degree of market concentration and the effect of market shares addition on that degree, which may have a significant influence on such effects, is an important factor (cf. the HHI calculations above, starting with paragraph 345).

363. The fact that goods or services exchanged in the market are homogeneous or more or less differentiated between suppliers is also taken into account. Indeed, competition intensity, taken as a whole within the market, is in principle weaker in the case of highly differentiated goods. Also, the competitive constraint exerted may vary from one supplier to the other. Moreover, in markets of differentiated goods, competition is more likely to be felt in terms of prices, which is to say that suppliers are able to directly act on the price of the goods or services in question, whereas for homogeneous goods, price movements tend to be rather influenced by

95 Decision COMP/M.2816 of 5 September 2002, Ernst & Young / Andersen France.
quantitative variations of demand and supply. National or Community competition authorities have not settled yet the question of the magnitude of unilateral effects that do not serve to create or strengthen a dominant position in markets of differentiated goods where price is the main competition driver. But the Conseil de la concurrence altered its competitive analysis in a case in which competition was driven by quantities, and in which the products were differentiated not by their supplier, but by the geographical origins of the product in question (salmon from Scotland, Ireland or Norway).

364. The "two-sided" character of markets can also be useful for explaining how competition operates. In such a case, the economic balance in a market cannot be grasped independently of the conditions prevailing in an interconnected market. In the press sector, the Conseil de la concurrence explicitly used, in its opinion 03-A-03 of 20 March 2003 relative to the Comareg / France Antilles concentration, the concept of a two-sided market for illustrating the interdependency between two distinct relevant markets, namely the market for small ads and the market for commercial advertisements: "the market for commercial advertisements and the market for small ads are interdependent and are linked to the audience or to the readership. Indeed, there would be no market for commercial advertisements in the absence of readers, and there would be no readers in the absence of small ads". In the more recent SIPA/Pôle Ouest Sopresse case, the competition authorities considered that the two-sided character of the regional press market considered amongst other elements could contribute to offset the risk of unilateral effects on prices. As the Minister noted in his decision: "Indeed, the economic model of the press as an interface between readers and advertisers, combined with the structural decline of the daily regional press as well as the strong elasticity of demand and low substitutability between titles, limit the new entity's market power over the readership market".

c) The competitive positioning of the merging parties towards each other

365. In market(s) of differentiated goods or services, where merging parties supply close substitutes, the probability that an operation will result in significant horizontal effects rises. Indeed, even if the goods and services in question are not perfect substitutes and if the degree of substitutability may vary, they are sufficiently substitutable from the viewpoint of buyers to be considered as offered in a single relevant market. The position of the remaining competitors must also be taken into account. When merging parties supply close substitutes while non-merging parties do not, it is possible that a large number of customers consider the products sold by the merging parties as their first and second choices. For example, in its opinion relative to the acquisition of Fincar's distribution division by Cafom, the

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96 Conseil de la concurrence opinion 06-A-20 of 20 October 2006: "Competition in the farmed salmon market has specifics that must be taken into account when assessing the operation's effects on how competition operates. Primarily, as a result of the inelasticity of the supply of a living and perishable product, all producers can only, in the short term, accept the price that results from the comparison between this supply and the demand. Competition can therefore only be played out by affecting the quantities, which can only be implemented over the long term in view of the time needed for the growth of the fish".


Conseil de la concurrence observed that, relative to the retail distribution of furnishings and home appliances, "the format of the But and Conforama stores, the ranges of products on offer, the available services and the price positioning are such that the parties to the operation are the closest substitutes within the markets concerned, whereas competing stores offer more limited product ranges or are positioned differently with regard to prices".  

366. Insofar as significant market shares are related to customers who actually consider these two stores as their first and second choices, the elimination of competition between the merging parties may render it profitable for the new entity to increase substantially its prices (or to reduce the volume or the quality of its production). This latter will indeed have the possibility to profit from a number of captive clients whereas in the former situation, a price increase of one of the parties would have led to an important shift to the other party. The possibility for competitors to reposition their offer or for newcomers to enter the market is nevertheless carefully examined by the Autorité (cf. below) as this would counteract these unilateral effects.

367. The loss of rivalry must also be taken into account when one of the merging parties contributed significantly to the dynamics of competition in the pre-merger situation, even if its market share was small. As such, the risk that the operation might harm competition is greater if the operation leads to the elimination of the actor who contributed actively to competition (sometimes called a "maverick"). This can be the case when a party to the concentration was a newcomer that would have exerted a strong competitive pressure if it had stayed independent. Technological breakthroughs can also lead small market operators to play a major role in the dynamics of competition. For example, the Minister for the economy considered that the set-up of terrestrial digital television would be a leverage for the TMC channel in the television advertising market and that its market share recorded in previous years was a poor indicator of its future market power.

**d) The competitive pressure exerted by parties remaining on the market**

368. The number, market shares and competitive assets of the new entity’s competitors are also key elements when analysing a merger’s horizontal effects. In particular, the Autorité assesses the ability of current competitors to react to the new post-merger situation. The size of the competitors, their production capacities, the gap between their market share and that of the new entity constitute major indicators for assessing if competitors will be able to absorb the demand should the new firm increase its prices (or if competitors would have the possibility to increase the quantities sold on the market if the new entity should decrease its production). Consideration is also given to their interest of doing so. In certain market configurations, they may, even in the absence of coordination with the new entity, find it more profitable to benefit from price hikes after the merger. With regard to the previously mentioned merger in the farmed Atlantic salmon market, the Conseil de la concurrence noted in this regard: "In theory, it is in their

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100 Minister's decision C2002-51 Mr Bricolage/Tabur of 29 August 2002.
interest to produce more than they would have in the prior state of the market in order to benefit from the supply deficit relative to a no-merger situation. However, it is not more in the interest of the competitors to totally compensate for this deficit. The cumulative effect of the operation, considering reduced production by the parties as well as higher production by the competitors, is therefore still negative: after a merger operation, the total quantity on offer is lower than what it would have been without the operation and, consequently, the market price is higher than it would have been without the operation. Of course, the competitors must have the capacity to react. If they are limited in terms of available capacities, the supply deficit and tension on prices will be greater”.

369. However, competitors’ reactions possibilities may be hindered by the new entity which would, for example, control upstream resources needed for production, or access to content in the media sector, or patents and intellectual property rights that are essential for competitors, or even significant downstream distribution capacities relative to the goods and services in question. The fact that the merging parties are vertically integrated in upstream and downstream markets is apt to strengthen the horizontal effects already resulting from aggregated market shares102 (cf. below part E on the vertical effects of mergers).

370. The constraint exerted by competitors can also be hindered by supplier switching costs. These switching costs can spring from subscriptions or other types of contracts that it would be expensive for customers to terminate. The adverse effect on competition is particularly strong when high switching costs incite consumers to accept tacit renewal.

371. For example, in its opinion on the acquisition of the CCMX holding company by CEGID, the Conseil de la concurrence indicated103 that “the purchase of a licence for a chartered accountant software package is amortised after 3 to 4 years, and it is therefore only as of the fifth year that the firm might begin to consider the timeliness of changing its IT solution. The switching costs are significant since beyond the direct cost of the software package, one must consider the need to train personnel as well as the costs and risks attached to transferring files to a new system. CEGID indicates that sellers have developed solutions for a quick and risk-free migration of data from one system to another. However, this progress does not do away with the migration costs, notably in terms of risks taken by the firm as it moves from a proven solution to one that it does not know yet. In fact, a large portion of the interviewed customers consider that they are captive of their service provider. The significance of these costs explains the fact that firms hesitate to change software packages, and that they use the updates provided by their service provider in order to adapt their software”.

372. These switching costs can nevertheless be relative. With regard to the same operation between manufacturers of chartered accountant software packages, the Conseil noted that "nevertheless, a software change becomes attractive, and is even necessary, when the existing package is based on outdated technology. In these circumstances, the costs borne by the chartered accountancy firm are almost equivalent whether it chooses a new range produced by the same service provider or a product from another provider". In this specific case, the innovation-based dynamics of the sector would neutralise switching costs’ effects and put various actors back on the level playing field.

373. Customers’ ability to change suppliers can also be hindered by the fact that they attach particular importance to one of the offer’s characteristics from the company resulting from the operation, thereby leading to reduced substitutability with other available offers, even though it had been considered that the relevant market for the analysis encompassed all of these offers. In markets in which brand image plays a significant role, the mobility of consumers can thus be reduced.

e) Customers’ buying power

374. A firm’s market power can be efficiently constrained by the buying power or their countervailing buying power. The effects of a merger effects can therefore be assessed differently depending on the nature of customers – residential or business- or whether it is a retail or wholesale market. When it is a business-to-business market, the high degree of concentration of customers, their size and diversity of their purchases are likely to contribute to a countervailing buying power to the new entity’s own market power. On the other hand, when prices are negotiated with each customer, the market power of the new entity is less efficiently constrained as the buying power exerted by certain customers does not benefit less powerful customers, towards which the new entity may exert its own power.

375. As such, in several opinions, the Conseil de la concurrence expressed the view that the strong concentration of mass retail distribution in France and the buying power it provided to firms gave distributors strong bargaining power relative to suppliers. In an opinion on the acquisition of Moulinex’s assets by Seb, it therefore explained that: "The statements of distributors put forward their freedom of choice relative to brands and their desire to diversify their supply services when faced with the increasing market shares of one supplier. Certain ones indicate that they have already reacted to the Seb / Moulinex merger by offering competing suppliers an opportunity to develop their notoriety and presence on shelves".

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376. Similarly, in the magazine printing sector, the Conseil noted that publishers did not hold insignificant market power, for several reasons: publishing is concentrated in the hands of a small number of powerful actors, publishers can divide the printing of a single magazine between several printers, printers had significant surplus production capacities. The Conseil considered that this market power was likely to counterbalance the new entity’s market power in a market segment for the printing of magazines limited to "hot" editions.

f) Potential competition

377. A firm’s market power, even if it has a high market share, can also be efficiently constrained not only by non-merging competitors’ reactions, but also by the fact that it is relatively easy for new actors to enter the market in question. When this is the case, any deterioration of the initial market conditions linked to the merger will be viewed as an opportunity for newcomers, and these new entries will help to re-establish the initial competition conditions. Competition, even potential, therefore exerts pressure on the behaviour of the existing actors.

378. As a result, and as the Commission indicates in the 2004 guidelines, "when market entry is sufficiently easy, a merger is unlikely to raise any significant anticompetitive risk". Entry barriers in the market in question are therefore an important analytical factor. One must nevertheless ensure that possible entry is timely and large enough to exert an effective constraint.

379. Entry barriers may take various shapes. Firstly, the arrival of competitors in the market may be rendered more difficult by barriers related to regulations or to the protection of intellectual property. For example, regulations of commercial zoning deter the creation of new outlets and justify that a significant weight should be given to the market shares of incumbent market players in the retail distribution sector. Price regulations intended to keep them at a low level have also been considered as a barrier to entry in the markets for homeopathic medications.

380. Secondly, new entry will be even less probable if it becomes riskier in the post-merger situation. Thus, the risk associated with entry grows with the level of associated sunk costs. The fact that a newcomer cannot exert significant competition within the market without incurring significant advertising expenditure in order to support its brand is for example considered as a barrier to entry.

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106 Conseil de la concurrence opinion 01-A-10 of 6 February 2009 (Printers/Quebecor).
107 See the classification proposed in the thematic study on entry barriers in the 2006 annual report.
381. For example, in the Coca-cola / Carlsberg concentration, the Commission\textsuperscript{109} noted that "CSDs (carbonated soft drinks) rely heavily on brand image, and companies like TCCC and PepsiCo have established brand loyalty through heavy investment to maintain the high profile of their brands. The introduction of a new brand would thus require heavy expenditure on advertising and promotion in order to persuade brand-loyal consumers to switch away from their usual CSD brand. Moreover, consumer loyalty to the established brands would make it difficult for a new supplier to persuade retail customers to change suppliers and would thus further hinder entry. Such advertising and promotion expenditures are sunk costs and add substantially to the risk of entry".

382. The Autorité also assesses the importance of fixed costs and the conditions under which they can be recouped, i.e. the combination of market share and time needed in order to amortise the initial investment. The higher the fixed costs, the larger the scale of the entry into the market must be in order to be profitable. The capitalistic intensity of an industry, as a result of fixed costs for research and development, production or marketing, the level of economies of scale required to be competitive in the relevant market, or disadvantages such as inexperience and a lack of know-how can lead potential newcomers to consider that they cannot recoup sunk costs in case their entry is not successful. For example, in its opinion relative to the acquisition of Atos company by Experian company, the Conseil considered that the investment needed to enter the cheque processing market was relatively low as compared to the profitability prospects\textsuperscript{110}. In its prospective analysis of the markets, the Conseil also took into account the major technological shift that was taking place in the sector: the dematerialisation of cheque clearing operations that has arisen with the set-up of the Cheque image exchange (CIE) system. This evolution was estimated to have had two effects: firstly, it reduced the importance of geographical proximity between processing centres and bank local offices, thereby reducing the need of a comprehensive geographical network. Secondly, it reduces the investments needed in order to set up a centre, by making sorters unnecessary. Overall, the Conseil concluded that "while the constraints linked to a competitive operator's size constitute one of the factors that explain the concentration, they do not necessarily constitute an overriding obstacle to market access".

\textsuperscript{109} Commission decision of 11 September 1997 relative to the Coca-Cola Company / Carlsberg SA merger.

\textsuperscript{110} Conseil de la concurrence opinion 03-A-15 of 25 July 2003: "Both the Experian company and its main competitor, the Safig company, estimate the minimum size of a competitive cheque processing centre to be approximately 100,000/150,000 cheques per day, i.e. over 250 days, 0.74% to 1.11% of the volumes handled within this market in 2002. Despite slightly divergent assessments of the equipment purchase cost in the cheque processing sector (between 20,000 and 150,000 euros depending notably on the capacity of the reader-sorters), the operators agree in their estimate that the initial investment needed for a centre with this capacity can be amortised with only a single 3-year contract under normal business conditions. Indeed, the fixed costs are relatively insignificant, as the processing of cheques is primarily a manpower activity (70% of the total costs)".
The existence of network effects may also constitute an overarching obstacle. A product market has network effects when the product’s overall usefulness for the consumers that use it depends not only on their personal usage of it, but also on the number of other consumers using this product. Such a network effect is a direct network effect. There is an indirect network effect when the user value of an item increases as the number and variety of complementary products increases. For example, such effects play a significant role in air transport: "The fact that a company has an extended network, offering high frequencies and quick connections structured around a 'hub', can constitute a significant entry barrier for competing companies that do not have the benefit of such an attractive network." 111

Moreover, certain advantages available to the market’s incumbent actors are difficult to reproduce for newcomers. For example, in the aforesaid opinion on the acquisition of the CCMX holding company by CEGID, the Conseil mentions that the renown of the suppliers guarantees, in the eyes of customers, the durability and quality of the purchased product: "When a change of operators is envisaged, renown is then one of the main criteria in the choice of an IT service provider. The status of the products sold by vendors is measured in terms of software performance and also of the reliability of the assistance and maintenance services. Customers appreciate this quality primarily on the basis of the renown and long-term existence of the vendors. Chartered accountants also stress the importance of a vendor’s continued existence: the disappearance, or even the mere purchase of a vendor, leads to a risk as to the follow-up of the range and the continuation of maintenance and assistance services".

In more general terms, the existence of switching costs, as already described above in paragraph 370, prevents customers not only from shifting to non-merging competitors, but even more so to newcomers.

As such, entry barriers may result from the existence of supply or distribution contracts benefiting to one or several market actors. In the opinion on the TPS/Canal Plus merger, the Conseil noted that long-term exclusive contracts completely foreclosed access to certain premium television contents: “[...] considerable essential content is not available due to exclusive rights. As such, to create a channel with a movie theme, a newcomer needs to acquire content, i.e. pay-TV rights that apply both to recent American and French films, and to catalogues of films. However, the master contracts with American studios are all held by the parties for long periods”.

111 Letter from the Minister for the economy to the Board of the Air France company, dated 27 April 2000.
387. It should finally be noted that the fact that no entry has taken place does not suffice to establish the existence of entry barriers. Conversely, the fact that new firms have entered the market does not prove per se that entry barriers are insignificant. Indeed, both the absence of entry and new entries are phenomena of exceptional nature\textsuperscript{112}. The observation of past entries may at most constitute an indication that has to be examined amongst other analytical factors.

388. Certain of these entry barriers may be easier to overcome for some potential competitors than for others. For example, in the CEGID/CCMX opinion, the Conseil de la concurrence noted that "the importance of the notoriety criterion has nevertheless not, in the past, been a market entry obstacle for new publishers, insofar as former employees of publishers already present in the market had created the merging parties. As such, Coala had been created by former CEGID employees, and the Ibiza software program was developed by a former employee of the Sage company and is being marketed by a former CCMX employee. The technological breakthroughs described above favoured these creations through spinning off. The existing structures hesitate to innovate such that the opportunities are then seized by former employees who create their own company in order to develop the innovation in question". Similarly, certain companies located in related markets can benefit from strengths in terms of know-how or range savings that will allow them to reduce the specific investment for entry into the market, or the sunk costs.

389. As such, the easier it is to identify potential newcomers, the more likely these entries will be.

390. Finally, entry timeliness is an essential factor. As such, the Commission's guidelines on horizontal mergers indicate that the Commission "examines whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants. However, entry is normally only considered timely if it occurs within two years\textsuperscript{113}.

E. NON-COOORDINATED EFFECTS IN VERTICAL MERGERS

1. NATURE OF THESE EFFECTS

391. Vertical effects of mergers are analysed when the concentration brings together market operators present at various stages of the value chain. This may include the acquisition by a supplier of assets of its distributors (or the other way round), or the acquisition, by a company, that already operates

\textsuperscript{112} Conseil de la concurrence opinion 03-A-15 of 25 July 2003, Experian/Atos

\textsuperscript{113} Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, of 5 February 2004 - paragraph 74.
upstream and downstream, of additional capacities at one of these levels, or at both levels.

392. A vertical merger is likely to result in efficiency gains and to promote competition (integration of complementary activities, suppression or reduction of double marginalisation, cut in transaction costs, better organisation of the production process, etc.). As such, in the Arc / Callens-Lesage case, the Conseil determined\(^{114}\) that "the economic analysis of the behaviour of the undertakings brought to light the efficiency gains that are likely to result from vertical integration, as a result of improved interplay of the decisions taken between suppliers and distributors, and notably the consideration of the externalities of the decisions taken on one level and from which another level could benefit: both downstream and upstream, each economic actor makes decisions that affect the other level, and vertical integration can promote decision-making in line with common interests. Vertical mergers also serve to reduce the extent of double marginalisation. Indeed, when two upstream and downstream undertakings separately maximise their own profits, each one imposes a negative externality on the other, thereby causing a decrease of the consumer surplus and of the profits of the undertakings. By aligning the interests of both parties, vertical integration does away with these externalities, which leads to a more efficient price or service level".

393. However, a vertical merger may also distort competition by making it more difficult to access the markets in which the new entity will operate, and even by potentially evicting competitors or harm them by increasing their costs. We then refer to markets' "locking down" or "foreclosure". Such a situation increases the new entity's market power and allows it to increase prices or to reduce output.

394. It is this type of effect of that, for example, was brought to light by the Conseil de la concurrence in the case of Vivendi / Canal +\(^{115}\), submitted to the control authorities in 2000: "Whereas the group's vertical integration, strengthened by the operation now being examined, is in principle likely to include several anticompetitive effects; that [...] situations of purchasing or sale power at certain levels of the value chain could be reinforced as a result; that risks of crowding out of less vertically integrated competitors cannot be excluded". The strengthening of entry barriers for potential competitors is particularly harmful when the new entity's vertical integration requires that they too enter both the upstream and downstream markets. In the aforesaid Vivendi / Canal + case, the Conseil indicated that "the establishment of large integrated groups occupying a strong position both in the content and advertising markets could contribute to making any entry into the markets in question more difficult; that in fact, once the upstream and downstream activities are dominated by integrated groups, it will be difficult for a newcomer to enter only one level of the market".

\(^{114}\) Conseil de la concurrence opinion 04-A-20 of 22 October 2004 relative to the acquisition by the Arc International company of the Vachaud Distribution, Financière Saint Laurent, Piffaut and Callens-Lesage Group.

\(^{115}\) Conseil de la concurrence opinion 00-A-04 of 29 February 2000 relative to the acquisition by the Vivendi company of the 15% interest held by the Richemont group in the Canal + company.
In the guidelines on the assessment of non-horizontal mergers adopted on 28 November 2007 by the European Commission\(^{116}\), two types of foreclosures are clearly distinguished. In the first case, the integrated firm refuses to sell an input to its downstream competitors or provides it to them at a higher price, under unfavourable conditions or at a deteriorated quality level (foreclosure of the inputs market). This foreclosure can be total, when the competitors are no longer supplied at all, or partial, when the hardening of the price terms results in higher costs for competitors. In the second case, the downstream branch of the integrated firm refuses to buy or to distribute the products of the active upstream manufacturers and then reduces their commercial outlets (foreclosure of the access to the clientele)\(^{117}\).

2. ANALYSIS CRITERIA

In these most recent decisions\(^{118}\) as well as in the guidelines mentioned in the previous paragraph, the European Commission assesses the probability of an input foreclosure scenario, on the one hand, and that of a customer foreclosure, on the other hand, by first examining if the entity resulting from the merger would have, after the merger, the ability to foreclose access to inputs or the clientele in a significant manner, secondly, if there are sufficient incentives to do so, and thirdly, if such a foreclosure strategy would have a significant effect on the markets in question.

In practice, these three constraints are intertwined and are examined together. They are determined by most of the parameters that are also taken into account in an analysis of horizontal mergers and already presented above, as summarised by the Conseil de la concurrence in the Kronenbourg/CHR case\(^{119}\): "The feasibility and interest value of foreclosure practices depend [...] firstly, on the integrated undertaking's market power. Similarly, the presence in the upstream and downstream markets of other vertically integrated undertakings has to be taken into account when assessing the degree of the closing of these markets after the integration. Secondly, in order for these practices to prevent a competitor's access to the downstream market, the latter's entry must be difficult, and there must not be any sufficient alternatives to distribution by the integrated undertaking. The criteria that call into question the interest value of these practices for the integrated company naturally observe that, should foreclosure practices exist, non-integrated companies can protect themselves by contracting with other independent firms or by assuming control. Of course, it must be necessary for these independent companies to exist, or be able to be created. The Commission nevertheless insists on the importance of entry into competition that is not only sufficient but also effective."

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\(^{117}\) Other risks related to vertical mergers have been identified by the competition authorities. For example, a dominant operator in a downstream market can obtain, through the acquisition of a firm that provides a significant input for its competitors in the said downstream market, the possibility of obtaining precise knowledge of the costs and consumption of the said competitors, which can constitute a decisive competitive advantage, thereby allowing it to adapt its downstream rate policy and thus supplant its rivals. This type of "foreclosure" or indirect "lock down" risk was most notably brought to light in the ENI/EDP/GDP: case, through the acquisition of GDP, when EDP, the main electricity producer in Portugal, was able to find out the costs of gas supplies (and of the consumption figures) of its main competitor in the electricity market.


\(^{119}\) Conseil de la concurrence opinion 04-A-08 of 18 May 2004 relative to several warehouse acquisitions carried out by the Scottish & Newcastle-Kronenbourg group in the beer distribution sector for the CHR (café, hotel, restaurant) circuit.
barriers: "Wherever it is relatively easy for competing suppliers to create new buyers or to find alternative buyers for the product, foreclosure is unlikely to be a real problem" (point 144 of the guidelines). It also insists on the counterweight ability of buyers who, if they are sufficiently powerful, will not easily allow the offer of competing goods or services to be pushed away".

398. The specific application of these criteria to the risk analysis, both of input and customer foreclosure, will be examined below [the new entity's market power (a), the reaction capacities of competitors (b), the market entry barriers (c) and the purchasing power of customers (d)]. The other criteria that may determine the probability of the foreclosure scenarios will be presented thereafter (e).

a) Market power of the merged firm

399. Vertical integration of a firm or its strengthening can harm competition when the said company holds, in one or more markets concerned, a substantial market power that may serve as a leverage (either over the upstream markets through input foreclosure, or over the downstream market through customer foreclosure).

400. The Autorité considers that it is unlikely that a firm whose market share is lower than 30% in a given market is able to foreclose any upstream or downstream market. Indeed, in the aforesaid Arc / Callens-Lesage case, the Conseil de la concurrence indicated that "vertical integration produces [...] the same effects as the restrictive competition clauses signed between a supplier and its distributors". However, "EC Regulation [n° 2790/99 relative to the application of Article 81(3) of the EC Treaty] does not indicate that there is a competitive risk if the supplier's market share does not exceed 30%". As such, in the Bigard / Socopa decision, the risk of vertical effects was set aside by the Minister in certain of the meat markets (sheep, pigs, veal) given that the measurement of the new entity's market shares did not exceed 30%, whether the processing level was taken or not into consideration.

401. Moreover, when the aim is to assess the new entity's market power within the framework of vertical mergers, own-account consumption can be taken into consideration. As such, in the Channel +/-TPS case, the Conseil de la concurrence considered that the relation between Canal + and its distribution partner did not involve own-account consumption, i.e. the manufacturing of an intermediate product by a firm for the purposes of its own consumption: "In any event, if the distribution by the Canal + station had to be considered as own-account consumption, this would not change the competitive analysis given that own-account consumption must be taken into account when assessing the new entity's market power". Indeed, internal production can prove to be very important in a competitive analysis,

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120 Letter from the Minister for the economy, industry and employment C2008-100 /17 February 2009 to the board of the BIGARD company, relative to a merger in the meat sector.

121 Conseil de la concurrence opinion 06-A-13 of 13 July 2006 relative to the acquisition of the TPS and Canal Satellite companies by Vivendi Universal and the Canal Plus Group.
as a competitive constraint or factor that strengthens the position of a firm in the market.

402. Besides market shares, market power may also be strengthened by the relevant product's characteristics. In particular, it is important, in order to assess possible input foreclosure, to assess how necessary the inputs involved are for the firms operating at the downstream level. This is the case, for example, when the input is a critical element used in the composition of the products or services sold at the downstream level. As such, in the GE / Honeywell case\footnote{Case COMP/M.2220 - General Electric / Honeywell of 3 July 2001.}, the Commission considered that since Honeywell was a supplier of key components for direct competitors of GE GE would hold "an important stronghold further up the supply chain line" and direct control over the supply of these key components to its competitors after the concentration is carried out. In particular, this can involve an input whose cost is critical to the pricing of the downstream product, or to differentiation at the downstream level (e.g. recognised brand, specific technology). Similarly, in the GE / Smiths Aerospace case\footnote{Case COMP/M.4561 - GE / SMITHS AEROSPACE of 23 April 2007.}, the Commission ruled out the possibility of input foreclosure, notably because the input in question only represented [0-5\%] of the cost of an engine.

403. Symmetrically, customer foreclosure is characterised when the new entity is able to control essential outputs for upstream operators. By examining the effects of the Arc International company's acquisition of several wholesalers involved in the wholesale distribution markets for tableware\footnote{Aforesaid Conseil de la concurrence opinion 04-A-20 of 22 October 2004}, the Conseil recalled that "In order to be able to impose itself as a necessary conduit between suppliers and the end customer, and to be able to close off access to downstream markets for competing manufacturers, the integrated undertaking must have market power over the distribution markets". Similarly, the Conseil noted the strong concentration in the beer distribution market when it issued a decision on the effects of the acquisition of several warehouse operator / wholesalers by the brewers Heineken and Kronenbourg\footnote{Aforesaid Conseil de la concurrence opinion 04-A-07 and 04-A-08 of 18 May 2004.}.

b) Reaction capacities of competitors

404. With regard to vertical mergers, the reaction capacities of non-merging competitors depend on their own vertical integration, their production capacity, their efficiency, counter-strategies that they may develop, alternatives that they can propose, alternative outlets that they may find, but also on exclusivity or long-term contracts binding operators at different stages of the value chain.
405. The presence in the upstream and downstream markets of other vertically integrated firms has to be taken into account when assessing potential foreclosure. Foreclosure is relatively unlikely if the new entity's competitors are also vertically integrated and if they have internal production capacities or outlets. As such, in the Rhodia / Chlorap case\textsuperscript{126}, Rhodia's acquisition of a chlorine producer was not considered to be a foreclosure factor insofar as competitors were able to supply in-house their own chlorine. In the aforesaid Colas / Spie and Vivendi / Canal + cases, the existence of other integrated groups was an important factor in the analysis.

406. When downstream competitors depend on the merging parties for their inputs, it is necessary to determine if they will be able to find an alternative source, or in other words if the new entity's upstream competitors have the ability to increase their production or, on the contrary, if they are subject to capacity constraints or to a possible decrease of their returns to scale. Thus, in the Evraz / Highveld case\textsuperscript{127}, the Commission considered that in view of the limited number of competitors of the parties in the upstream market and of their capacity constraints, purchasers of highly purified vanadic pentoxide would be unable to find an alternative supplier. It is also necessary to consider the possible capacities of the upstream competitors that may be made available by the new entity's integration. Indeed, if the downstream division of the new entity only buys its inputs from the upstream division, this may release capacities amongst the alternative suppliers of the inputs.

407. With regard to customer foreclosure, one must determine if the upstream competitors will be able to find alternative outlets. As such, in the Banamart / Fruidor case\textsuperscript{128}, the Minister considered that Fruidor's competitors in the downstream wholesale banana sales market provided sufficient outlets so that plantain producers / importers, the competitors of Banamart in the upstream market, would be able to sell their products.

408. Finally, an analysis of exclusivity or long-term contracts can be essential for analysing the effects of a vertical concentration. They can strengthen the dependency of competitors if such contracts bind them to the new entity, or on the contrary can constrain the market power of the merged firm and protect competitors by ensuring credible alternative supplies / outlets. For example, in the aforesaid Arc / Callens-Lesage case, the Conseil indicated that "in addition, there are weak entry barriers to the activity of a tableware wholesaler. Contracts between suppliers and distributors are renegotiated each year, which provides the market with a certain degree of fluidity". In the TomTom / Tele Atlas case\textsuperscript{129}, the Commission noted that the existence of long-term contracts protects the new entity's main competitor: "Garmin,

\textsuperscript{126} Letter from the Minister for the economy, finance and industry C2004-170 / of 13 January 2005 to the boards of the Rhodia company relative to a merger in the chemical products sector.

\textsuperscript{127} Case COMP/M.4494 - EVRAZ / HIGHVELD of 20 February 2007.

\textsuperscript{128} Letter from the Minister for the economy, industry and employment C2008-67 / of 4 September 2008 to the board of the Baninvest company, relative to a merger in the food sector.

which is TomTom’s most important competitor in the PND market, is largely protected against increases in the price of map databases by virtue of its long-term contract with NAVTEQ. (…) This protection from foreclosure for Garmin will limit the profits that TomTom could capture on the downstream market if it engaged in input strategy”.

c) Potential competition

409. As in the analysis of unilateral effects, the role of entry barriers is also a critical part of the competitive assessment. Indeed, if entry barriers are low and entry at the upstream and/or downstream level is relatively easy, foreclosure of the markets concerned is rather unlikely. The Autorité therefore takes into account the possibility that potential competitors might be able to challenge the market power of the new entity. The pressure exerted by possible competitors will be considered to exert actual constraint if entry is likely, timely and sufficient to deter or offset anticompetitive effects. Entry barriers are analysed on the basis of the principles developed starting in paragraphs 291 above.

410. The existence of switching costs can notably play an important role, insofar as these switching costs have an impact on the ability of competitors to change suppliers or distributors. As such, in the Kronenbourg/CHR case, such switching costs were brought to light by the Conseil: "The weight of the beer contracts also limits the ability of CHR retailers to quickly change distributors and suppliers. The strong proportion of CHR that are bound to a brewer by a five-year beer contract was pointed out in paragraph 263 above (approximately 70 to 80%)”. In general terms, the degree of fluidity of the market is an important factor. This fluidity can notably be assessed by considering the duration of contracts in the sector in question, the renewal method for these contracts (automatic rollover or not), the possible penalties in case of early interruption, etc.

d) Countervailing buyer power

411. When analysing an operation’s vertical effects, the Autorité also considers countervailing buyer power. Indeed, if buyers are powerful, they will be able to thwart a possible foreclosure strategy by the newly integrated firm, for example by encouraging the development of new competitors. For example, if the clientele of a downstream firm takes full advantage of the offer of a range of products (notably different brands), this firm will have to maintain diversified supplies from its various upstream suppliers.
412. For example, in the Saint-Gobain / BPB case, the Commission considered that distribution networks such as Point P had to provide their clientele with a very broad range of products and, as such, Point P would not be able to limit its range of plaster-based products to those of BPB. In the Colas/ Spie Rail decision, the activity of Emofer, a subsidiary of Spie Rail active in the market for the production and marketing of concrete cross ties, was dependent on purchases from the market’s main principal, RFF/SNCF, that had no interest in losing the benefit of its monopsony position and in depending only on a single supplier.

e) Foreclosure scenarios

413. Besides market characteristics, the Autorité also concretely analyses the probability of the adoption of foreclosure strategies by the new entity, by considering both the incentives for the adoption of such behaviour as well as factors that will serve to decrease and even eliminate such incentives, including the possibly illegal nature of such behaviour. To begin with, the aim is to demonstrate that the vertically integrated firm resulting from the operation will be encouraged to foreclose the market. This inducement depends on the profitability of the foreclosure.

414. As such, in the case of input foreclosure, a decrease of sales of inputs to the downstream competitors has in a first phase negative effects on the new entity's profitability. However, later on, the new entity may benefit from the declining sales of its downstream competitors as a result of deteriorated quality, higher costs or a lack of available inputs, and may increase the price invoiced to consumers or increase its market share at the downstream level. In case of customer foreclosure, the new entity has to draw the balance between two possible effects: on the one hand it may weaken or eliminate competition, but on the other hand, if the upstream division terminates contracts with its competitors at the upstream level and stops supplying them inputs, this implies that the new entity will bear higher costs and lose sales at the downstream level. As such, in the EDF / South Western Electricity case, the Commission considered that it could rule out the scenario of foreclosure resulting from the vertical integration between the generation activities of EDF and LE and the distribution activities of SWEB given that EDF’s sale to its downstream division at low prices would constitute an expensive strategy and would not be sufficient to evict competitors at the distribution level.

415. Various factors can therefore hamper the new entity's incentives to foreclose its competitors. In particular, an important element is the level of profits and therefore of margins generated upstream and downstream. Indeed, it is unlikely that a company will consent to significant losses in a market in which it generates high margins in order to increase its market share in a market where the margins are low.

131 Letter from the Minister for the economy, finance and industry C2007-22 / of 14 May 2007, to the boards of the Colas company, relative to a concentration in the sector for the installation and maintenance of railways.
416. Moreover, when demand shifts away from the downstream competitors, it is necessary to determine what share of this demand will be diverted to the new entity. This share will notably depend on the new entity's available capacities, on the degree of substitutability that exists between the new entity's products and those of the remaining competitors, etc. As such, in the aforesaid Saint-Gobain / BPB case, given that it would have been difficult for Saint-Gobain to increase its distribution capacity, it was considered as rather improbable that BPB, the main supplier of gypsum plasterboard to the United Kingdom, would reduce its deliveries to Saint-Gobain's competing distributors.

417. The diversity of the available product ranges is also likely to have an impact on the profitability of new entity's strategy. In the decision C2008-103 Dole France / Compagnie fruitière, the new entity would have had no interest in depriving its competitors of their supplies in the wholesale sector, given that these competitors also run outlets for the other fruits sold by its upstream division and that, in retaliation, they might have chosen other suppliers than the new entity for their purchases of these other fruits.

418. Moreover, the new vertically integrated entity also has an interest in selling off all its production. As such, in the Lafarge / Blue Circle case133, the Commission considered that it was not possible for Lafarge, a major actor in the downstream concrete market in England, to hoard all of the very significant production of Blue Circle to the detriment of its competitors. Similarly, in the Compagnie Fruitière/Dole France case134, after the concentration, the new entity would not have sufficient downstream capacity to sell off the portion of pineapples that the Compagnie Fruitière that were previously purchased by wholesalers of Dole France.

419. In support of its analysis, the Autorité can also consider the type of strategy and the behaviour that have been adopted in the past by the merging parties. Strategic internal documents can also cast a light on the envisaged strategies. In its GE / Commission ruling135, the CFI indicated that: "That said, convincing evidence could, in principle, consist of documents attesting to the settled intention of the board of directors of the applicant and/or Honeywell to exploit commercially the strength of GECAS and GE Capital on the avionics and non-avionics markets after the merger, in the same manner as described above in relation to the market for large commercial jet aircraft engines, or an economic assessment showing that such behaviour would objectively have been in the merged entity's commercial interests". As such, in the Havas/Compagnie Générale des Eaux case136, the Conseil based its analysis on the minutes of a board of directors meeting.

133 Case COMP/M.1874 – LAFARGE / BLUE CIRCLE of 7 April 2000.
134 Letter from the Minister for the economy, industry and employment C2008-103 / of 28 October 2008 to the board of the Compagnie Fruitière de Paris SAS company, relative to a merger in the fruit and vegetable sector.
135 Ruling of the Court of First Instance of the European Communities T-210/01, General Electric / Commission of 14 December 2005.
420. Finally, in the aforesaid Tetra Laval / Commission and GE / Commission cases, the CFI recalled that the competition authority was required, as part of its assessment, to consider the potential dissuasive effect of the possible clearly illegal or very probably illegal nature of foreclosure strategies with regard to Community and national law: "the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct". However, the Autorité will consider this case law relative to the expected benefits of the preventive nature of the merger control.

421. The efficiency gains resulting from a vertical merger must also be taken into account in the overall analysis of the merger's effects, provided that they a portion of these gains are passed on to consumers, that these gains are merger-specific and verifiable. Efficiency gains are analysed according to the principles developed in section L below.

F. NON-COORDINATED EFFECTS IN CONGLOMERATE MERGERS

1. NATURE OF THESE EFFECTS

422. A merger has conglomerate effects when the new entity extends or strengthens its presence in several markets when the connection between these markets may allow it to increase its market power (excluding cases of markets located upstream and downstream of one another, cf. vertical effects). Such an operation may make it possible to bring together or to expand a range of products or a portfolio of brands.

423. A conglomerate merger generally opens up the possibility of developing synergies between the various entities within the group. Some of these synergies can be beneficial to competition, in the sense that, by increasing the overall production efficiency, they will bring about lower costs and lower prices which will favourable to end consumers. The new entity can benefit from significant common fixed costs or from the complementary nature of several products and services. Conglomerate mergers can also generate considerable savings, allow for greater compatibility between complementary components, or lead to the internalisation of the positive effects that a price cut on one product will have on the sales of the complementary product ("Cournot effect") (cf. notably the present document's section on the contributions to economic progress).

137 Ruling of the Court of First Instance of the European Communities T-05/02, Tetra Laval / Commission.
138 T210-01, CFI ruling of 14 December 2005, General Electric / Commission. This case law followed on the Commission / Tetra Laval ruling from the CFI and on the appeal on points of law to the CJEC relative to this same case.
139 Conseil de la concurrence opinion 08-A-08 of 14 May 2008 relative to the acquisition of the Zurfluh-Feller company by the Somfy company in the sector of the supply of accessories for roller shutters.
424. Certain conglomerate mergers can nevertheless produce effects that will harm competition, when they serve to "technically or commercially bind the sales of elements making up the grouping, such as to foreclose the market and evict competitors".140

425. There are various ways of tying sales or bundling goods or services produced on distinct markets. As recalled by the CFI141, one must distinguish: i) pure bundling, i.e. tied sales as a result of a commercial policy imposing to purchase two or more products together; ii) technical bundling, i.e. tied sales as a result of technical constraints; and iii) mixed bundling, i.e. the fact of selling several products together under better conditions than the ones proposed if the products were purchased separately.

426. The recourse to tied or bundled sales can provide a firm with the ability and motivation to exploit, through a leverage effect142, its strong position in a market and thus to evict its competitors. Moreover, it is necessary to examine whether such behaviour would have a significant harmful effect on competition, for example by ousting competitors from the market, or marginalising them.

427. When conglomerate effects involve a series of brands, the Commission, in its Guinness / Grand Metropolitan decision143 indicates that having a portfolio of leading brands allows for a "position in relation to his customers [that] is stronger", "greater flexibility to structure his prices, promotions and discounts", and that the holder of the leading brands will have a greater potential "for tying, and he will be able to realise economies of scale and scope in his sales and marketing activities".

2. CRITERIA USED BY THE AUTORITÉ

428. The guidelines on non-horizontal mergers144 recently published by the European Commission provide, for the risks of foreclosure in conglomerate mergers, the same analytical framework as for vertical effects. The Autorité de la concurrence examines if the new entity would, after the merger, be able to foreclose its competitors, if it would be encouraged to do so, and if a foreclosure strategy would have a significant effect on the markets in question. In practice, these three constraints are closely linked.

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140 Idem.
141 T210/01 General Electric Company versus Commission.
142 The notion of "exploitation by leverage" is currently used in competition law in order to designate the ability of a firm to increase its sales of one product on the market (the "tied market" or "bundled market") by exploiting the strong market position of another product to which the first product is tied or bundled (the "tying market" or "market exerting leverage").
143 Decision n° IV/M.938 of 15 October 1997.
144 Aforesaid C2008/265/07.
429. The factors already mentioned in the previous sections (new entity's market power, competitors’ reaction capacities, entry barriers and buyers’ countervailing power) are the subject of a specific adaptation relative to conglomerate effects.

430. As with vertical mergers, it is notably rather unlikely that the fact of holding a range of products or a portfolio of products will harm competition in one or more markets if the new entity does not have a strong position in one market, from which it would be able to play a leverage effect. The Commission's guidelines on non-horizontal mergers suggest "safe harbours" below market shares of 30% and a post-operation HHI below 2000.

431. However, for the analysis of conglomerate effects, market power can also result from the fact of the parties owning one or several products, or one or several brands, that are considered by many customers to be particularly important, even essential, and that have few acceptable substitutes as a result, for example, of the differentiation of the products or of the capacity constraints with which competitors are faced. For example, in the Somfy / Zurflüh operation\textsuperscript{145}, the Conseil de la concurrence ascertained that the merged entity would have high market shares and widely renowned products, viewed as essential by customers.

432. Similarly, in its first opinion relative to the Coca-Cola / Orangina case\textsuperscript{146}, the Conseil de la concurrence indicated "that the producers generally have a range of products of greater or lesser renown; that one or more of the beverages that they market may appear to be essential for consumers in the CSD market intended for consumption outside of the home; that this may be the case if this brand has greater renown than that of other brands present in the same segment; that, for example, the "Orangina" brand has greater renown than the "Fanta" brand; that, similarly, certain beverages may appear to be essential, even if their share in the CSD sector is low, if they had no direct competitor in their segment; that, for example, the beverages "Schweppes Indian Tonic" and "Gini" from the Cadbury Schweppes group, which are not positioned in the same segments as those offered by Coca-Cola or by Pepsi-Cola, are considered by many intermediaries in the sector of consumption outside of the home, as indicated by the wholesalers / warehouse keepers queried during the investigation, to be essential due to the absence of alternatives in their segment, even though these brands only respectively represent 8.4 and 4.9 million litres, i.e. 4.6% and 2.7% of the market for CSD intended for consumption outside of the home".

\textsuperscript{145} Conseil de la concurrence opinion 08-A-08 of 14 May 2008 relative to the acquisition of the Zurflüh-Feller company by the Somfy company in the sector of the supply of accessories for roller shutters.

\textsuperscript{146} Conseil de la concurrence opinion 98-A-09 of 29 July 1998 relative to the project for the acquisition by the Coca-Cola Company of all of the assets of the Pernod Ricard group relative to the Orangina brand beverages.
433. Moreover, a bundled or tied offer can only have an effect on competition within the markets concerned if a sufficient share of buyers is likely to be interested by the simultaneous purchase of the products in question. For example, in the Somfy / Zurflüh-Feller operation\(^\text{147}\), the Conseil de la concurrence noted that a majority of customers expressed interest in obtaining their supplies from a single supplier, for a large range of products.

434. The Autorité then studies the credibility of the tied sales scenario. In its decision General Electric versus the Commission\(^\text{148}\), the CFI mentioned three types of evidence that are likely to support the probability of a tied sales scenario:

- past behaviour that could indicate that bundled sales had already been of interest to the firm. However, it is generally probable that such past behaviour was noted in markets other than the ones that could be the subject of tied sales after the operation, which puts the scope of this behaviour into perspective;
- documents proving the acquiring firm's intention to adopt such behaviour;
- an economic study that demonstrates that such behaviour would objectively be in the merged entity's commercial interests.

435. This last type of evidence is based on a study of the profitability of a tied sales strategy. In terms of gains, such a strategy could make it possible to protect sales on the tying market, while developing sales in the tied market. The gains can result from increased market shares or from higher prices. In terms of costs, one must consider the discounts intended to promote bundled sales, as well as, possibly, the decline of sales due to the loss of customers not interested by the tied offer. For its part, the implementation of a product technical integration (technical bundled sales) results in development costs.

436. As is the case with vertical effects, it is rather unlikely that the new entity will run the risk of losing sales in a very profitable market in order to develop its position in a less profitable market. For example, in the aforesaid Somfy / Zurflüh-Feller opinion, the Conseil indicated that the foreclosure strategies that would lead to decreased engine sales would not be very credible in view of the relative prices of engines and other components.

437. The Autorité also examines the degree to which competitors are likely to offer as complete a range of products or as attractive a range of brands. As such, in the Johnson / Bayer case\(^\text{149}\), the risk of an anticompetitive effects was set aside because of the existence of an equivalent competing range to that of the new entity. Conversely, in the Spontex / 3M case, none of the other participants was able to offer a complete range. The Autorité also assesses the possibility for competitors to develop their ranges in response

\(^{147}\) Conseil de la concurrence opinion 08-A-08 of 14 May 2008 relative to the acquisition of the Zurflüh-Feller company by the Somfy company in the sector of the supply of accessories for roller shutters.


\(^{149}\) Minister's decision C2003-41, Johnson / Bayer, of 11 March 2003.
to the entity's strategy, and to this end, it examines the entry barriers in the various markets concerned.

438. The Autorité also outlines strategies implemented by customers in order to diversify and secure their supplies. As such, in its first opinion on the Seb / Moulinex merger\(^{150}\), the Conseil performed an in-depth analysis of the counterweight represented by mass retail distribution relative to its suppliers, while notably focusing on the strong concentration of mass retail distribution in France and the purchasing power that is provided to firms, which resulted in a strong negotiating power of distributors relative to suppliers, as well as the desire of distributors to diversify their supply sources when faced with a supplier's growing market shares.

439. Finally, as mentioned in the previous section on vertical effects, the Autorité de la concurrence takes into account the clearly illegal or very probably illegal character of the strategy used by the merged entity in order to assess its probability.

G. OTHER CASES OF NON-COORDINATED EFFECTS: EXIT OF A POTENTIAL COMPETITOR

440. Even when no horizontal overlap results from a merger, it may nevertheless harm competition on one or more markets insofar as even the target that did not operate in the same market as that of the acquiring firm could have easily entered the markets of the acquiring firm and thus exerted competitive pressure.

441. For the Autorité to consider the exit of a potential competitor as an anticompetitive effect, two conditions must be met:

- the potential competitor must already be appreciably constrain the behaviour of other firms, or there must be a high probability that this competitor will become a strong competitive force,
- the number of other potential competitors capable of maintaining adequate competitive pressure after the completion of the merger must be sufficient.

442. In practice, this characterisation of a risk to competition is relatively rare. For example, in the opinion relative to the joint acquisition of control of the Delaroche company by Est Républicain and the Banque Fédérative du Crédit Mutuel\(^{151}\), the Conseil rejected the hypothesis that the exit of Delaroche would harm competition as a result of the exit of a potential competitor: "Several elements nevertheless lead to the opinion that the Delaroche company is not a potential competitor for the titles of the Est Républicain or of the BFCM on the daily regional press markets. As it did in its previously mentioned opinion no 05- A-18, SIPA / Socpresse, the Conseil pointed out the crisis being exchanged by the press sector, in particular the


\(^{151}\) Conseil de la concurrence opinion 07-A-09 of 2 August 2007 relative to the joint acquisition of control of the Delaroche company by the L'Est Républicain company and the Banque Fédérative du Crédit Mutuel, a subsidiary of the Crédit Mutuel Centre Est Europe.
daily regional press. The "severity of the crisis being experienced by the press of general information" has since then also been pointed out in the Lancelot report. In part, this crisis originates in profound changes to society and in the appearance of new media that are in step with these changes. Under these conditions, the efforts of the daily regional press have been more devoted to shoring up the decline of its readership than to conquering new distribution territories. Moreover, for the entire daily regional press, in the recent period we note no attempted incursion by a title outside of its historical market: on the contrary, the trend is concentration in order to meet the need for the sector's restructuring. Groups are also focusing on the diversification of their activities. Secondly, in its SIPA/Socpresse opinion, the Conseil took note of the reader's attachments to "his" daily regional press title in particular. The penetration of a new title would therefore require significant advertising investments. Finally, in this specific case, the deterioration of the financial situation of the Delaroche company would not have allowed it to carry out such an expansion strategy."

443. On the other hand, the anticompetitive effect resulting from the exit of a potential competitor has been pointed out in several decisions from the Commission. For example, in the Air Liquid/BOC case\(^\text{152}\), the Commission's analysis focused on the elimination of a potential competitor resulting from the merger between BOC, present in the bulk gas and gas in bottles markets in the United Kingdom and Ireland, and Air Liquide, which supplied the same products in other European countries but was not active in the United Kingdom and Ireland. The Commission considered that Air Liquide was the only major producer of industrial gas that might potentially penetrate these markets. It attributed the absence of Air Liquide from the British market to a strategic decision that could be reversed at any time, rather than an objective factor that could limit the ability of Air Liquide to supply these countries with bulk and bottled gas. Moreover, the Commission also considered that BOC was a potential competitor of Air Liquide in continental Europe even though BOC had recently sold its business in continental Europe to Air Liquide.

444. In its Telia / Telenor decision\(^\text{153}\), the Commission considered the merging parties represented for one another the most credible and significant potential competitor in the national telecommunications market, with Telia being present in Sweden and Telenor in Norway. Even though other companies had the technical capacities to enter the Swedish and Norwegian markets, the Commission considered that none of the others were as well placed to do so as Telia and Telenor.

\(^{152}\) Commission decision in case IV/M.1630 - Air Liquid/BOC, whereas clauses 201 et seq.

\(^{153}\) Commission decision 2001/98/EC in case IV/M.1439 - Telia/Telenor.
445. In its EDF/EnBW decision154, the Commission considered that EnBW was one of the firms best placed in strategic terms in order to penetrate the French electricity market, and that it would have been strongly encouraged to enter the French market notwithstanding the merger. The Commission also considered that the merger provided EDF with the possibility of countering the penetration into the French market by German interconnection firms by means of launching reprisals on the German market, and therefore decreasing the competitive pressure exerted by German companies, including EnBW, on the French market.

446. In the three above-mentioned decisions, the operations were finally authorised by the Commission, subject to the implementation of commitments intended to strengthen the credibility of the potential competitors remaining in the market. These commitments involved the divestiture of assets or obligations to grant access to essential infrastructures for interested competitors.

H. OTHER CASES OF NON COORDINATED EFFECTS: CREATION OR STRENGTHENING OF PURCHASING POWER

447. A concentration can strengthen the created firm's purchasing power to an extent that its suppliers will be placed in a position of economic dependency. This case of an anticompetitive effect is specifically targeted by Article L. 430-6 of the French Code of commercial law (Code de commerce).

448. This type of examination is notably carried out for operations occurring in mass retail distribution sectors. The European Commission therefore analysed, in the Rewe / Meinl case155, the dependency of suppliers relative to the Rewe / Meinl purchasing pool. Indeed, some economic models show that above a certain "threat threshold", which is a function of the share that this outlet represents amongst all of the supplier's sales, the distributor can, by stopping its purchases, more or less quickly push its supplier into a very difficult financial situation, even towards bankruptcy. The level of this threshold is not set ex ante and depends on a great number of parameters that are specific to the sectors concerned, to the structure and financial situation of the firms, and especially to the existence or cost of possible alternative solutions.

449. The Minister of the economy also pointed out the risk of the creation or strengthening of buying power as the result of a merger in the meat sector: "At the end of the operation, the new entity will have strong positions relative to purchase of live cattle (excluding veal) in the northern zone of France, irrespective of the slaughterhouse and size of the trade area in question. As the alternative offer for slaughter in this zone is limited and the costs and timeframes for building an slaughterhouse are very significant

154 Commission decision 2002/164/EC case COMP/M.1853 - EDF/EnBW.
(estimated at more than two years and nearly €40 million), the risks of the creation of purchasing power at the end of the operation, that would place cattle suppliers in a position of economic dependency, cannot be set aside". Commitments were therefore negotiated relative to the sale of slaughterhouses 156.

450. In and of itself, economic dependency does not constitute an anticompetitive effect unless it has an effect on the competition within a market and, finally, on the consumer surplus, and not only on a supplier, given that the objective of the competition authorities is not to protect a firm per se, whether it is a competitor, customer or supplier. However, the strengthening of buying power, as a general rule, tends to take place for the benefit of consumers, provided that this buying power does not affect the upstream and downstream structures in the markets.

451. But insofar as it can decrease financial capacities, or the research and innovation capacities of certain actors, and eventually prompt them to leave the market, which reduces competition, the strengthening of dependency can harm competition in a market. In particular when its corollary or its origin is an increase of purchasing power in the downstream market, it is rather unlikely that the increased purchasing power in the hands of the new entity may offset the reduced competition ascertained in the downstream market. It may even further reduce the downstream competitive intensity.

452. These effects must be appreciated on a case-by-case basis, depending on the characteristics of each channel, in order to clarify the impact of a possible economic dependency. An excessively general application could lead certain buyers or users of subcontracting to ex-ante relinquish certain economic relations, which could generate problems by preventing certain small firms from accessing either the upstream mass retail distribution markets or the subcontracting from major manufacturers.

I. COORDINATED EFFECTS

1. NATURE OF THESE EFFECTS

453. The concentration can also modify the nature of competition in the market such that firms that, until then, had not been coordinating their behaviour, are much more likely to do so or, if they were already coordinating their behaviour, can do so more easily. Coordinated effects arise from the creation or strengthening of a collective dominant position or of a collusive oligopoly, with the operation increasing the incentives and ability of firms present in the market to tacitly maintain a collusive balance. The coordination in this case is "tacit" rather than "express", with each firm being supposed to continue behaving in an independent manner, on the basis of its own interests.

454. Such effects are possible when, in an oligopolistic market or a highly concentrated market, a merger operation has the result that, while being

156 Minister’s decision C2008-100 of 17 February 2009.
aware of common interests, each member of the oligopoly in question would consider it possible, economically rational and therefore preferable to adopt, over the long term, the same policy within the market in an effort to sell at supra-competitive prices, without having to enter into an agreement or making use of concerted practices according to the terms of Articles L. 420-1 of the French Code of commercial law (Code de commerce) or 81 EC157, without the current or potential competitors, to say nothing of customers and consumers, being able to react in an effective manner.

2. CRITERIA USED BY THE AUTORITÉ

455. In the Airtours ruling158, the CFI identified three necessary conditions for the purposes of assessing coordinated effects during a merger operation:

- "first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. [As the Commission expressly admits], it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;" (detection condition).

- "second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. [As the Commission observes], it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. [Here, the parties share the idea that] for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, along these lines, the above-mentioned Gencor / Commission ruling, 276);" (sustainability condition)

- "third, in order to establish, with legal sufficiency, the existence of a collective dominant position, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy." (no-challenge condition)

157 See CJEC, ruling of 31 March 1998, France [e.a.] / Commission, known as "Kali & Salz", C-68/94 and C-30/95.

456. These three criteria were reiterated by the French administrative Supreme Court (Conseil d'État) in its Fiducial decision of 31 July 2009\textsuperscript{159}: "Considering that the behaviour of operators in an oligopolistic situation within a market can, in the absence of any formal coordination, be implicitly coordinated, such that the power of these operators in the market is increased, notably to the detriment of consumers; that the identification of such a dominant position presupposes that, given various indicators and evidence that must be identified, it would appear that each of the oligopoly members must be made aware, sufficiently precisely and quickly, of the way in which the other members' conduct is evolving, that there are credible threats of retaliation in case of deviation from the policy implicitly approved by everyone, and that the foreseeable reactions of consumers and current or potential competitors of the oligopoly would not be sufficient to jeopardise the results expected from the tacit collusion".

457. The CJEC confirmed the analysis of the Airtours ruling in the Impala ruling\textsuperscript{160}. It stressed further that such coordination was only possible if the firms were able to understand the common objective and the means for reaching it and specified the link between this "condition of understanding" and the three conditions recalled above: "Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination."

\textsuperscript{159} French Supreme Court for administrative law (Conseil d'Etat) Fiducial Audit and Fiducial Expertise n°305903 of 31 July 2009

\textsuperscript{160} CJEC, C-430-06, IMPALA, 10 July 2008.
458. The Court’s ruling also included a warning: “in applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination”. A coherent approach to the criteria concerned could be encouraged by identification of a tacit coordination scenario (common policy relative to price discrepancies or their evolution, on the level of production capacities or market shares, or on the distribution of clientele types, geographical zones or invitations to tender).

459. In its analysis of coordinated effects, the Autorité relies on all of the elements that may serve to cast a light on the operation’s effects on the functioning of markets.

a) Common understanding condition

460. It is all the more reasonable to anticipate a coordination of behaviour within a market when it is simple for the firms concerned to reach a common appreciation of the operating provisions of the coordination. To this end, the firms must share a common view that consists of strategies that can be considered as compliant with the common behavioural policy, as well as those that are not. The probability of a mutual understanding emerging is therefore greater when the market and its background are stable and not complex. Thus, in its analysis of coordinated effects, the Autorité notably considers the following elements:

- the number of market operators: it is easier to agree upon the coordination details when the number of potential participants is low;
- symmetry in the market: a common definition of how a coordination should work is easier to reach when the firms concerned are similar. Symmetry can notably exist on the level of the cost structure, market shares, production capacities or degree of vertical integration. For example, in its Exxon / Mobil decision\(^\text{161}\) the Commission put forward that "similar degrees of vertical integration among the members of an oligopoly generally increase their willingness to engage in parallel behaviour and the prospects of stability of such behaviour. This results first from the fact that integration may confer cost advantages and cost similarities on the integrated players as opposed to the non-integrated ones. Second, and more importantly, strategic interests among equally integrated firms tend to coincide at every commercial level. Indeed, changes in the market conditions will affect similarly the integrated firms, pushing them to react similarly". On the contrary, in the SFR/9Cegetel case\(^\text{162}\), the Minister stipulated that the asymmetry of the parties, both in terms of market share and of cost structures, made the creation of a collective dominant position rather unlikely;

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\(^{161}\) Commission decision of 29 September 1999, case n° IV/M.1383 - Exxon / Mobil.

homogeneity of the product: a price coordination agreement is easier to implement if it relates to homogeneous products. When the products are strongly differentiated, coordination is threatened by the dispersion of price levels. In the above-mentioned case, the Commission noted that the high degree of homogeneity of fuels was likely to simplify the tacit coordination of price policies;

• stability of demand: strong fluctuations in demand constantly modify the extent of the incentives to deviate, and require members of the oligopoly to constantly adjust the provisions of the coordination. On the contrary, stable demand facilitates the emergence of a common and lasting policy;

• importance of innovation: as innovation is a source of instability, a market with little innovation provides fertile ground for the emergence of a common view that consists of coordination conditions. In its Alcoa / British Aluminium decision163, the Commission found that the degree of technological innovation in the flat rolled aluminium market used in the aerospace industry contributes to making the appearance of coordinated effects rather unlikely.

461. The complexity and instability of the economic background in which the coordination is taking place can sometimes be overcome by the firms concerned, notably thanks to:

• the existence of structural links: such links bring together the interests of oligopolists and thereby encourage the convergence of their respective views as to the coordination provisions. Moreover, these links facilitate information exchanges. In the electricity sector, the Commission therefore considered, in its VEBA/VIAG decision164, that the presence of crossed shareholdings could encourage the adoption of coordinated behaviour;

• the existence of common pricing rules: these rules (that can take the shape of reference prices, for example) constitute a series of focal points that make it easier to adopt coordinated strategies;

• access to market data: the different information that oligopolists can obtain and exchange, notably on the evolution of demand or of prices, for example through observatories or professional associations, encourages the existence of a common policy. The publication of ex-refinery fuel prices (by organisations such as Platt’s) but also at all other points in the distribution chain right up to the marketing at the level of the petrol station is considered, in the Commission's Exxon / Mobil decision165 to be a factor that encourages coordination.

165 Aforesaid Commission decision.
b) Detection condition

462. In order for firms to be able to efficiently coordinate their behaviour, they must be able to monitor the operation of the market in which they are working. Indeed, the market’s transparency must be such that each of the collusive oligopoly's members can timely:

- observe the strategy implemented by its partners;
- assess whether or not unexpected behaviour actually constitutes a violation of the common policy.

463. The market's transparency is assessed relative to an identified coordination scenario. The following aspects can notably be taken into account:

- homogeneity of the products: a change to the price strategy used by a firm involved in a collusive oligopoly can be justified by the degree of differentiation of the products that it distributes, relative to the oligopoly's other members. In this case, it is more difficult to efficiently detect a possible deviation. Moreover, in case of strong differentiation, violation of the common policy is less profitable: the deviating firm cannot hope to secure a very significant market share unless it considerably lowers its prices. For example, in its parallel analysis of the Shell/DEA and BP/E.ON cases, the Commission stressed the homogeneous nature of ethylene carried via a pipeline;

- access to market data: the information available to oligopolists (notably through professional associations), in particular relative to the evolution of demand or prices, facilitates the detection of deviant behaviour. In the UPM-Kymmene/Haindl case\(^{166}\), the Commission stipulated that in the markets for newspaper paper and magazine paper that use wood, professional associations, such as CEPIPRINT, contributed to the transparency of the aforesaid markets;

- structural links: because they facilitate informational exchanges (which can, for example, relate to price or investment policies), the structural links possibly shared by oligopolists improve the degree to which each of them can verify the behaviour of the others. For example, in its decision 07-D-13\(^{167}\) relative to the maritime transport sector, the *Conseil de la concurrence* pointed out, in its analysis of a possible collective dominant position, the existence of "structural correlation links or factors";

- existence of a reduced clientele base: this can be a vector for the transmission of information from one competitor to another.

\(^{166}\) *Commission decision COMP/M. 2498 - UPM-KYMMENE/HAINDL of 21 November 2001.*

\(^{167}\) *Conseil de la concurrence* decision 07-D-13 of 6 April 2007.
c) Deterrence condition

464. For a coordination to be stable, possible deviations must be severely punished. The threats of reprisals in case of deviant behaviour must be credible (once the deviation has been detected, there must be no doubt of their implementation) and sufficiently significant that it will be in the interests of each oligopolist to comply with the common policy.

465. Irrespective of the environment in which the coordination is operating, the existence of a credible punishment mechanism is always guaranteed by the simple return back to a competitive state. Thus the deterrent condition focuses not so much on retaliation, but rather on its deterrent power. Indeed, while the return to competitive behaviour can constitute a sufficient threat in some cases, in other cases, more severe punishment will be needed in order to ensure the stability of the coordination. Economic theory\(^{168}\) has therefore shown that extremely strong punitive measures, resulting in negative profits for the firms concerned, applied over a finite period of time could prove to be more efficient for maintaining coordinated practices than a simple return back to a competitive state.

466. The assessment of coordinated effects therefore focuses on the various elements that will make it possible to appraise the deterrent power of possible reprisals. The following are notably taken into account:

- production capacities of the oligopolists: a surplus production capacity (or in certain cases, significant stocks) provides oligopolists with the necessary means for implementing severe punishments, and consequently constitutes a powerful deterrent tool. However, the presence of excess capacities within firms can indicate asymmetry that could undermine the coordination's stability. Indeed, an operator with surplus capacity is encouraged to deviate, which will be all the more profitable for it than what the other oligopolists will be able to do in order to punish it, lacking comparable production power\(^{169}\);

- the existence of multi-market contacts: when firms simultaneously operate in several markets, a deviation in one of them can result in retaliation directed against the perpetrator in all the other markets. As such, multi-market contacts are likely to increase the severity of the punishment, and correspondingly the stability of the coordination. In the UPM-Kymmene/Haindl and Norske Skog/Parentco/Walsum cases, the Commission therefore estimated that the multi-market contacts of the parties could appreciably improve the stability of a coordination. It should nevertheless be noted that in the event of multiple contacts, if an oligopolist wishes to deviate within a market, it can also do so in all of the markets, thereby generating a much greater instantaneous profit. Multi-market contacts are consequently also able to increase

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\(^{169}\) Notably see the Article by Compte, Jenny and Rey (2002), "Capacity Constraints, Mergers and Collusion." European Economic Review. 46: 1-29.
incentives for deviation to the detriment of the coordination. The probability of the adoption of a common policy resulting from multiple contacts is therefore the subject of an assessment on a case-by-case basis;

- timeliness of retaliation measures: a punishment is all the more efficient as it is applied quickly after the deviation. In this regard, a market in which transactions are few in number and widely spaced in time is a particularly encouraging incentive in favour of deviant behaviour, since the punishment will not arrive until much later. Such a market is therefore not very favourable to the adoption of common strategies.

d) No-challenge condition

467. For the coordination to be profitable for its member firms, it must not be disturbed by the other incumbent or potential competitors in the market. The emergence or strengthening of coordinated effects therefore depends on the efficiency with which the policy can be challenged, both by customers and competitors. As such, to assess a possible collective dominant position, the Autorité de la concurrence notably considers:

- current state-of-play of competition: the presence, after the merger, of mavericks capable of significantly modifying the position of oligopoly members can severely hinder the stability of the coordination. In his Alliance Santé Distribution/ORP decision, the Minister considered that the exit of a maverick was likely to create a position of collective dominance between the market's three biggest actors, even though the target's market shares were very low;

- potential competition: potential competitors can also destabilise the coordination. However, the ability of these mavericks to enter the markets concerned is conditioned by the existence of entry barriers;

- existence of countervailing buyer power: sufficiently powerful buyers can undermine the coordination between oligopolists by persuading one of them to deviate. As such, in the VENA/VIAG case, the Commission indicated that the absence of sufficiently significant purchasing power was likely to promote the emergence of coordinated behaviour. The criteria for assessing purchasing power are the same as with regard to uncoordinated effects (cf. § 374 above).

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3. ANALYSIS OF COORDINATED EFFECTS SPECIFIC TO VERTICAL AND CONGLOMERATE CONCENTRATIONS

468. The Commission’s recently published guidelines relative to non-horizontal mergers stress that foreclosure, as it results in reducing the number of competitors, is likely to create conditions that are more favourable for coordination. Vertical integration can also modify the market transparency conditions and the incentives of the merged firm and its competitors. It can also have an effect on the efficiency of the surveillance and retaliation mechanisms. However, these effects are ambiguous.

469. For example, a non-vertically integrated supplier is less encouraged to lower its prices when dealing with integrated competitors. Indeed, integrated distributors will most likely continue to obtain supplies in-house (at least partially) even if a non-vertically integrated supplier proposes more advantageous conditions. As such, a vertical merger reduces the outlets available for non-vertically integrated suppliers, which correspondingly decreases their profits from deviation and, consequently, their incentive to deviate. This effect of the decrease of outlets encourages tacit collusion.

470. On the other hand, integrated firms generally realise more profit than non-integrated firms during the retaliation phases. Indeed, even if, during such a phase, at one level of the value chain, prices come very close to costs, a vertically integrated firm can generate positive profits at another level of the chain. Such a firm is therefore less vulnerable to punishment than a non-integrated firm. From this point of view, vertical integration reduces the possibilities of tacit collusion.

J. RISKS OF COORDINATION OF MOTHER COMPANIES

1. NATURE OF THE EFFECTS

471. When two independent firms create a joint venture, the links now established between them could encourage them to coordinate their behaviour, not only within the joint enterprise but also more broadly, in all of the markets in which parent companies and subsidiaries are present, by reinforcing information exchanges between them or by facilitating the understanding of common objectives. Merger control gives an opportunity to appraise these risks when a full-function joint venture is created (cf. above starting in paragraph 53). When this is not the case, such practices fall in the provisions of Articles L. 420-1 of the French Code of commercial law (Code de commerce) and 81 EC. As such, when Banques Populaires and Caisse d'Épargne created a common subsidiary in the investment banking and financing sector, Natixis, the Minister verified that this operation ran no risk of bringing about coordination of the behaviour of the two banking.
groups in the retail and commercial banking markets, including at local level\textsuperscript{171}.

472. The way the effects on competition of the creation of a joint venture by two parent companies must be analysed are reflected in the case Est Républicain / BFCM / Soepresse operation\textsuperscript{172}, which was examined both by the Minister and by the Conseil de la concurrence. As recalled by the opinion of the Conseil, national law does not provide for any specific test. The applicable test is therefore the general test that derives from Article L. 430-6 of the French Code of commercial law (\textit{Code de commerce}), intended to identify operations that "may harm competition, notably through the creation or strengthening of a dominant position or through the creation or strengthening of purchasing power that places suppliers in a situation of economic dependency" and that do not "make a sufficient contribution to economic progress to compensate for the anticompetitive effects".

473. The situation in which the creation of a joint venture encourages the parent companies to coordinate their behaviour in the markets where they both active could lead to establish that the resulting anticompetitive effect would be incompatible with the provisions of Article L. 430-6, irrespective of the shape of this coordination, whether it is express, under the meaning of competition law, or tacit, under the meaning of decisional practice relative to collective dominant position. Indeed, it cannot be ruled out \textit{a priori} that the creation of a joint venture might strengthen the structural ties between the parent companies, as their interplay would allow them to anticipate each other’s behaviour, to align their strategies and to make their objectives converge, even if they do not necessarily engage in anticompetitive practices. If relevant, the structural characteristics of markets whose background would favour an express agreement can also be taken into account to assess the likelihood of the creation or strengthening of a collective dominant position. However, the analysis of this latter risk also implies that the reaction of other competitors is also part of the picture.

474. Such an harmful effect on competition can more easily be envisaged if the parent companies and common subsidiary operate in the same markets. It cannot be ruled out \textit{a priori} even when the parent companies operate in different market from that of the common subsidiary, as multi-market contacts between firms are also likely to facilitate the coordination of their behaviour.

\textsuperscript{171} Decision C2006-45 of 10 August 2006.

\textsuperscript{172} In particular, see the Minister's decision C2007-27 of 28 August 2007 and Conseil de la concurrence opinion 07-A-09 of 2 August 2007. For this operation, an initial decision to authorise the operation as provided by the Minister on 17 May 2006 (reference C2006-52) was cancelled by the French Supreme Court for administrative law (Conseil d'Etat) in its decision of 31 January 2007 (decision n° 294896 France Antilles).
2. CRITERIA USED BY THE AUTORITÉ

475. In compliance with the decisional practice of the European Commission, that inspired that of national competition authorities, the risks of coordination between parent companies when creating a joint venture are analysed on the basis of three cumulative criteria:

- there must be a causal link between the creation of the joint venture creation and the creation or strengthening of the risks of coordination of the parent companies;
- the coordination must be plausible, i.e. it must be possible and must be in the interest for the parent companies;
- this coordination must have an appreciable effect on competition.

a) Causal link

476. A causal link can be established if the joint venture's activity is of essential importance for the markets in which both parent companies operate. However, it cannot be ruled out, in certain cases, that other factors may be behind the increased interdependency between the parent companies.

477. For example, in the above-mentioned decision relative to the creation of Natixis\(^{173}\), the Minister considered that the creation of Natixis was such as to create the conditions for coordination between its parent companies on certain markets. The analysis brought to light that the Natixis products were an essential production factor within the activities of the parent companies on several of their markets. However, the Minister also indicated that "with regard to the general organisation of the entity consisting of Natixis and its parent companies, the investigation indicates that the banking networks will generally be involved as bringing in new business for banking products and services whose production will be centralised on the level of Natixis. As such, their compensation will take the shape of fees. Consequently, the fact that the two networks share the same production platform and will be proposed the same fees for the business brought to Natixis may be such as to lead to a convergence of their behaviour on the market".

478. On the contrary, in the second examination of the Est Républicain / BFCM / Socpresse concentration, the Minister and the Conseil de la concurrence considered that the causal link was not established, after having noted that there was little interaction between the markets in which the joint venture EBRA was active and those in which the two parent companies were competing, and thus that it was unlikely that EBRA will be the avenue for information exchanges between the two shareholders relative to their respective activities. They added that the financial links existing between EBRA and its parent companies were not such as to increase the interdependency between its parent companies.

\(^{173}\) See the Minister's decision C2006-45 of 10 August 2006.
b) Conditions of plausibility and appreciable effect

479. The plausibility and appreciable effect criteria are closely linked: the coordination of policies will be all the more plausible if it is profitable, and will therefore have a appreciable effect on the markets. The appraisal of these effects is based on an analysis of the state-of-play of competition in the markets in which the parent companies are competing and in which they could coordinate their behaviour.

480. The coordination between parent companies of a joint venture will be all the more plausible as the parent companies can easily reach a common appreciation of the provisions for the operation of the coordination, and if the existence of a joint venture will allow them to easily monitor one another. Its effect will be all the more appreciable as the parent companies hold strong positions in the markets concerned and as the common policy cannot be efficiently challenged by customers or by competitors.

481. These criteria align with the ones used to assess the probability of the creation or strengthening of a collective dominant position. The French administrative Supreme Court (Conseil d'État) confirmed this reasoning in the ruling of 27 June 2007. This ruling was rendered upon the complaint lodged by M6, in which it held that the creation of a joint venture by TF1 and AB had an anticompetitive effect and it likened the risk of coordination to that of the creation or strengthening of a collective dominant position. The ruling provides:

"On the risks of coordination between the companies TF1 and AB
Whereas the Minister was required to examine, as part of the procedure anticipated in Articles L. 430-1 et seq of the French Code of commercial law (Code de commerce), if the joint operation to purchase the TMC company that had been referred to him was such as to create a risk of coordination of the behaviour of the parent companies in the markets concerned, the documents in the file indicate that on the date when the Minister took the contested decision and given, firstly, the very active competition in the markets for the operation and marketing of theme-based channels and of the purchase of broadcast rights, and secondly the commitments undertaken by the companies TF1 and AB with regard to televised advertising, the operation in question did not, in and of itself, create or strengthen a collective dominant position for these companies; that, if the behaviour of these two companies subsequently brings such risks to light, it will be the responsibility of the competition authorities to implement, if relevant, the appropriate procedures" [emphasis added].

482. To begin with, the examination by the Autorité focuses on the market shares of the parent companies, since the risk of an anticompetitive effect can, in many cases, be ruled out if these market shares are low\(^{174}\). However, the risks of an anticompetitive effect cannot, in a given market, be set aside \textit{a priori} for the only reason that the parent companies (or only one of them) have

\(^{174}\) See, for example, the Minister's following decisions: decision C2006-49 of 10 May 2006 relative to the AP Moller Maersk / Perrigault operation, decision C2008-94 of 2 January 2009 relative to the creation of a joint venture between the Agrandys and Epis-Centre cooperative groups.
low or non-existent market shares in case parent companies plan to enter this market.\(^{175}\)

483. When the positions of the parent companies are not weak enough to rule out risks of coordinated effects the Autorité also considers all other legal and factual elements that will help determine if the coordination of the parent companies is plausible and whether it will have an appreciable effect. In particular, the Autorité can check various factors such as symmetry between the parent companies, homogeneity of their products, stability of demand, innovation pace in the sector, existence of common pricing rules and even the possibility for each parent company to access information regarding the other parent company, notably as a result of the creation or strengthening of a joint venture. Moreover, the Autorité assesses whether or not current or potential competitors may constrain the parent companies and the countervailing buyer power of their customers.

K. ANCILLARY RESTRAINTS

484. Council Regulation (EC) n° 139/2004 of 20 January 2004 on the control of concentrations between firms (the EC Merger Regulation) (1) indicates, in Article 6(1)(b), second sub-paragraph, as well as in Article 8(1), second sub-paragraph, an in Article 8(2), third sub-paragraph, that any decision declaring a merger compatible with the common market "shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration". In its notice relative to the restrictions directly necessary to be implementation of merger operations published on 5 March 2005, the Commission provides the following clarification: "A concentration consists of contractual arrangements and agreements establishing control within the meaning of Article 3(2) of the Merger Regulation. All agreements which carry out the main object of the concentration, such as those relating to the sale of shares or assets of an undertaking, are integral parts of the concentration. In addition to these arrangements and agreements, the parties to the concentration may enter into other agreements which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market. If such agreements contain ancillary restraints, these are automatically covered by the decision declaring the concentration compatible with the Common Market". Insofar as the restraints are directly related and necessary to the implementation of the merger, Regulation n°139/2004 applies. On the other hand, for restraints that cannot be considered as directly related and necessary to the implementation of the merger, Articles 81 EC (101 TFEU) and 82 EC (102 TFEU) remain potentially applicable.

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\(^{175}\) See the Minister's decision C2006-06 of 17 February 2006 relative to the creation of a joint venture between Natexis Banques Populaires and Banque Postale.
485. This Regulation only applies to operations falling under Community control, and does not target those operations subject to national law. Nevertheless, the combination within a single Autorité, as of 2 March 2009, of the responsibilities relative firstly to the application of Community and national law on anticompetitive practices and, secondly, to merger control, a reform inspired by the Community model in which the control of market structures and the supervision of behaviour in this same market are entrusted to the same institution, now allows the Autorité to examine such restraints within the framework of the authorisations issued in application of Articles L. 430-5 or L. 430-7 of the French Code of commercial law (Code de commerce). To this end, the aforesaid communication provides an analytical guide that will be used by the Autorité.

486. The notifying firms are not required to inform the Autorité of the existence of an ancillary restraint. Nevertheless, it may be in their interest to inform it of the existence of a restraint whose compatibility with competition law may give rise to doubts, in view of its form, scope or of its combination with other restraints, or in view of the competitive context of the market(s) concerned.

487. When such restraints are brought to its attention, and when there is a need to examine them, the Autorité will assess if they are directly related and necessary to the implementation of the concentration. In doing so, it will not be bound by the position of the parties. Restraints will be considered as directly related and necessary if, in their absence, the merger could not be carried out or its viability would be jeopardised. Insofar as the competition restraints exceed that which is directly related and necessary, the implementation by the Rapporteur general of the Autorité, of the provisions of Article L. 462-5(III) of the French Code of commercial law (Code de commerce), which allow her to propose to the Autorité that it should launch ex officio proceedings relative to the anticompetitive practices mentioned in Article L. 420-1, can be envisaged.

L. CONTRIBUTIONS TO ECONOMIC PROGRESS

1. OBJECTIVE

488. Article L. 430-6 of the French Code of commercial law (Code de commerce) provides that, during the in-depth examination phase, the Autorité de la concurrence must "assess whether the merger makes a sufficient contribution to economic progress to compensate for the anticompetitive effects". In particular, the Autorité assesses whether the efficiency gains can increase the incentive of the new entity to adopt a pro-competitive conduct.

489. It is up to the parties wishing to do so to prepare comprehensive and quantified arguments to demonstrate that the concentration will result in economic efficiency gains that are likely to offset its anticompetitive effects, and to provide evidence in support of this claim. For illustrative purposes,
the Commission indicates in its guidelines\textsuperscript{176} that "evidence relevant to the assessment of efficiency claims includes, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit".

490. It should be noted that with regard to economic efficiency gains, it is frequent that claims are not sufficiently substantiated. The French administrative Supreme Court (Conseil d’État), in a decision relative to the Coca-Cola / Orangina merger\textsuperscript{177} indicates that "the inaccuracies of the submitted data do not establish that the envisaged operation's anticompetitive effects could be compensated by a sufficient contribution to economic and social progress". Another example, in its decision relative to the Cafom/Fincar operation\textsuperscript{178}, the Minister notes that "the notifying party presented various sources of efficiency gains potentially generated by the merger operation, but without providing any evidence, in addition to not providing arguments relative to a possible transfer to consumers". Beyond a precise description of the expected economic efficiency gains, it is required from the parties to demonstrate to what extent the assessment criteria for these gains, presented below, are met. For example, in its opinion relative to the Pan Fish / Marine Harvest operation\textsuperscript{179}, the Conseil de la concurrence indicated that while the parties had indeed described the expected efficiency gains, none of these criteria was complied with: "(...) the proposed efficiency gains, while accurately described, are rarely verifiable and even less so quantifiable. Moreover, no indication is given that similar results could not be obtained otherwise than via the merger operation. Finally and especially, there is nothing that provides for an estimate with any likelihood that they could be partly transferred to consumers, through lower prices or increased quality".

2. CRITERIA USED BY THE AUTORITÉ

491. The case law of the French administrative Supreme Court (Conseil d’État) and the decisional practice bring to light three criteria:

- The efficiency gains must be quantifiable and verifiable;
- they must be merger-specific;
- a portion of these gains must be passed on to consumers.

\textsuperscript{176} Commission guidelines on the assessment of horizontal mergers of 5 February 2004, paragraph 88.
\textsuperscript{177} French Supreme Court for administrative law (Conseil d'Etat), Division, dated 9 April 1999, 201853.
\textsuperscript{178} Minister's decision C2006-155, of 31 August 2007.
\textsuperscript{179} Conseil de la concurrence opinion 06-A-20 of 20 October 2006 relative to the acquisition of the Marine Harvest NV company by the Pan Fish ESA company.
492. This third criterion excludes gains that would only benefit to the merging parties, as indicated by the French administrative Supreme Court (Conseil d'État), in its Pernod Ricard decision\(^{180}\): "while the development of the Pernod-Ricard company is likely to be favoured as a result of the additional financial resources generated by the envisaged divestiture, such a development does not constitute per se and does not provide, in and of itself, a sufficient contribution to economic and social progress to compensate for the operation's anticompetitive effects;". The French administrative Supreme Court (Conseil d'État) further ruled that "such compensation can neither result from additional tax revenues likely to be collected by the Revenue Service if the operation is carried out, or of from possible future investment".

493. To assess the degree to which economic efficiency gains that meet the three above-mentioned criteria offset the anticompetitive effects of the concentration, the Autorité notably considers their magnitude in comparison with that of the anticompetitive effects, and their timeliness.

494. With regard to the magnitude of economic efficiency gains, the Commission recalls in its guidelines\(^{181}\) that "the incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the Common Market on the ground that efficiency gains would be sufficient to counteract its potential anticompetitive effects".

495. For example, in the Canal Plus / TPS operation\(^{182}\), both the Minister and the Conseil de la concurrence pointed out that the operation could serve to enhance the content of the offer made available to consumers. In his decision, the Minister concluded that "the concentration could result in an improvement of consumer welfare. Indeed, the new entity's monopoly in the markets for the acquisition of cinematographic broadcasting rights, for example, would allow the latter to make a complete range of existing cinematographic genres available to consumers within a single offer. This would also apply with regard to sports". However, the Minister considered that this gain had to be compared to the anticompetitive effects resulting from the new merger-to-monopoly situation of several markets, which led him to conclude that "this monopoly must constrained so that competition and consumer surplus (with the latter taking into account, all right above the quality of the offer, its price) are maintained. As such, the arguments put forward by the parties are insufficient to demonstrate that the operation, in

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\(^{180}\) French Supreme Court for administrative law (Conseil d'État), Division, 6 October 2000, n° 216645.

\(^{181}\) Guidelines on horizontal mergers dated 5 February 2004, paragraph 84.

and of itself, provides a sufficient contribution to economic progress such as to compensate for its resulting anticompetitive effects”.

496. With regard to the timeliness of economic efficiency gains, the Commission recalled in its guidelines that "in general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely".

497. For example, in 2007, for the CCIP / Unibail operation\textsuperscript{183} in the sector for the organisation of trade fairs and exhibitions, both the Minister and the Conseil de la concurrence indicated that the operation was likely to contribute to economic progress, but that the envisaged timeframe for the realisation of this contribution, i.e. 2021, made its quantitative assessment relatively uncertain.

498. This assessment can be included in the construction of prospective scenarios that consider both the operation’s anticompetitive and pro-competitive effects, as mentioned above in the section on conglomerate effects.

3. EXAMPLES OF CONTRIBUTIONS TO ECONOMIC PROGRESS

499. In its analysis, the Autorité can consider whether the contributions to economic progress meet the above-mentioned criteria, as of the moment when they are claimed by the parties. The contributions that are most frequently put forward by the parties are illustrated below.

500. Cost savings: many mergers lead to the realisation of cost savings, whether these gains result from economies of scale or productivity gains. The parties wishing to claim such gains must demonstrate that the envisaged saving costs meet the above-mentioned criteria, in particular that they will at least partly be partly or totally passed on to consumers in the form of lower prices, improved quality of the offer or enhancement of choice available to consumers.

501. The Ouest France / Soepresse concentration\textsuperscript{184} provides an example of cases where the envisaged cost savings synergies were indeed partly transferable to consumers. In his decision, the Minister indicated that "the elements in the file indicate that the operation will bring about substantial cost savings. These savings will result from the pooling of information that is undifferentiated by nature, the sharing of advertising networks, distribution networks and pre-press services, and from the transfer of Presse Océan printing facilities to Ouest-France ". The transfer to consumers of the realised gains resulted from the fact that, as the Conseil indicated in its opinion, "the resulting savings would appear to be such as to place the three titles of newspapers and magazines acquired in a lasting viable situation". Indeed, "economically, the new entity has every interest in amortising the fixed cost of its business over a maximum volume of sales. Moreover, in view of the strong attachment of readers of PQR [daily regional press] to


their preferred publication, the Ouest-France group will derive a benefit from continuing the publication of the acquired titles. This twofold incentive is certain to guarantee, at the very least, the continuation of the current publishing figures. It also follows that local advertisers and individuals will continue to have access to several widely distributed and differentiated media. The distribution of the Presse Océan title, which is currently irregular as a result of its very fragile financial situation, will be secured over time and rationalised. Local advertisers and individuals will therefore benefit from this new regular distribution of the newspaper. Finally, advertisers in the titles of the Ouest France division will benefit from the improved quality of the newspapers (increase of the number of coloured pages), and from a larger audience (possibility of consulting small ads on the Internet; rationalisation of the distribution of titles, thereby ending the current uncertainties regarding the delivery of PQR titles in the morning in certain "departments"). By helping to improve the quality of the new entity's titles, all of these elements add to the attractiveness of these titles. As such, in the advertising and small ads markets, this attractiveness is sufficient to offset, for local advertisers and individuals, a possible increase of the prices for advertising spaces”.

502. The Alliance Santé Distribution/Ouest Répartition Pharmaceutique concentration provides another example where, on the other hand, the transfer to the community of the anticipated cost gains was not demonstrated. In this case, given the predominance of fixed costs in the industry, the weak incentive that the parties would have had to pass on possible gains to their customers in view of the oligopolistic nature of the market and of its low level of competitive pressure due to low elasticity of final demand relative to price and to regulatory constraints on price setting, the Minister considered that the possible efficiency gains would not be passed on to consumers.

503. It should be noted, as illustrated by the last example, that it is more probable that efficiency gains leading to reductions of variable or marginal costs will result in a decrease of consumer prices than is the case with reductions of fixed costs, since the ratio between fixed costs and consumer prices is normally less direct, at least in the short term. Nevertheless, and as shown in the following examples, the operation's effects on fixed costs can still be taken into account, even though it is more difficult to demonstrate that these fixed cost gains will be passed on to consumers.

504. The enhancement and improvement of the quality of the products and services offered to consumers constitute another source of contribution to economic progress that is likely to be included in an operation's appraisal, particularly in conglomerate mergers. The Ouest France / Socpresse operation below provides an example where this claim was accepted. On the other hand, in the Canal Plus / TPS operation, this argument was rejected. In his decision, the Minister indicates that "one of the main reasons put forward by the acquiring group in order to explain the concentration is the enhancement of the content of offers made available to consumers as a result of the upstream cost savings. Indeed, the exit of TPS would serve to

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185 See the Minister's decision C2002-21 of 20 January 2003.

do away with costs that were maintained artificially high as a result of upstream competition between the two satellite platforms". The minister indicated that "gathering the currently scattered" content between the TPS and CanalSat offers within a single pay-TV offer could represent a true increase of the consumer surplus in terms of the quality of the offer. As put forward by the parties, this evolution is indeed very favourable”. However, "an enhancement of the content of the offers proposed to consumers could be accompanied by an increase of subscription prices, which would constitute an anticompetitive effect if this increase were significant and not in proportion with the increase of the content quality”. And especially, "the enhancement of the content of the offers proposed to consumers by the new entity results from the exit of a competitor (TPS), which results in a decrease of the content acquisition costs. However, this exit would strengthen the acquiring group’s already important position in the upstream markets. Such strengthening would necessarily be accompanied by a decrease of the competitive pressure exerted by third party operators, which could in time prove to harm competition”.

505. The pass on to the community: for example, in the above-mentioned CCIP/Unibail operation, the Minister and the Conseil de la concurrence assessed the economic fallout for the community that would be allowed by the merger of the trade fair and exhibition sites of the firms concerned: "it appears to be well-established that trade fair, exhibition and conference activities create positive externalities for the geographical markets where they are held, which also explains why the potential beneficiary local and regional administrations quite often accept to contribute to the investment effort for the creation or modernisation of sites". Another example, in its opinion relative to the TDF / Bouygtes operation that consisted of the acquisition, by Télédiffusion de France, of a series of pylon sites owned by Bouygues Telecom, the Conseil noted that “increased sharing of the divested pylons contributes to the development of mobile telephony markets and notably to the opening of the UMTS market, by reducing the investment needs of each of the operators concerned.”, that “the sharing of sites and passive elements would allow for average savings in the area of 20 to 30% on the network investment costs”, and that "pooling [could] therefore be considered as a general interest objective". However, both the Minister and the Conseil de la concurrence indicated that this pooling could only be accepted from the standpoint of competition law if it were applied in a complete, transparent and non-discriminatory manner, which led to an authorisation subject to commitments.

187 Conseil de la concurrence opinion 2002-A-04 of 11 April 2002 relative to the acquisition by the Télédiffusion de France company of a series of pylon sites from the Bouygues Telecom company.
506. Improvement of innovation capacities and strengthening of means earmarked to research and development: for example, in the Dolisos/Boiron operation\textsuperscript{188}, the parties put forward a claim based on the fact that the operation would release financial resources for R&D, that the development of homeopathy would contribute to reducing the social security deficit, that scientific progress expected from R&D investments would benefit consumers and contribute to the promotion of homeopathy in general, as it would benefit the merged entity as well as its current and potential competitors. The Conseil considered that the increase of financial resources devoted to R&D was indeed "such as to increase the probability of obtaining results, and therefore the probability of passing on the gains to consumers", even though, by its nature, the contribution to economic progress resulting from R&D investments is still difficult to assess in view of the hazards inherent to research.

507. Improving the international competitiveness of firms can also constitute a contribution to economic progress if it is likely to benefit French consumers. For example, in the purchase by Coca-Cola of the assets relative to the Orangina brand from the Pernod-Ricard group, the French administrative Supreme Court (Conseil d'État) indicated that "the petitioning company puts forward the development prospects that would be opened for the "Orangina" brand abroad thanks to the projected operation, the development possibilities that would be offered to the Pernod-Ricard group as a result of the sale of its assets relative to "Orangina" beverages and the beneficial effects of this sale for the community; that, however, from the moment that this sale of the assets pertaining to international activities relative to "Orangina" beverages is not forbidden, this brand's foreign development, which would in fact only be of limited benefit to the French economy, can be carried out without the sale of the assets relating to the national market"\textsuperscript{189}.

508. The economic efficiency gains specific to vertical mergers: by allowing better linkage of the decisions taken between suppliers and distributors, vertical mergers can generate efficiency gains that are specific to them. Indeed, the relations between suppliers and distributors can be subject to externalities that would be internalised as a result of the vertical integration. In particular, when a supplier chooses its wholesale price, it considers its own margin (wholesale margin) but does not take into account the margin(s) of its non-integrated distributor(s) (retail margin). By choosing a high wholesale price, the manufacturer reduces, all other things being equal, the retail margin of its distributors, thereby exerting a negative externality on them. The addition of two margins, i.e. wholesale and retail, leads to higher prices than would result from an integrated structure. Indeed, the latter takes the total margin into account, i.e. the sum of the wholesale and retail margins, which the non-integrated supplier does not do. Vertical integration serves to do away with the inefficiency of double marginalisation which, in certain cases, can be beneficial to consumers.

\textsuperscript{188} Conseil de la concurrence opinion 05-A-01 of 7 January 2005 relative to the acquisition of the Laboratoires Dolisos company by the Boiron company.

\textsuperscript{189} French Supreme Court for administrative law (Conseil d'État) decision of 6 October 2000 n° 216645.
Similarly, an integrated firm is, *in principle*, more inclined to invest upstream in expenses for which the benefits are primarily expected downstream, for example to adopt designs, production processes or packaging that encourage savings in the distribution costs. Symmetrically, the downstream branches are more heavily encouraged to carry out the promotion of the products.

510. For example, in the case relative to the acquisition of several warehouses by the Scottish & Newcastle-Kronenbourg group¹⁹⁰, the Conseil examined the efficiency gains that the integration between a brewery and the distribution of beverages to CHR (cafés, hotels, restaurants) could possibly generate. According to Kronenbourg, such an integration would serve to eliminate double marginalisation and lead to a better coordination of the efforts of the brewery and of the distributor with regard to the quality and promotion of the products available for sale. Nevertheless, in this case, the Conseil determined that the price relations between the brewery and the warehouse keepers had certain specific features that did not encourage the elimination of double margins and that, as such, the alleged efficiency gains could not be expected from the operation.

511. In conglomerate mergers, economies of range are generally expected and consumers can directly benefit from the grouping of their purchases with a single contact ("one-stop shopping")¹⁹¹.

M. THE FAILING FIRM DEFENCE

512. In the specific case of a competitor’s purchase of a firm that would shortly exit the market if the operation were not carried out, the Autorité de la concurrence can potentially authorise the operation despite anticompetitive effects. In this regard, the decisional practice of the Autorité is based on the case law of the Court of Justice of the European Communities ("Kali and Salz" ruling of 31 March 1998¹⁹²), whereby when a failing firm is bought out by a competitor, the concentration may be authorised without being subject to remedies when it appears that the effects of the concentration would harm less competition than the exit of the target firm. The three cumulative criteria defined by the Court in this ruling were reiterated by the French administrative Supreme Court (Conseil d’État) in a ruling dated 6 February 2004¹⁹³. It can be considered that the effects of the concentration would not be more harmful to competition than the exit of the failing firm when:

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¹⁹³ French Supreme Court for administrative law (Conseil d’État) ruling of 6 February 2004 relative to the SEB / Moulinex merger (Royal Philips Electronics company and others v/Minister for the economy), n° 249267.
• these difficulties experienced by the failing firm would result in the company's imminent exit in the absence of a takeover,
• there is no other total or partial takeover offer that would do less harm to competition,
• the exit of the failing company would do more harm to consumers than the projected takeover.

513. In this decision, the French administrative Supreme Court (Conseil d’État) stipulated the following implementation criteria "(…) relative to a competitor's takeover of a company in difficulty, [the Minister] must authorise the operation without subjecting it to remedies when it appears, at the end of this appraisal, that the effects of the concentration on competition would not be more unfavourable than the ones that would result from the exit of the failing undertaking, in other words if it can be established, firstly, that these difficulties would result in the company's imminent exit in the absence of a takeover, secondly that there is no other takeover offer that is less harmful to competition, relating to all or a substantial part of the undertaking and, thirdly, that the exit of the company in difficulty would not be less harmful to consumers than the projected takeover”.

514. There are currently too few cases in which this argument has been accepted by the national competition authorities to allow for the identification of a systematical analytical framework. The main recent operations in which the failing firm defence has been the subject of an examination are the Boiron/ Dolisos operations194, Seb/Moulinex195, EBSCO / Rowecom France196, and Alliance Santé Distribution (ASD) / Ouest Répartition Pharmaceutique (ORP)197 that serve to illustrate how these three criteria listed by the French administrative Supreme Court (Conseil d’État) are likely to be analysed.

515. The company's imminent exit in the absence of a takeover: in the Seb / Moulinex and ASD / ORP concentrations, the criterion was deemed met because the target companies had ceased payments and were the subject of bankruptcy proceedings before the commercial court. In the EBSCO / Rowecom France operation, though the commercial court had declared the target had ceased payments, the Minister considered that the first criterion was properly met as a result of the deterioration of the target's financial situation subsequent to the court's decision, and the fact that the target's parent company was undergoing bankruptcy in the United States, thereby resulting, in France, in the withdrawal by certain banks of loans granted to the target and the refusal of suppliers to deliver unpaid products.

195 The Seb / Moulinex operation was first examined by the Minister (decision C2002-2 of 5 July 2002) with an opinion from the Conseil de la concurrence (opinion 02-A-07 of 15 May 2002). After cancellation of the Minister's decision by the French Supreme Court for administrative law [Conseil d'État] (decision of 6 February 2004 n° 249267), the operation was again examined by the Minister (decision C2004-40 of 6 February 2004) with an opinion from the Conseil de la concurrence (04-A-16 of 28 July 2004). The appeal for annulment of this second decision before the French Supreme Court for administrative law [Conseil d'État] by the De Longhi company was rejected (decision of the French Supreme Court for administrative law [Conseil d'État] of 13 February 2006 n°278796).
Absence of takeover offers that are less damaging to competition: in the Seb/Moulinex and ASD / ORP operations, demonstrating the second criterion was also based of the decision of the commercial court that indicated an absence of serious alternative offers. In the EBSCO / Rowecom operation, the Minister considered that the second criterion was met by the fact that an acquisition by the only credible buyer to have declared itself was not less harmful to competition, and by the fact that one could, given the responses from the market test, "reasonably exclude any possibility of a takeover by another competitor (actual or potential) insofar as none of them is capable of providing the funds needed in order to maintain the activity of Rowecom France, which requires quite significant cash, notably because of advances to publishers".

On the other hand, in the Boiron / Dolisos operation, both the Minister and the Conseil de la concurrence considered that this second criterion had not been met. In its opinion, the Conseil considered that "in the absence of bankruptcy proceedings, with a public call for buyers, it is up to the parties to demonstrate, by all means, that there was no other alternative to the purchase of the Dolisos laboratories". The elements provided by the parties nevertheless proved to be insufficient to satisfy this condition. Moreover, a foreign company had expressed an interest in entering the French market, with Dolisos constituting a possible acquisition target. Finally, there were many foreign competitors who could have been interested, even though they had not declared themselves.

Neutrality for consumers: in the EBSCO / Rowecom case, the Minister considered that the third criterion indicated by the French administrative Supreme Court (Conseil d'État) had been met: "indeed, with regard to an invitation to tender, one must consider the number of operators that are likely to bid rather than the level of market shares. Whether the operation takes place or not, the number of international operators capable of responding to diverse demand will inevitably drop from 3 to 2, when faced with often specialised "residual" competitors that have much less financial and commercial capacity than that of the two main suppliers". It concluded that "if the operation does not occur, the competition structure would deteriorate in a manner that is at least as harmful as after the merger that is being examined".

In the ASD / ORP operation, which occurred in an oligopolistic market, various prospective scenarii were investigated, both by the Minister and by the Conseil de la concurrence in order to determine if the takeover of ORP by ASD was less detrimental than its exit, for both competition and consumers. The prepared scenarii considered the possible creation of a collective dominant position whether ORP disappeared or was purchased, the non-coordinated strategies that ASD could envisage, the fact that the takeover of ORP by ASD created an asymmetry in the oligopoly that could serve to destabilise it, the fact that ASD's competitors were nevertheless ready to re-create the symmetry by extending their offers, and the risks of the eviction of actors from the competitive fringe. The outcome of this analysis was that the exit of ORP "would be at least as harmful to the operation of competition as the takeover by ASD". Accordingly, the third criterion was considered to have been met and the operation was authorised
despite serious risks of adverse affects on competition through the creation of a collective dominant position.

520. On the other hand, in the SEB / Moulinex case, the French administrative Supreme Court (Conseil d’État) considered that the third criterion had not met and that the Minister had not properly authorised the operation. In particular, the French administrative Supreme Court (Conseil d’État) stressed that "by estimating that the fact that brands were sold within a comprehensive buy-out package that also comprises industrial assets or independently from these industrial assets was irrelevant for the competitive the Minister erred in neglecting the attractiveness, for an operator which plans to enter the French small appliances market, of the acquisition as brands are the main barrier to entry, as the Minister stressed himself ". As such, a scenario that would possibly be less harmful to competition, and more favourable to consumers, than the projected takeover could be envisaged.

N. REMEDIES

521. When an operation has significant anticompetitive effects, when the economic efficiency gains that it offers are insufficient to compensate for these effects, and when the failing firm defence cannot be employed, the operation cannot be authorised unless it is addressed by measures that remedy or compensate for the anticompetitive effects.

522. These measures can take the shape of commitments proposed by the parties pursuant to Article L. 430-5(II), in phase 1, or Article L. 430-7(II), in phase 2, or of injunctions and conditions imposed by the Autorité pursuant to Article L. 430-7(III). The latter Article stipulates that the Autorité can authorise the operation "while requiring the parties to undertake all measures in order to ensure sufficient competition or obliging them to observe provisions that will serve to make a sufficient contribution to economic progress so as to compensate for the anticompetitive effects".

523. The recourse to injunctions and provisions is rare. From 2000 to 2008, of the 64 merger operations authorised in France with conditions, 61 were authorised subject to the implementation of commitments undertaken by the parties, and only 3 subject to the implementation of injunctions or provisions imposed by the competition authority. Indeed, competition authorities only envisage the imposition of injunctions or provisions when the parties refuse to propose commitments even though the operation has significant anticompetitive effects, or when the proposed commitments are insufficient.

524. It is the parties that are required to propose sufficient commitments in order to remedy any competition issues and to provide the information needed for the purposes of assessing these commitments. However, the Autorité can consider that the proposed commitments are insufficient and do not serve to overcome the anticompetitive effects.
525. More precisely, in order to be accepted, the commitments must meet several criteria:

- they must be efficient, i.e. they must effectively serve to overcome the identified anticompetitive effects;
- their implementation must not raise any doubts, which implies that they are drafted in a precise and unambiguous manner, and that the operational provisions for carrying them out are sufficiently detailed;
- their implementation must be timely, since competition is not safeguarded until they are carried out;
- they must be verifiable. To this end, in their commitment letter, the parties anticipate a monitoring mechanism that will allow the Autorité to ensure that they are actually implemented.

526. Moreover, the Autorité carefully checks that:

- the remedies, in particular injunctions, are neutral: their objective is to protect competition in and of itself, and not specific competitors. In particular, the injunction power of the Autorité is not a protectionist tool intended to protect national economic actors;
- the remedies are proportionate\(^{198}\), that is to say that the obligations imposed on firms, which go against the principle of freedom of trade, are strictly necessary in order to maintain or re-establish sufficient competition.

527. In its ruling\(^{199}\) "Coca-Cola Company", the French administrative Supreme Court (Conseil d’État) issued a ruling on the proportionality of the commitments relative to the objective of maintaining sufficient competition: "Whereas, firstly, while the petitioning undertaking has [...] proposed commitment intended to compensate for the anticompetitive effects brought to light by the competent Ministers, of which the main one would entail the granting to an independent third party, for a period of five years, of an exclusive licence for the sale and distribution of "Orangina" products on part of the "outdoors" market, such proposals were insufficient in this case because of the excessively short duration of the envisaged licence and its excessively limited scope; and that, thereafter, by not accepting the said proposals, the Ministers did not make an incorrect assessment;

Whereas, secondly, the Coca-Cola Company claims that it is incumbent upon the Ministers, from the moment that they deviate from the commitment proposal submitted by it, to define adequate and proportionate measures that are likely to be imposed on the parties to the merger operation and to authorise this operation while making it subject to an injunction to implement the said measures; that it nevertheless results from the items in the file that in view of the nature and importance of the merger project’s anticompetitive effects and the subsequent difficulty of determining adequate measures to compensate for them, the decision taken by the

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\(^{198}\) See in particular the Division ruling of 9 April 1999 of the French Supreme Court for administrative law (Conseil d’État), The Coca-Cola Company.

Ministers to merely oppose the projected operation cannot be viewed as having had excessive adverse effects on freedom of trade;”.

528. When seeking adequate remedies, the Autorité de la concurrence gives priority to structural remedies that are intended to preserve effective competition through divestitures of activities or of certain assets to an appropriate buyer that is likely to exert actual competitive constraint, or through the elimination of capitalist ties between competitors. Structural measures can be supplemented by behavioural measures that are intended to regulate the behaviour of the new entity. In certain cases, behavioural measures may be adopted on a stand-alone basis, for example when no adequate buyer of the assets whose sale is necessary to address identified competition issues can be found.

529. Irrespective of the type of remedy that is adopted, the appointment of an independent monitoring trustee is systematically required by the Autorité. The role of this person, the provisions intended to ensure his/her independence relative to the parties and the provisions for reporting to the Autorité must be stipulated in the commitments.

530. The main remedies are listed in detail below.

1. DIVESTITURES

a) Characteristics of divested activities

531. For a divestiture to be able to effectively remedy anticompetitive effects, it is indispensable that the divested activity should be viable and competitive. To this end, the divestiture scope must include all assets and all the personnel needed for its proper operation.

532. This parameter must be precisely and unambiguously described in the commitment proposal received from the parties. The parties will take care to indicate in detail the tangible and intangible fixed assets (brands, intellectual property rights, know-how and goodwill) that are being sold. They must stipulate the licences, permits and authorisations delivered by public institutions that are needed for the development of the divested business, and explicitly include them in the divestiture perimeter. They must precisely indicate which customer contracts are being taken over. Finally, in general terms, they must also indicate the transferred personnel, including the seconded personnel, and indicate any teams or members who are essential for the viability and competitiveness of the activity, that they undertake to transfer together with the ownership of the activity.

533. The sellers are asked to undertake to maintain, until the divestiture is carried out, the economic, commercial and competitive viability of the divested assets, notably by abstaining from any measure that would have an unfavourable impact on their economic value, management or that would undermine their scope. For example, in the above-mentioned

200 For example, see Autorité de la concurrence decision n° 09-DCC-016 of 22 June 2009 relative to the merger between the Caisse d'Epargne and Banque Populaire groups
CAFOM/FINCAR case, the sellers were asked not to prevent the buyer from establishing a franchise contract with the Conforama company.

534. In certain cases, rather than involving an autonomous economic activity, the divestiture may be limited to certain assets such as patents, licences or brands, if their sale is sufficient to remedy the identified anticompetitive effects.

b) Characteristics of a suitable buyer

535. A divestiture is only efficient if the buyer is suitable, i.e. if:

- the buyer is independent of the parties, in capitalistic as well as in contractual terms;
- it must have the adequate competence and financial capacity in order to develop the activity and efficiently compete with the merging parties;
- the acquisition must not be likely to create new anticompetitive effects.

536. The buyer can be identified in three ways:

- within a fixed timeframe, after the decision's adoption, within the commitments. In this case, once the buyer has been identified, the parties must so inform the Autorité, which gives its approval if this buyer meets the above-mentioned conditions. This method is the most frequent;
- by prior regulation: during the investigation by the Autorité de la concurrence, the parties can propose a buyer for the activity, with which they sign a binding agreement. In this case, the Autorité decides upfront if the buyer is appropriate before issuing its decision;
- finally, the actual performance of the concentration may be dependent on the prior identification of an appropriate buyer. This solution may be relevant when the realisation of the divestiture is highly uncertain. Such uncertainties may result from difficulties to find an appropriate buyer as a result of their limited number, risks of deterioration of the activity's value during the transition period, uncertainties related to the pre-emptive rights held by third parties or related to the possibility of transferring key contracts or intellectual property rights. For example, this mechanism was selected by the Minister for the economy in the decision relative to Panzani / Lustucru\textsuperscript{201}.

\textsuperscript{201} C2002-14.
c) Deadlines for divestiture

537. When the deadlines for performing divestiture is set in the commitments and that the concentration may take place independently from the identification of a suitable buyer, they must be as short as possible. Indeed, competition is not safeguarded until the divestiture is carried out. To assess the proposed divestiture timeframe, the Autorité de la concurrence considers the circumstances of the case and the legitimate interests of the parties in the protection of the value of their assets.

538. This timeframe varies depending on the complexity of the implementation of the concentration but is generally less than one year.

539. Moreover, in addition to stipulating the deadlines for divestiture, the commitments of the parties must include a description of the transition stipulations, and demonstrate that they are sufficient to preserve the activity's viability and competitiveness.

d) Appointment of a divestiture trustee

540. The search for a suitable buyer and the negotiation of the divestiture conditions can be entrusted, either upfront or after an initial period where no buyer could be found in an independent divestiture trustee. In this case as well, the buyer is approved by the Autorité.

e) Examples of remedies involving divestiture

541. Divestiture of activities or assets can be efficient in order to resolve anticompetitive effect, whether resulting from horizontal, vertical or conglomerate effects, as well as coordinated effects.

542. Anticompetitive effects resulting from the aggregation of market shares of the merging firms (horizontal mergers), can be addressed by means of sales of assets, as notably illustrated by the acquisition of control of Socopa by Bigard in the meat sector, which the Minister for the economy only authorised subject to the completion of the sale of several slaughterhouses202, as well as by the acquisition of control of Les Echos by LVMH, which was authorised only subject to the sale of La Tribune203.

543. Divestitures can also remedy anticompetitive effects identified in vertical or conglomerate mergers. For example, with regard to the foreclosure of certain local beer distribution markets resulting from the vertical integration of brewers, the Minister for the economy ordered by decree dated 25 May 2005 the brewers Heineken and Kronenbourg to sell several wholesaler warehouse keepers. In the Lustucru/Panzani case204, Panzani's sale of the Lustucru brand and of all material and immaterial assets needed for the Lustucru dry pasta activity allowed the Minister to find that the operation no

202 C2008-100 letter from the Minister for the economy, industry and employment of 17 February 2009 to the board of the Bigard company, relative to a merger in the meat sector.
204 Minister's decision C 2002-14 of 17 May 2002 Lustucru/Panzani.
longer had anticompetitive effects due to conglomerate effects, subject to the implementation of the commitments undertaken.

544. In mergers in which coordinated effects can have an adverse effect on competition, the transfer of a market position by means of divestiture can be a possible solution. The objective is to create or strengthen a competitive dynamic that would be capable of efficiently calling a possible coordination into question. Such a remedy was notably proposed in the Community case of Air Liquide/Messer Targets.

2. CANCELLATION OF STRUCTURAL LINKS BETWEEN THE COMPETITORS

545. In certain cases, in order to sever the link with an important competitor, the parties can propose the sale of minority interests in this competitor or in a jointly held firm.

546. On an exceptional basis, the parties can also propose to waive the rights related to minority interests without selling the shares. This waiver must have the same competitive effect as a sale of shares. It must be permanent and cover all rights likely to have an influence on competitive behaviour, such as representation on the board of directors, veto rights and information rights.

547. Remedies intended to terminate the structural links between competitors have been implemented in various operations, such as, for example, in the Solvey/Montedison-Ausimont case where a commitment to withdraw from a joint venture was intended to sever certain structural links that were likely to promote the adoption and stability of coordinated behaviour, as well as in the Nordbanken/Postgirot case, that notably included discontinuation of representation within the board of directors of a competing firm.

3. CREATION OF NEW CAPACITIES

548. In the above-mentioned CCIP / Unibail case, the notifying parties undertook to overcome the effects of the creation of a monopoly situation by creating new exhibition surfaces in the Paris region.

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205 In this regard, see the Commission's classification of remedies in cases of collective dominant positions: DG COMP, European Commission (2005), Merger Remedies Study.
208 Commission decision of 8 November 2001, case COMP/M.2567 - Nordbanken / Postgirot.
4. Behavioural Remedies

549. Behavioural remedies can be of different types, depending on their intended objectives. For example, they can involve:

- granting access to networks or infrastructures, in a non-discriminatory and transparent manner,
- granting access to licences, patents, brands or technologies,
- altering pricing conditions,
- terminating or modifying exclusivity contracts,
- altering the conditions for the distribution or supply of a product,
- disclosing information on a non-exclusive basis.

550. Behavioural measures can be envisaged as a supplement to structural measures. For example, in the decision of the Minister for the economy, Lesieur/Puget 210 Lesieur undertook to sell the olive oil brand "Olï" but also to discontinue the use of brand and assortment discounts. Other examples: for several operations for which the Commission had concluded that they had anticompetitive effects due to the exit of a potential competitor, commitments combining the divestiture of assets and obligations to provide access to essential infrastructures were combined in order to strengthen the credibility of the potential competitors remaining in the market 211.

551. Behavioural measures can also be envisaged as a substitute - temporary or not - for structural measures, particularly when a divestiture would be difficult to arrange. For example, in the decision issued on the merger of the Banques Populaires and Caisses d'Epargne groups, the Autorité noted that the divestiture of a portion of the assets held by the new group on Reunion Island would be difficult in view of the crisis currently being experienced in the financial sector, and its particular severity overseas. Measures intended to maintain the autonomy and legal independence of the new group's three agency networks on Reunion Island were preferred, bearing in mind that, should non-compliance or inefficiency then be detected, an asset disposal commitment would apply ipso jure.

552. Behavioural remedies intended to protect consumers from the anticompetitive effects of the concentration and to limit entry barriers for newcomers were implemented for the CCIP/Unibail and TPS/CanalPlus concentrations, relative to mergers in duopoly 212. For example, in the Canal+/TPS case, many behavioural commitments were proposed by the parties in order to allow non-merging competitors who, unlike the new entity, would

210 Minister's decision C 2004-130 of 18 November 2004 Lesieur/Puget.
211 See the decisions Air Liquide/BOC, Telia/Telenor and EDF/EnBW mentioned in the chapter on the disappearance of a potential competitor.
not operate throughout the value chain to be given access to content so that are not foreclosed from downstream markets (sale of non-linear exploitation rights for films found in the new entity's catalogue to any distribution platform that submits a request; commitment to make seven channels (TPS Star, 3 movie channels, sports and two youth channels) available to third party distributors.

553. Behavioural measures can also be considered in order to remedy anticompetitive effects resulting from vertical or conglomerate integration. For example, in the Arc / Callens case214, the parties proposed a commitment relative to maintaining non-discriminatory commercial relations with the competing wholesalers of the downstream division, so as to eliminate any possible foreclosure of the downstream markets. In the Zürfluh-Feller case, the parties to the operation undertook to continue the manufacturing and marketing of parts that provide for interoperability between their accessories and those of their competitors215 so as to eliminate the risks of anticompetitive effects due to vertical effects.

554. In certain cases, anticompetitive effects through coordinated effects have been corrected by providing rival operators a guarantee to access facilities. For example, such measures were proposed during the Community case Sell/DEA216. They were also adopted with regard to the marinated meat market, during the Bigard Group/Socopa Viande operation217. In the latter case, the buyer undertook to sign an exclusive licence contract for the Valtero brand with a third party, such as to facilitate its entry into the "manufacturers' brands" market.

555. Behavioural remedies are always implemented for a fixed period, which depends on the case at hand.

556. As with structural remedies, the Autorité verifies their proper execution. To this end, the parties can propose to report on the progress of their implementation to the Autorité on a regular basis, either directly or, in more complex cases, through a trustee specially appointed in order to monitor the realisation of these commitments and to report to the Autorité.

557. The control by the Autorité also relies on market surveillance. Competitors can inform the trustee or the Autorité of the non-implementation of a commitment. It is for this reason that behavioural commitments are always published and that non-disclosure is kept to a minimum.

214 Letter from the Minister of state, Minister for the economy, finance and industry C2004-86 of 24 November 2004 to the boards of the Arc International Group relative to a merger in the sector for the wholesale distribution of table arts products.


216 Commission decision of 20 December 2001, case COMP/M.2389 - Sell/DEA.

VI. Appendices

A. MERGER CONTROL PROCEDURE OVERVIEW

* In phase 1, the time limit is extended to 40 working days when commitments are filed. The parties can also request an extension of up to 15 working days. In phase 2, the time limits are extended by 20 working days if commitments are filed fewer than 20 days before the initially anticipated deadline; the parties can request an extension (up to 20 days); the Autorité can stop the time limits when the notifying parties have failed to inform it of a new fact as of its occurrence, or to provide it with all or part of the requested information.

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B. RECOMMENDATIONS FOR SUBMITTING ECONOMIC STUDIES TO THE AUTORITÉ DE LA CONCURRENCE

1. STUDIES PRESENTATION

558. The present appendix provides recommendations in order to guide firms and their boards when providing economic studies in support of a notification file, notably when these studies are based on analysis of statistical data. These recommendations are intended to facilitate communication between the parties and the services of the Autorité, such that the submitted studies can contribute to the investigation as efficiently as possible.

559. The economic studies must be drafted in a clear and transparent manner. They must explain and justify all of the adopted hypotheses. The economic service within the Autorité must be able to reproduce all of the presented results. It must therefore have all data and useful information relative to the employed methods.

560. Insofar as possible, it must be possible to understand the submitted studies independently of any external document. All elements needed for the examination of the reasoning pursued and the main presented results must be contained in the body of the text, or in an appendix. When material reasons make it impossible to include all of these elements, the authors must provide complete and precise references to ensure easy access to them. The studies can usefully mention the main prior works that have used comparable data or methods, whether academic articles, sector-specific studies, or economic studies carried out within the framework of competition cases.

561. Over and above a reminder of economic arguments of general scope, the studies must elaborate the markets and sectors’ specifics studied. The selected methodologies must be suited to each market's actual operation. Quantitative results must be interpreted intuitively, with a concrete illustration of the extent of the effects that are intended to be measured.

562. The studies must contain a summary written in non-technical language, understandable by readers who are not economists. The summary describes the analysis objective, the nature of the employed data, the selected methodology, the results obtained and their sturdiness. These various points are developed in the body of the study, while insisting on the link between the concrete operation of the studied market and the employed methodology. The study must include a bibliography containing the list of quoted works, with their precise references. The most technical elements can be contained in an appendix.

563. The text of the study and the appendices as well as, if any, data and program files (see below) must be provided in electronic format. For the study itself, PDF format is preferred.
564. It is recommended that the parties should discuss with the investigation services relative to the planned methodology for their economic studies, as of the pre-notification phase. This dialogue can lead to the modification of certain hypotheses and, in certain cases, to a substantial evolution of the approach. In-depth exchanges between the firms and the Autorité may be necessary in order for the economic studies to contribute to the investigation in an efficient manner.

565. The investigation services can organise technical workshops, in order to specifically discuss economic studies. The further upstream in the procedure these workshops are held, the more they will be useful.

566. The authors of the studies can provide the details of a contact person who can answer possible technical questions or provide clarifications.

2. STUDIES CONTENT

a) Regarding econometric studies

567. Statistical data are the essential ingredient for empirical studies. To assess the scope of the conclusions that may be drawn from their examination, it is essential to indicate in what manner they can clarify the competition stakes for the Autorité, and to discuss their qualities and limits in terms of precision, representativeness, aggregation level, etc.

568. The studies must clearly present the approach used in order to tackle the economic concerns that are specific to the case at hand. They must clarify all of the adopted hypotheses and show why the selected methodology is suitable relative to the data and the competition issue.

569. The results must be interpreted and commented upon in an intuitive manner, in economic terms, on the basis of the concrete elements of the case and of the characteristics of the markets in question. The studies must discuss the quality of the employed econometric models, and check the adequacy of the models relative to the data. The presentation of the results must therefore include the standard tests for the quality and adequacy of the models to the data. The studies must discuss the sturdiness of the results relative to the specifications of the models, the selection of the sample and the definition of the variables. They must make it possible to assess the sensitivity of the results to the various employed parameters and hypotheses.

570. Finally, the investigation services must be able to reproduce all of the results of the econometric studies submitted by the parties. The studies must therefore be accompanied by the employed data and all of the implemented IT programs, in a digital format that will allow the investigation services to consult them without difficulties (databases and programs compatible with Stata or Excel).

571. More specifically with regard to data, the submitted studies must be accompanied by the raw data and the various working samples that have been used, in electronic format. They must precisely describe the initial
sources of the studied data, as well as the construction of the various samples on which the statistical treatments have been carried out.

572. The studies are accompanied by the IT programs that were used for the establishment of the working samples. Comments on the programs must be included. The comments describe the successive modifications made to the raw data: elimination of missing or absurd values, corrections of input errors, data corrections or adjustments, construction of new variables, etc.

573. In a specific file, the studies include the "catalogue" of all of the variables that have been used. For each variable, this catalogue indicates if it is present in the raw data or if it was constructed by the authors. It gives the name and precise definition of each variable, as well as, if relevant, its construction method and any other useful information, for example its measurement unit (thousands of euros, tonnes, no units, etc.).

574. The studies present detailed descriptive statistics for the main variables that are of interest relative to the working samples and, insofar as possible, relative to the raw data. These statistics notably provide information on the representativeness of the working samples.

575. The submissions must also include the programs, also commented upon, that have been used for the statistical and econometric treatments applied to the data. These programs must be commented upon so that they can be understood and replicated by the investigation services.

576. The studies must be accompanied by a set of files (raw and restated data, IT programs, catalogue of variables), that can be relatively complex. It may then be useful to include a "usage guide" in order to describe these various files and the order in which they must be run so as to obtain the results presented in the study.

b) On the polling data

577. When the data are based on the results of polls, they must clearly and precisely describe:

- the complete questionnaire with all of the questions asked and the possible answers;
- the practical provisions for the questioning (face-to-face, telephone, Internet, etc.) as well as the period (and if relevant, the location) of the survey;
- the description of the sample: the targeted population, the survey plan, the size and method for establishing the sample;
- the description of the obtained responses: non-response rate, consistency of the answers, missing or excluded answers, etc.

578. The complete results of the surveys used by the parties must be described and attached to the studies. They must discuss the representativeness of the samples, the reliability of the polling method, the relevance of the questions asked, and the particularities of the circumstances in which the survey was carried out.
c) On literary reviews

579. In order to clarify the issues at hand, it may be useful to review the economic literature. Without necessarily being exhaustive, such literary reviews must faithfully present the current status of the knowledge, discuss the hypotheses that are most often accepted, and assess the relevance in the current case. The submitted studies must prioritise the various effects mentioned by the literature on the basis of their likelihood and their probable extent in the case at hand.

d) On the recourse to economic modelling

580. Mathematical formalisation may be useful when it serves to present the arguments and economic mechanisms at play in a more rigorous manner. Studies that use this type of technique must justify the adopted hypotheses, discuss the robustness of the results, explain the mechanisms at work in an intuitive manner, and prioritise the various elements that are brought to light.

C. QUESTIONS RELATIVE TO DISTRIBUTION CONTRACTS

581. Distribution contracts can take various shapes. Within the framework of merger control, the contracts most often subject to examination by the Autorité are franchise contracts, contracts for membership in a cooperative of independent retailers, and automobile concession contracts.

582. The LME's introduction of controllability thresholds specific to retail commerce\(^\text{218}\) has resulted in an increase in the number of notifications involving such contracts. In particular, several major distribution networks, namely food or specialised mass retail distribution networks, have opted for an organisation method that contractually binds the "network members" (dealers, franchisees, co-operators, etc.) to a "network head" (that can be a licensor, franchisor or a corporative, for example).

583. The application of ordinary merger law to relations existing within such a distribution network requires the consideration of various questions (nature of the control, turnover calculation, assessment of the market power, etc.). The present appendix is therefore intended to clarify these questions.

\(^{218}\) (II) of Article L 430-2 of the French Code of commercial law (Code de commerce).
1. DISTRIBUTION CONTRACT AND DECISIVE INFLUENCE

584. The mere signing of a distribution contract is not sufficient to imply a decisive influence within the meaning of Article L. 430-1 of the French Code of commercial law (Code de commerce), except in very specific cases. As such, the Commission's consolidated notice reiterates that "in order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights)." 219. As such, with regard to independent stores that are offered as part of a trade name contract, the initial signing of these contracts does not, in and of itself, generally constitute a merger operation. In principle, the same applies when these stores become affiliated with another network, and change names. 220.

585. The Commission more specifically asserted this principle with regard to franchise contracts: "in principle, franchise agreements to allow the franchisor to control the activities of the franchisee. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor." 221. In its decision M. 940 UBS/Mister Minit of 9 July 1997, the Commission considered that the "typical" provisions (obligation for the franchisee to comply with the franchisor's marketing standards, preservation of the franchisor's intellectual property rights, etc.) within a franchise agreement were not sufficient to imply decisive influence of the franchisor over the franchisee, insofar as the latter continued to bear the commercial risks of its activity (management of stocks and procurements, setting prices).

586. Distribution contracts are likely, however, when taken jointly with other legal or factual elements, to provide the network head with decisive influence over its members. The Autorité examines all clauses that allow the network head to limit the member's autonomy, whether in terms of the conduct of its commercial policy (for example, through contractual mechanisms that transfer all or part of the member's commercial risk to the network head) or of the possibilities for changing networks, and determines if they are sufficient to provide the "network head" with decisive influence over the firm of its "member". 222.

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219 Paragraph 18 of the Commission's consolidated notice.
220 Letter 09-DCC-23 of 23 July 2009 relative to the name change of points-of-sale under the trade name of Vêtsi to the trade name of Kiabi: "In this case, the affiliation commission contracts stipulate that the operational companies in question will be free to define their commercial strategy and notably to determine their rates, with AFFIPART nevertheless being able to provide the latter with a maximum recommended price. Moreover, the operational companies will assume the financial and commercial risks linked to their activity, and most also, in particular, bear the cost for unsold products. Via AFFIPART, KIABI will therefore exert no decisive influence over the operational companies in question.

221 Paragraph 19 of the Commission's consolidated notice.
222 See for example the France Telecom / EC decision of 4 January 2008 on exclusive distribution agreements as attached to lender relations and the signing of commercial leases.
In particular, it is possible that a franchise agreement or membership agreement for a network of independent retailers may include an acquisition of assets (goodwill, stocks, premises) that is likely to provide the network head with control of the assets of the franchisee or member. The operation whereby these assets are acquired is then likely to fall under merger law if a determined turnover can be allocated to these assets, and if the turnover thresholds are reached. Indeed, in its decision M.890 Blocker / Toys "R" Us, the Commission stressed that "the mere fact that a franchise agreement is a part of the operation cannot exclude the whole operation from the application of the Merger Regulation".

Similarly, if the head of the distribution network secures an interest in the member's capital that allows it to exercise sole or joint control over the latter, the operation can easily be qualified as a merger.

The case in which only a minority interest is acquired is more delicate. Such an equity investment can primarily be intended to protect the financial interests of the minority shareholders in their capacity as investors, and in principle is not sufficient, in and of itself, to provide the franchisor (or licensor or cooperative) with a decisive influence over the franchisee (the dealer or member). Nevertheless, such an operation can be accompanied by a modification of the Articles of association of the firm concerned. In this case, the Autorité assesses to what degree certain clauses of these Articles of association are likely to provide the minority shareholder with decisive influence over the member. For example, if these Articles of association stipulate the trade name under which the member must carry out its activity, and if they can only be modified with the approval of the minority shareholder, they allow the head of the distribution network to prevent the member from leaving the network. The Autorité then considers that this minority interest, attached to the distribution contract, provides the network head with decisive influence. The same applies when provisions of the Articles of association establish a very long interval during which the member cannot leave the network, or de facto prevent the member from leaving the network for a very long period. Such provisions in the Articles of association can be in consideration of equity interest equal to a simple blocking minority (34% in a SA (limited company), 26% in a SARL (joint stock company)), or even the holding of a single preferred share.

On the basis of the other prerogatives over the firm's management possibly granted to the minority shareholder by the Article of association and of the

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223 C2006-18 Conforama / Sodice Expansion, decision of 24 February 2006 published in the BOCCRF of 22 June 2006 (Sodice Expansion, first Conforama franchisee) and C2006-15 Carrefour / Hamon, decision of 14 April 2006 published in the electronic BOCCRF of 15 September 2006 (the stores were franchised under two Carrefour trade names prior to the operation. Moreover, the reverse situation of the acquisition of control of a network head by its main franchisee has also already been examined by the Minister: see the decision of 16 July 2006, authorising the takeover of Sofinhor SAS, majority shareholder at the head of the Jardiland network, by its main franchisee, Conte - Decision C2006-77, published in electronic BOCCRF of 26 October 2006.

224 See for example, Autorité de la concurrence decision 09-DCC-06 of 20 May 2009, ITM/Evolis.

225 See Autorité de la concurrence decision 09-DCC-064 of 17 November 2009: “ITM held a single preferred share of the Mikery company that operated a point-of-sale under the Intermarché trade name, but the firm's Articles of association had been modified and had granted to ITM Enterprises, for a duration of [more than 10 years], the possibility of blocking any name change, opposing any transfer of shares and obliging the majority shareholders to sell the business as of the moment when they would operate a similar business under a competing trade name: a pre-emptive right in case of divestiture of the business at a price calculated according to a predetermined formula. Finally, after [more than 10 years], while ITM Enterprises could no longer block any name change or oppose any transfer of shares, ITM Entreprises still retained a pre-emptive right to any sale of shares for an additional 5 years.”
provisions of the trade name contract, the control exercised by the network head over the member can be joint, with both parties necessarily having to agree on the commercial policy of the point-of-sale, or it can be exclusive, with the network head alone having the possibility of determining this policy. When the network head already has joint control over the member, the network head acquiring exclusive control of the member also constitutes a merger operation.

591. Certain acquisitions of control by the network head of companies that operate retail stores affiliated to the network are carried out on a temporary basis, with the network head anticipating, in a more or less short term, to sell all or part of the acquired control to an independent buyer. Two cases can then be considered:

- when this buyer is known, when binding legal documents have been signed between the buyer and the network head and the sale is to occur in the short term (less than one year), then both operations, the one in which the network head acquires exclusive control and the one whereby it sells all or part of this control to a third party, can be considered as a single operation. In this case, both operations can be jointly notified to the Autorité. In this case, the first - and temporary - operation is considered not to have effects on the structure of competition, meaning that only the effects of the second operation will then be the subject of a competitive analysis;

- in other cases, the operation whereby the network head acquires exclusive control of one or more points-of-sale must be independently notified to the Autorité, which will assess their effects on the network's competitive structure.

2. TURNOVER CALCULATION

592. The turnover of a network head (franchisor, licensor, cooperative etc.) includes the sales of its branches, the sales to its independent members in order to supply them and the compensation paid by independent members for all services provided by the network head. These services, paid by means of a royalty or other measures, can take several shapes: know-how, brand, assistance, market and assortment studies, training actions, seminars, etc.

593. On the other hand, the network head's turnover does not include the sales to the public carried out by independent members, insofar as the network head does not have the right to manage the member's affairs within the meaning of Article 5 of Community Regulation (EC) n°139/2004, to which Article L. 430-2 of the French Code of commercial law (Code de commerce) explicitly refers. This point was established in the aforesaid M940 UBS/Mister Minit decision.
3. MARKET POWER APPRAISAL

594. The notions of decisive influence and of market power do not take in one another. As such, even if the network head does not control the store operated by a member (franchisees, dealers, cooperating members...), the latter's sales can be included with those of the stores operated by the network head itself for the purposes of the competitive analysis, on the basis of the degree of autonomy of the commercial policy implemented by the network's independent members.

595. On a case-by-case basis, the Autorité examines whether one must consider that, within a single trade area, the stores controlled by the network head, on the one hand, and those operated under the same trade name but not controlled by the network head, on the other hand, are likely to exert competitive pressure on one another.

4. CONTENT OF THE NOTIFICATION FILE

596. As indicated above starting in paragraph 163, the content of the notification file is lighter for operations that, in principle, do not bring competition problems to light:

- for operations that do not result in competition issues, the absence of markets affected leads to a simplified notification, the most demanding part in terms of required information is by far the detailed description of the markets affected.
- the firms can, after the closing of the annual financial statements, provide the mergers unit with a core summary, preferably in electronic format, that contains the general information that is likely to be repeated in all notifications for the coming year. They can then limit the content of their notification to the information that is specific to the operation.
- when the operation has to be notified in application of (II) of Article L. 430-2 of the French Code of commercial law (Code de commerce) but not of (I) of the same Article, the definition of the upstream

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226 Decisions M. 1221 Rewe/Meinl and M. 1684 Carrefour/Promodes; Conseil de la concurrence opinion 00-A-06 and letter from the Minister C2000-03, Carrefour Promodes.

227 As such, in the Carrefour/Promodes opinion, the commercial policy of the stores under the trade names of the Promodès company operated as franchisees or under a membership contract under the trade names Champion, Shopi and 8 à Huit was heavily controlled: "that, firstly, the Promodès company has majority or minority interest in the capital of several companies made up of franchisees or members; that secondly, as part of its franchise contracts, the company requires its franchisees to commit to adhering to a commercial policy defined by the franchisor, notably with regard to the ranges, promotions and determination of resale prices for consumers; that moreover, the franchisees grant a preference pact to the Promodès company, through its subsidiaries, the Prodim operational companies, relative to the shops under the name of Shopi or 8 à Huit, Amidis for the Champion trade name;". On the other hand, in the same case, the stores affiliated to the Prodim purchasing pool and operated under the names Corsaire and Proxi offer an example of sufficiently autonomous franchisees that "cannot be considered to comprise a set, together with the other stores operated under the trade names of the Promodès company; that indeed, these companies have signed a 5-year commitment, subject to tacit renewal, that allows them, if they wish, to take advantage of the purchasing pool's procurement terms for consumer goods, and that they are only responsible for the payment of orders; that as such, agreements signed with the purchasing pool do not limit the autonomy of the stores in question in terms of the definition of their commercial policy relative to the consumer; that consequently, with no obligation being anticipated in terms of the price policy or product ranges, the stores affiliated to this purchasing pool cannot be considered as comprising, with the group's other stores, a single set;"

228 Operations requiring notification in application of (III) of Article L. 430-2 cannot be the subject of a simplified file.
supply markets and the assessment of the market shares of the buyer and of the target in these upstream markets can be omitted.

597. Finally, a simplified file can also be submitted in the following cases:

- when the buyer(s) is/are not present in the same markets as the ones in which the target(s) is/are operating, nor in upstream, downstream or related markets\(^{229}\); however, a simplified file will only be accepted in this regard when the delimitation of the relevant markets concerned is sufficiently obvious such as to imply the absence of any overlap or of vertical and related links between these markets; in the simplified notification file, the declaring parties are also asked to give a sworn statement that the operation in question meets this condition;

- when the operation has to be notified in application of (II) of Article L. 430-2 but not of (I) of the same Article\(^{230}\) and it does not result in a change of the trade name of the retail store(s) in question.

598. For these operations, for which it is supposed, in principle, that they are unlikely to harm competition, the parties can, for the following points in the notification form indicated in appendix 4.3 of the regulatory part of the French Code of commercial law (Code de commerce):

- for point 2c, provide a recap table of the financial data only for the last closed fiscal year;

- for point 2e, not provide the "list and description of the activity of the undertakings with which the undertakings or groups concerned and the groups to which they belong maintain significant and lasting contractual ties within the markets concerned by the operation, the nature and description of these ties";

- for point 3, simply provide a list of the activities of the parties.

599. On the other hand, the following elements (in the core summary or, in case of changes to these elements, in each notification file) are indispensable for a quick and complete examination of the file:

- a detailed study of the trade areas concerned by the operation. This study must be accompanied by a map showing the locations and trade names of each competing store, but also of any stores ( independents or branches) that are tied to the distribution network involved in the operation,

- copy of the contracts, i.e. distribution, franchise, concession, membership in a cooperative etc.),

- copy of the Articles of association and rules of procedure of the head of the distribution network ( franchisor, licensor, cooperative etc.),

- names of the members leaving the distribution network and the reasons for their departure within the three years preceding the date of the notified operation.

\(^{229}\) The buyer can be an investment fund.

\(^{230}\) Operations requiring notification in application of (III) of Article L. 430-2 cannot be the subject of a simplified file.
D. SPECIFIC QUESTIONS REGARDING INVESTMENT FUNDS

600. Ordinary law as it pertains to mergers is fully applicable to operations involving investment funds. However, these operations elicit the following specific questions.

1. CONTROL QUALIFICATION

601. Investment funds bring together unit holding investors who, in principle, have no control over the fund, neither on a personal nor a collective basis. The funds generally acquire the shares and voting rights that provide control of the companies that make up their portfolio, with this control generally being carried out by the portfolio management company that created the fund.\(^\text{231}\)

602. Several operations not subject to control, which is relatively frequent in operations involving funds, can be pointed out, even though an analysis of the controllability of these cases brings to light nothing that is specific to investment funds:

- in the cases of fluctuating majorities (in this regard, see paragraph 36),
- in the case of a purchase option, unless it must be exercised in the near future, in compliance with legally binding agreements (in this regard, see paragraph 40),
- in the case of the absence of a significant change of control: if an operation implies a reduction of the number of shareholders that exercise joint control, with the remaining shareholders continuing to exert joint control over the firm in question, it will be considered that there is a lack of a significant change of control. This question is covered in points 89 and 90 of the Commission's consolidated notice,
- similarly, it is possible, all things being otherwise equal, that an investment in a firm carried out by a management company does not provide it with any control in view of the presence of an industrial co-shareholder (or even the company's founders or directors) that, as a result of its knowledge and in-depth experience of the sector, is able to exercise exclusive control.

603. The appreciation of certain cases of possible joint controls can be complex. In case of doubts, the operators are required to contact the mergers unit.

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\(^{231}\) In paragraph 15 of the consolidated notice, the Commission recalls that, in rare cases, control can be exercised by the fund itself.
2. TURNOVER CALCULATION

604. To determine the turnover of an acquiring fund, one must apply Article 5 of Regulation (EC) n° 139/2004 and notably Article 5(4), while considering, as a general rule, that the firm concerned is the portfolio management company that manages the acquiring fund. When a shareholder of the portfolio management company meets the criteria anticipated in points b), c) or e) of Article 5 of paragraph 4, irrespective of the autonomy of the portfolio management company relative to it, its turnover will be taken into account. When a portfolio management company belongs to a banking group, the turnover of the overall group must therefore be taken into account.

3. CONTENT OF THE NOTIFICATION FILE

605. The provisions anticipated in the body of the present guidelines relative to simplified files apply to the operations of investment funds.

606. The issue of the notification file does not in fact bring to light questions specific to funds, except with regard to the application to investment funds of point 2 (b) of the notification file, which requires the following to be provided: "the list of the main shareholders, the shareholders' pacts, as well as the list and amount of the equity interests held by the undertaking or its shareholders in other undertakings, if this participation directly or indirectly results in at least a blocking minority or the ability to appoint at least one member of the board of directors", as well as in point 1 (b), which requires "a presentation of the operation's legal and financial points that mentions, if relevant, the amount of the acquisition".

607. This involves indicating, for investment funds, in the most common case of an acquisition of control by a portfolio company:

- the composition of the shareholding of the portfolio management company,
- the documents determining the governance rules of the portfolio management company, such as association articles, possible pacts or internal regulations,
- the identity of the fund's main investors, with the amount invested by each investor in the fund. In certain cases, the identity of the investor can be difficult to determine, as nominees can provide a screen between the investment company and the final investor in the fund. In this hypothesis, the notification file will mention this difficulty and will provide any useful element that will serve to demonstrate the impossibility of providing the investor's identity.
- the fund's rules of procedure as well as any contractual document governing the relations between the management company and the investors in the fund. Any form of agreement, even verbal, between
the fund's management company and the investors, must be mentioned in the notification file.

- the list of equity interests held by all of the funds managed by a single investment company, while stipulating the share of the capital held, the type of control (exclusive, joint, absence of control), the turnover and the firm's business sector.

608. The filing of these documents is intended to make it possible to verify the management company's actual degree of autonomy relative to its shareholders and investors, in order to determine the perimeter of the merged entity that is taken into account in the competitive analysis. Should the management company not be autonomous relative to a shareholder or, on a very exceptional basis, to an investor, the list of equity interests held, directly or indirectly, by the shareholder or investor concerned must be provided.

609. In the case of funds subject to particular foreign legislation, this matter will be examined on a case-by-case basis, in view of the applicable national legislation and of the assessment elements included in the notification file.

610. With regard to point 1 (b) contained in the part specific to each operation, it should notably be clarified, in the case of an investment funds belonging to a bank, if the operation's financing plan includes credits granted by the bank or if the firm that is the subject of the operation has or will have recourse to credits granted by the said bank. The participation of the bank linked to the investment funds in a LBO-type arrangement, or a significant liability of the firm that is the subject of the operation relative to this bank, can indeed be considered as an element comprising a decisive influence.

4. FILE INVESTIGATION TIMEFRAME

611. At times, investment funds can be particularly interested in being able to quickly carry out their operations. When the operation in question raises no competition issues, it is best to be able to issue a decision without uselessly delaying the operation. To take these timeframe constraints into account, French legislation was adapted by including, in Article L. 430-3 of the French Code of commercial law (Code de commerce), the possibility for the parties, to notify "sufficiently complete" agreements. The parties are therefore invited to use this faculty in order to not necessarily wait for the signing of irrevocable agreements before submitting their operation for examination by the merger control services.

612. It is furthermore possible, when a prima facie analysis makes it possible to set aside any risk of an anticompetitive effect, to request the benefit of an authorisation within 15 working days instead of the usual 25 working days. In all cases, it is up to the parties wishing to carry out the operation within short timeframes to provide the administration with a complete notification file as of its filing.

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232 See decision M 1357 of the Commission, Nordic Capital / Hilding Anders.
5. REFERRALS TO THE COMMISSION

613. When an investment funds wishes, pursuant to Articles 4-5 of Regulation n° 139/2004 EC, to benefit from a one-stop shop examination on the Community level, it files a request for this purpose with the European Commission. The Autorité will generally give a favourable outcome to this request if the operation is in fact likely to be controlled by three Member States.

6. COMPETITIVE ANALYSIS

614. The competitive analysis of an operation involving a portfolio management company brings to light specific questions relative to the appreciation of its management autonomy relative to their shareholders and investors in the fund that they manage.

615. Portfolio management companies, subject to approval by the French monetary and financial code (Code monétaire et financier)\textsuperscript{233}, are required to maintain a policy of efficient management of conflicts of interest in accordance with the various provisions of the French monetary and financial code (Code monétaire et financier), of the code of ethics of the Association Française de la Gestion financière (AFG-ASFFI) and/of the Association Française des Investisseurs en Capital (AFIC). Many foreign Regulations anticipate similar provisions with regard to preventing conflicts of interest. The result is that portfolio management companies most often have management autonomy relative to their shareholders, even majority shareholders, and relative to the investors in the funds that they manage\textsuperscript{234}.

616. In the case of an acquisition of control by a sufficiently autonomous portfolio management company, the merged entity that is the focus of the competitive analysis is comprised of the management company and of all of the firms over which it has a decisive influence via its managed funds. Should it be demonstrated that the portfolio management company holds no controlling participation in an identical, upstream, downstream or related market to that of the target, the competitive analysis does not need to be taken any further. When the management company holds equity interests in an identical market, whether upstream, downstream or related to that of the target, the analysis provided by the parties must allow for an assessment of the operation's impact on competition. It can then happen that operations involving investment funds can result in anticompetitive effect, notably in the case of build-ups\textsuperscript{235}.

617. In the rarer cases in which the management company is insufficiently autonomous relative to a shareholder, or very exceptionally, an investor, the analysis must be extended to include the holdings of the group to which it belongs or those of the individual investor(s) that has/have decisive

\textsuperscript{233} In accordance with Article L. 532-9 of the French monetary and financial code (Code monétaire et financier).

\textsuperscript{234} See, for example, decision of the Minister for the economy AXA IMPEE/CORNHILL of 31 July 2002.

\textsuperscript{235} One can refer to several decisions of the Minister issued pursuant to commitments and involving funds: C2002-14 PAI LBO (Panzani)/Lustucru, of 17 May 2002.

influence over the management of the management company's equity interests. 

618. In particular, when the investors in the fund managed by the management company and its shareholders make up a single economic entity, the analysis will be extended to the entire economic entity in question: "Indeed, it is only when there are possible divergences of interests between the shareholders and the management company's parent company that it may be possible to presume a certain degree of autonomy of the management company, in the interests of the managed fund's shareholders."  

E. QUESTIONS CONCERNING AGRICULTURAL COOPERATIVES AND THEIR UNIONS 

619. The purpose of agricultural cooperatives is the "joint usage by farmers of all means intended to facilitate or develop their economic activity, and to improve or increase the results of this activity." Farmers who are members of a cooperative are necessarily its associates. Agricultural cooperatives, governed by a specific legal system as codified in book V, Section (II) of the French Rural code (Code rural) are generally considered to be companies of a special type, neither non-trading nor commercial. Their "hybrid" or "semi-integrated" form results in a particularity that renders their analysis more difficult in terms of competition law. As such, they find themselves between the two poles of the markets and organisations. 

620. Cooperatives are increasingly grouping together, notably through the creation of unions or grouping provisions that are not specific to cooperatives, such as mergers. 

621. The analysis of merger operations involving cooperatives, or unions of cooperatives, are based on the principles and general criteria used in merger control. The purpose of the present appendix is to stipulate certain specifics of cooperatives and their unions that have to be taken into account in order to answer four questions: 

- in what cases do a cooperative's members exercise decisive influence over it? 
- does the creation of a union of cooperatives constitute a merger within the meaning of Article L. 430-1-II of the French Code of commercial law (Code de commerce) (creation of a full-function joint venture)? 
- how to calculate the turnover of a cooperative or union of cooperatives? 
- how to analyse markets that are characterised by the presence of a cooperative and its members? 

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236 One can notably refer to the Minister's decision C2002-82 Astorg / Vetsoca of 20 September 2002. 
237 Bridgepoint / Nocibé decision of the Minister for the economy, of 10 September 2002. 
238 Article L. 521-1 of the French Rural code (Code rural).
622. For any other question, such as the controllability of a merger between cooperatives, the reader is invited to refer to the corresponding chapters in the present guidelines.

1. IN WHAT CASES DO THE MEMBERS OF A COOPERATIVE EXERCISE DECISIVE INFLUENCE OVER IT?

623. On the one hand, the farmers are the cooperative's associates in that they provide its issued capital (subscribed according to their contributions), and on the other hand, they are its suppliers of raw materials and/or purchasers of products and services according to the cooperative's corporate purpose. The cooperative and its members therefore have a dual relation, capitalist and economic.

624. A cooperative's member is first and foremost one of its associates, whose commitment is for a limited time that, in practice, varies between 3 and 15 years, based on the production cycles handled by the cooperative239. Though owners of the cooperative, the members do not enjoy any legal power to block its strategic decisions. Indeed, cooperatives operate using the "one person / one vote" principle, with a possible weighting of the votes. However, this weighting has a ceiling: a single associate can therefore not have more than one twentieth of the votes that are cast directly or represented. In practice, such weightings are infrequently used in cooperatives, but increasingly often in unions. Given these elements, it is clear that no single member has a legal power to block the cooperative's strategic decisions.

625. As such, as a general rule, no member or group of members exercises decisive influence over a cooperative. The cooperative can therefore not be considered as a joint venture, and the existence of an upstream market between the cooperative and its members logically seems to stem from this.

626. However, in certain rare cases, notably in view of the services provided by the cooperative to its members, it can be considered that there are common interests between them (since they are simultaneously suppliers, customers and associates of the cooperative), which are powerful enough to keep them from opposing one another when exercising their rights, and that act in a collective manner within the "joint venture" making up the cooperative240.

627. In all cases, the burden for proving control or the absence of control of a cooperative by its members is borne by the parties to the operation. This demonstration is then analysed by the Autorité.

239 Let us recall that there is no legal obligation to join a cooperative. Similarly, when a farm operator joins a cooperative, he is not required to do so for all of his production, nor for all the needs of his farm.

240 See paragraphs 74 et seq of the Commission's consolidated notice on the common exercising a veto rights and collective actions.

628. Legally, the union is a cooperative of cooperatives. Most of the elements indicated above as part of the description of agricultural cooperatives, their Articles of association, operation and their relations with their members, to a large extent apply to unions of cooperatives. Indeed, such unions are also common subsidiaries of their farming cooperatives, and operate according to the same principles\(^{241}\) (legal personality, approval by the HCCA\(^{242}\), decision-making provisions) and they have the same purposes.

629. The creation of a union of cooperatives will constitute a merger within the meaning of Article L. 430-1-II of the French Code of commercial law (*Code de commerce*) if, firstly, it indeed consists of a joint venture (therefore controlled by its member cooperatives) and, secondly, if it is indeed a full-function entity.

630. Control by the associates is more probable in unions of cooperatives than in cooperatives. Indeed, for example, unions can consist of only two associated cooperatives. In such a case, the union is generally controlled by its two associates, and can constitute a joint venture. Collective action is also easier to envisage in the case of the union, since there are fewer member cooperatives then there would be associates within a cooperative. As such, the probability of the union being controlled by its associates is greater.

631. For the creation of a union jointly controlled by its member cooperatives to be considered a merger operation, the union must also be a full-function firm. The criteria presented starting in paragraph 53 apply. In particular, it is necessary to verify if the union will have sufficient resources to operate independently within a market. For example, when examining the creation d'Axéréal, a union jointly held by Agralys and Epis-Centre, themselves unions of cooperatives, the Minister for the economy considered that Axéréal was indeed full-function, given that the creative entity would clearly be active in various markets, and that it would have its own technical, financial and human means as required to carry out its activities\(^{243}\).

632. In all cases, the burden of proof regarding the controllability of an operation that consists in the creation of a union of cooperatives is borne by the parties to the operation.

633. If it can be shown that the created union is indeed a full-function joint venture, then its creation constitutes a merger within the meaning of Article L. 430-1-II of the French Code of commercial law (*Code de commerce*). The operation will be controllable if it meets the turnover criteria of Article L. 430-2. The provisions for calculating the turnover are indicated below.

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241 It should be noted, however, that unions are not limited to the given territory.

242 The High Council for Agricultural Cooperation (*Haut Conseil de la Coopération agricole - HCCA*) approves cooperatives in accordance with the agricultural orientation law of 5 January 2006.

243 See letter C2008-94 from the Minister for the economy, industry and employment of 2 October 2009 to the board of the Axéréal company, relative to a merger in the cereal and oil protein crop sector.
3. HOW TO CALCULATE A COOPERATIVE OR UNION OF COOPERATIVES’Turnover?

634. Article 5 of Regulation (EC) n°139/2004, in particular paragraph 4, applies to the calculation of the turnover for cooperatives and unions of cooperatives.

635. As a general rule, the members of agricultural cooperatives (or, to a lesser degree, of unions of cooperatives) have none of the rights and powers listed in point b, Article 5 (four) of the Regulation, neither independently nor jointly. Consequently, the turnover of these cooperatives (or unions) must include the sales by the cooperative (or union) to third parties and the sales by the cooperative (or union) to its members, but not the sales by its members to third parties\(^{244}\).

636. In the rare cases in which the members have one of the rights and powers listed in point b) of Article 5 (4) of the Regulation, their turnover generated with third parties must be included, in compliance with points c) or e) of this Article. On the other hand, this turnover must not include the purchases and sales carried out between the cooperative (or union) and its members, insofar as these are intra-group sales. For example, this will be the case of a union that is jointly controlled by two member cooperatives.

4. HOW TO ANALYSE MARKETS THAT ARE CHARACTERISED BY THE PRESENCE OF A COOPERATIVE AND ITS MEMBERS?

637. In the frequent cases in which a cooperative is not controlled by its members, there will be one or more upstream markets that are characterised by the presence of the cooperative and its members (collection of cereals, for example). Even if the co-operators have no decisive influence over the cooperative, it is nevertheless true that the relations between the cooperative and its members have certain particularities that must be taken into account during the competitive analysis. Indeed, there is relatively strong interdependency between the farmer\(^{245}\) and the cooperative\(^{246}\) (as well as between cooperatives and their unions). The legal (capitalist and contractual) and economic links that bind them together are relatively strong and stable.

638. As such, while the economic operations between cooperative and its members cannot be considered as transactions within a single legal or economic entity, they can also not be identified on the basis of the links between the cooperative and third parties. This particularity must be taken into account in the competitive analysis of merger operations involving one or more cooperatives.

639. The Commission tackled this issue in its ruling on the operation of agricultural cooperatives in Denmark within the market for the supply of

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\(^{244}\) It is indeed possible that a cooperative's members will not sell all of their production to a single cooperative.

\(^{245}\) When they join a cooperative, the farmers agree to supply a significant share of their production. For this production, the farmers are no longer present in the market in which their product is marketed, and they are dependent on the cooperative.

\(^{246}\) Cooperatives can indeed only obtain limited supplies from non-members. In practice, the contribution level is a function of the business sector.
live animals for slaughter\textsuperscript{247}. During the examination of these two operations, the Commission considered that, in view of the structure and operation of agricultural cooperatives in Denmark, farmers, on the one hand, and cooperatives, on the other hand, constituted legally and economically distinct entities\textsuperscript{248}. Even so, the Commission noted, in paragraph 192 of the above-mentioned decision n° IV/M.1313, while issuing its ruling on the upstream markets for the purchase of live pigs, that the cooperatives taking part in the merger were owned by their own members and that the bulk of the annual profits of the slaughterhouses had, in the past, been distributed to members in proportion with their respective deliveries. Consequently, as a result of this special cooperative structure, the Commission considered that the slaughterhouses were unable to exploit their member-suppliers in the traditional sense of a dominant purchaser\textsuperscript{249}.

640. As part of the examination of the Limagrain and Domagri mergers\textsuperscript{250} in the market for the collection of cereal that included the presence of the cooperatives that are the parties to the merger and their members, the \textit{Autorité de la concurrence} also noted this structural particularly of the market while still accounting, in its assessment, for the various storage options that are available to member farmers, since recourse to the cooperative is not the only possible option.

641. The particularly of the link between the cooperative and its members must also be taken into account within the framework of vertical integration operations. Indeed, while in most cases farmers do not control their cooperative, membership means that they will have outlets. In case of a cooperative’s acquisition of downstream firms, there is then a risk that such outlets could dry up for farmers who are not members of this cooperative\textsuperscript{251}. Similarly, the possibility for members wishing to leave the cooperative to find other outlets must be studied.


\textsuperscript{248} The Commission considers that: “\textit{Furthermore, the co-operative neither owns the individual farmer nor does it assume any liability for his operations. Hence, the individual farmers and the co-operative constitute separate legal and economic entities and thus the sale and purchase of pigs and cattle are not done internally within one group. Therefore, it is necessary for the purpose of the present assessment also to take into account the buying position of the merged entity vis-à-vis the Danish pig farmers, including co-operative members, in the assessment of the competitive impact of the transaction}”.

\textsuperscript{249} As such, we read in the above-mentioned paragraph 192: “\textit{The market for live pigs: As far as the upstream markets for the purchasing of live pigs are concerned it is to be noted that the parties will achieve market shares as buyers of 76%. It is concluded that the parties will be able to act as dominant buyers on this market. However, it is also noted that the parties are owned by their members, and that the main part of the yearly profits of the slaughtering houses has in the past been distributed to the members in proportion to the deliveries by each member. Consequently, because of the co-operative structure, it is not possible for the slaughtering houses to exploit their members-suppliers in the traditional sense of a dominant purchaser}”.

\textsuperscript{250} Decision 09-DCC-38 of 4 September 2009 relative to the merger of the Limagrain and Domagri cooperatives.

Do the members have an individual power to block the cooperative’s decisions?

No (given the principle of 1 person = 1 vote and the high number of members of the cooperatives)

Are there sufficiently powerful interests between the members so that they will not oppose one another when exercising their voting rights?

Yes (exceptional case)

No (most frequent case)

Is this a full-function cooperative?

Yes

The cooperative is a full-function joint venture

The cooperative’s turnover includes its sales to third parties and the sales of its members to third parties. It does not include the cooperative’s sales to its members (intra-group)*

Existence of an upstream market between the co-operators and the cooperative. The particularly of the links between the cooperative and its members is taken into account in this market’s competitive analysis.

No

The cooperative is jointly controlled by its members, but is not full-function

The cooperative’s turnover includes its sales to third parties and the sales of its members to third parties. It does not include the cooperative’s sales to its members (intra-group)*

No upstream market between the co-operators and the cooperative.

The members have no decisive influence over the cooperative

The cooperative’s turnover includes its sales to third parties and its members to third parties. It does not include the sales of its members to third parties.

Existence of an upstream market between the co-operators and the cooperative. The particularly of the links between the cooperative and its members is taken into account in this market’s competitive analysis.

* Provided that the members actually have one of the rights and powers indicated in article 5 (4) of the Regulation, which is the case barring rare exceptions, as of the moment when they have decisive influence over the cooperative. In this regard, see paragraph 184 of the Commission's consolidated notice.
CONTROLLABILITY OF THE CREATION OF A UNION OF COOPERATIVES WITHIN THE MEANING OF ARTICLE L. 430-1-II

Do the member cooperatives have an individual power to block the union’s decisions?

Yes

Are there sufficiently powerful interests between the members so that they will not oppose one another when exercising their voting rights?

Yes

Is this a full-function union of cooperatives? In particular, does it have sufficient resources to operate independently within a market?

Yes

The union is a full-function joint venture

No

The union is jointly controlled by its member cooperatives, but is not full-function

No

The members have no decisive influence over the cooperative

The union’s creation is a merger operation within the meaning of article L. 430-1-II of the French Code of commercial law (code de commerce). It is subject to control if the turnovers of the companies in question meet the threshold of article L. 430-2 of the French Code of commercial law (code de commerce).

The union’s turnover includes the union’s sales to third parties and the turnover of its member cooperatives. It does not include the union’s sales to its member cooperatives (intra-group)*

The union’s creation is not a merger operation within the meaning of article L. 430-1-II of the French Code of commercial law (code de commerce).

The union’s creation is not a merger operation within the meaning of article L. 430-1-II of the French Code of commercial law (code de commerce).

* Provided that the member cooperatives actually have one of the rights and powers indicated in article 5 (4) of the Regulation, which is the case barring rare exceptions, as of the moment when they have decisive influence over the cooperative. In this regard, see paragraph 184 of the Commission’s consolidated notice
F. QUESTIONS CONCERNING THE TAKEOVER OF FIRMS IN DIFFICULTY WITHIN THE FRAMEWORK OF BANKRUPTCY COLLECTIVE PROCEEDINGS

642. The fact that a merger operation takes place within the framework of a legal decision, such as the Commercial court's adoption of a recovery plan for a firm, does not hinder the respective responsibilities of the European Commission and of the Autorité de la concurrence to issue a ruling on the compatibility with competition law of such a takeover, and more particularly the provisions applicable to merger control. This was recalled by the French administrative Supreme Court (Conseil d’État) in its decision of 6 February 2004 that cancelled, on the merits, the decision by the Minister for the economy that had authorised the takeover of Moulinex by Seb.

643. Experience has shown that a large number of firms that are candidates for the purchase of assets within the framework of bankruptcy proceedings are often late to learn of their obligations with regard to merger control. However, this can have significant consequences: in principle, this procedure brings about a suspension (if no exemption has been formally requested), and if it results in the identification of an anticompetitive effect that results from a recovery plan, disposals may prove to be necessary, possibly relating to the scope of purchased assets.

644. It is therefore very important for candidates for the takeover of firms in difficulty to consider, right from the start of their reflections, the procedural and substantive consequences of merger control.

645. Official receivers have no legal or regulatory obligation to refer to the Autorité or to the Commission if the operation is notifiable. This notification obligation falls to the buyers of all or part of the firm that is undergoing the judicial settlement or liquidation and that is the subject of a divestiture plan. However, official receivers can play a very useful proactive role when it comes to informing candidate purchasers of their obligations, for example by indicating these obligations in the specifications of the invitation to tender provided to the takeover candidates.

646. The choice of a takeover offer in the Commercial court's decision can result in its immediate execution. To avoid the Court's acceptance of an offer automatically resulting in a violation of the applicable merger control provisions, the buyers in question must request an exemption that will suspend this control, pursuant to Article L. 430-4 of the French Code of commercial law (Code de commerce).252

647. Firms wishing to receive such an exemption must submit a request at least 5 days before the court issues its decision, by attaching it to a notification file that is as complete as possible and that includes, at the very least, a presentation of the parties and of the operation, the justification of the

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252 See details in the procedural part of these guidelines.
exemption request, and a preliminary competitive analysis of the operation's effects.

648. An application for such an exemption from the Autorité de la concurrence is examined quickly, with a favourable bias. However, an exemption is granted provided that the buyer refrains from any action that could hinder the adoption of measures intended to remedy any anticompetitive effects that would be detected during the investigation.

649. Moreover, the granting of this exemption has no impact on the outcome of the operation's control: the Autorité retains full competence with regard to the merits of the case, and can impose corrective measures, namely disposals involving the assets of the acquired target or, if this is forbidden by the ruling, the assets of the buyer, or even prohibit the operation if it will have anticompetitive effects.

650. Potential buyers can also submit their offer to the mergers unit during a pre-notification. This informal examination is particularly useful for facilitating the conduct of the operation's examination, and will avoid any suspension of the timeframes due to insufficient information in the submitted file; it also allows for a very early identification, if relevant, of the types of competition problems that could result from the takeover. Under these conditions, the candidate for the firm's takeover will be able to determine the consequences and establish the parameters of its takeover offer accordingly.

253 In 2009, the Autorité granted all of the requests for exemptions relative to firms in the midst of bankruptcy proceedings.