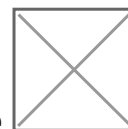


22 February 2013: Guidelines on merger control: a two-month public consultation has been launched

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The Autorité de la concurrence is releasing a revised draft as regards its merger control guidelines, taking into account all the experience gained over the last four years. In particular, it provides greater detail about some possible solutions to consider when a merger is likely to raise competition issues, by submitting a model form for commitments proposals in the event of assets divestiture and a model contract defining the tasks of a trustee.

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During the presentation to the press of the 2011 Annual Report, Bruno Lasserre, President of the Autorité, announced a revision of the guidelines on merger control. The current document was published on 16 December 2009, less than one year after merger control fell under the competence of the Autorité. The current guidelines replaced the previous ones that were applied by the Ministry of the Economy (DGCCRF), which was responsible for merger review until 2 March 2009.

The revised draft guidelines have benefited from the wide decision-making practice of the Autorité, from its dialogue with companies and their legal counsels while analysing their notification file, and the *Conseil d'Etat* case law since 2009. The active involvement of the Autorité within the European Competition Network (ECN) has further strengthened its experience through interactions and dialogue with the European Commission and other national competition authorities.

The revised draft guidelines reflect four years of merger control which have

demonstrated the advantages of a flexible and, where circumstances so require, fast process. In particular, it emphasises the importance of the informal pre-notification phase, enabling the company and the Autorité to discuss, prior to its notification, any potential problems related to the eligibility criteria of the review of the operation or to particularities of the companies and related markets, even going as far as to anticipate any possible competition problems. The Autorité also publishes eligibility criteria for a simplified examination procedure that has since January 2011 enabled companies, whose merger operation is not likely to raise competition problems, to benefit from a simplified decision within fifteen working days.

The examination of many notification files has also enabled the Autorité to refine its analysis with regard to the relevant markets, the competitive assessment and commitments – all main stages of examination of a merger operation, although the commitments stage is restricted to merger operations likely to cause competition problems.

Regarding the definition of the relevant markets and the competitive analysis, the Autorité has in particular specified its use of filters, enabling it to carry out a fast initial competitive assessment when an operation relates to a large number of local markets. It has also put greater emphasis on economic analysis, especially quantitative tests, taken into account when the data and methodology used are reliable and verifiable.

As far as commitments and injunctions are concerned, the Autorité has detailed and provided illustrative examples of its decision-making practice, characterised by a preference for structural remedies, including transfers of minority share holdings where the particularities of the merger operation will allow it. However, in the case of complex operations, especially when they consist of the acquisition of suppliers or distributors (vertical integration) or when they lead to conglomerate effects, the Autorité pragmatically accepts behavioural remedies, for which it provides several examples. Compliance with commitments by the companies is central to the process of merger control. The Autorité underlines that any such commitments must be complied with unless shifts in market conditions lead to a new examination. The Autorité does not hesitate to sanction

companies when their commitments are broken, as it has done twice since 2009.

Taking inspiration from models developed by the European Commission and other competition authorities, the Autorité is finally suggesting two model forms for the transfer of assets and trustee mandate aimed at relevant parties contemplating structural remedies. These models can be adapted on a case-by-case basis. The model form for divestiture commitments lists the legal requirements and defines the terms of the commitment. It also contains a pre-formulation of the transfer procedure, as well as some basic guarantees, which the Autorité deems necessary to retain the viability of the assets transferred. The role of the trustee, tasked with monitoring the commitments or the transfer procedure, has moreover been specified: its status, the terms of its independence towards the companies and, more generally, the conditions to obtain the Autorité's approval, as well as the tasks of the trustee, are set out in a model contract.

By using these examples, the Autorité wishes to facilitate, secure and homogenise companies' practices during the crucial phase of the commitments. Experience has indeed shown that it is necessary to anticipate any potential transfers of assets very early in the process when a merger operation raises competition problems, particularly for the acquisition of a competitor firm or a merger between competitors.

The public consultation, in which all stakeholders may take part, will remain open until 22 April 2013. It will be followed by a roundtable debate in Paris ("**Les Rendez-Vous de l'Autorité**"), on 13 May 2013. It is planned that the new guidelines on merger control will be adopted by the end of the first semester of 2013.

The guidelines on merger control are aimed at providing companies with an informative presentation of the scope of the regulations relating to merger control on a national level, of the notification procedure before the Autorité and of the objectives, criteria and methods for analyses on the merits. With a concern to guarantee companies with as much legal security as possible, the Autorité undertakes to apply the guidelines for every merger review, unless some circumstance specific to the case or some issue of general interest may justify

departing from these guidelines.

> [Read the revised draft relating to the merger control guidelines](#) (in French)

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