07 June 2018: Modernization and simplification of merger control

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The Autorité de la concurrence announces several measures aimed at streamlining and simplifying mergers' procedures for companies.

Last October, the *Autorité* launched a reflective process aimed at modernizing and simplifying merger law. Following a public consultation launched in October 2017, the *Autorité* issues an opinion on possible legislative changes and presents measures intented to simplify and modernise merger control. The planned measures could be implemented by the end of 2018.

Assessment of the adequacy of the legislative framework governing merger control:

- **confirmation of the current thresholds,**
- **the "transaction value threshold" is ruled out at this stage,**
- **a new "ex post" control is to be studied.**

Ten years after the 2008 reform establishing the *Autorité de la concurrence* in its current form, which endowed it with the power to authorise company mergers (which had been the competence of the French Minister of Economy up until then), the *Autorité* wished to make a qualitative assessment: are the general rules and applicable thresholds still fit for purpose, and are there any "shortcomings" in this control, which the legislator needs to remedy?

To make this assessment, the *Autorité* conducted a review of the cases submitted to it over recent years in order to ascertain whether it had had to control an excessive number of mergers and whether, conversely, a number of mergers that potentially raised competition issues had escaped its attention. The *Autorité* also launched a very broad-ranging consultation, which elicited a large

number of very detailed contributions from national and international bodies (ICC, IBA, ABA, etc.) and from other stakeholders (companies, lawyers, agents, etc.).

In light of these contributions (most of which have been published on the website of the *Autorité*) and its own analysis, the *Autorité* concluded that:

- The notification thresholds applicable to company mergers were indeed proportionate, including when compared with other countries,

- The existence of a specific threshold for the retail sector appeared still to be justified in light of the local competition issues that can arise.

The *Autorité* will thus not propose any reform of the general current legislative framework, as it seems to be justified and fit for purpose.

The question remained as to whether the law had to be supplemented to remedy any control shortcomings, particularly due to the specific nature of acquisitions of digital or high-tech companies (biotech, medicines), which can lead to high valuations of companies "with no turnover", for example, the acquisition by Facebook of WhatsApp for 19 billion dollars.

As things stand, the *Autorité* considers that the establishment of a new merger control category based on the transaction value (as recently decided in Germany and Austria) is not justified for the French economy: it is true that there can be acquisitions that may raise competition issues, but for what is, at the end of the day, a limited number of problematic mergers, and the framework for a transaction threshold would not necessarily make it possible to tackle all potentially problematic transactions, which are not presently controlled. The establishment of such a new category of systematic controls would thus constitute a significant constraint for many mergers or acquisitions.

The *Autorité* thus rules out such a scenario at this stage, and will closely monitor implementation of the measures adopted in Germany and Austria to see what lessons can be learnt.

The *Autorité* considers, however, that the introduction into French law of a new "ex post" control based on the models used in many other countries (in Sweden, the United Kingdom and the United States, for example) is an option to be explored: the advantage of this solution is that it would enable the *Autorité* to control, at its own initiative, a very limited number of transactions that may raise competition issues, especially in that they give rise to dominant or monopolistic positions on specific markets or can lead to significantly reducing competition. The *Autorité* is thus launching a second, four-month consultation relating to this potential legislative change. It will therefore submit for consultation a summary document presenting the broad outline of this control.

> **See the summary on ex post control**

Stakeholders will have until 28 September 2018 to submit their observations relating to the introduction of an ex-post control system via the following email address:
Email.

The *Autorité* also hereby announces a significant streamlining of the information required from companies under the simplified procedure, along with the creation of a new ultra-simplified, digital platform-based declaration system.

Simplification of the notification file

The companies involved in a preliminary notification of their merger transaction to the *Autorité* are subject to the dispositions of articles L.430-1 et seq. of the French Commercial Code (*Code de commerce*). The annexes of this code, specified by regulation, define the content of the file which must be addressed to the *Autorité*.

As with its legislative assessment, the *Autorité* carried out an assessment of all of the information that it required companies to provide to substantiate their notification in order to identify any areas of simplification and to avoid imposing requirements on companies that are disproportionate to the competition issues

raised by the cases.

In order to simplify the companies' administrative workload, the *Autorité* proposes eliminating several pieces of required information – especially financial information- (financial products from investments, intangible, tangible and financial assets, along with financial debts) and lowering to one the number of files submitted (rather than four at present). In the light of its practice in the investigation of the files since 1 March 2009, this information has not been considered indispensable for the control of all merger operations. Regarding Annex 4-4 of the French Commercial Code, only the total European and French annual turnovers (excluding taxes), along with the companies' net results will thus be required in the general case (complementary information can be requested if deemed necessary).

Widening the scope of the simplified procedure

The simplified procedure, provided for in the *Autorité de la concurrence* merger guidelines, enables companies to submit a simplified file and allows the *Autorité de la concurrence* to issue a decision within a shorter time frame (3 weeks on average instead of 5). Each year, about half of the files examined by the *Autorité* benefit from this procedure, which also exists at the European Commission level.

Only operations that are not liable, *prima facie*, to raise anticompetitive issues are eligible for the simplified procedure. This applies to operations for which the acquirer(s) is/are present neither in the same markets as the target(s) nor in upstream, downstream or related markets, or operations that can be notified in accordance with II of Article L. 430-2 of the French commercial code pertaining to retail (which makes provisions for specific notification thresholds) and which do not entail a brand change.

The *Autorité* proposes the extension of the benefit of this procedure to other types of operation:

- In case of a horizontal overlap of activities (the companies operate in the same markets), when the cumulative market share of the concerned companies is below 25% ;

- In case of vertically linked markets (the companies operate in different markets but those are still linked), when the market share of the companies in question in one market or the other is below 30%;

- In case of horizontal overlap, when the total market share of the concerned companies is below 50 % and the growth of market share following the operation is below two percentage points;

- In case of acquisition of sole control of companies where the acquirer already has joint control over the target with another stakeholder;

- When the transaction relates to the planned creation of a full-function joint venture exclusively active outside the national territory;

- When the transaction relates to the joint acquisition of real-estate assets under the sale of property for future completion (*Vente en état futur d'achèvement, VEFA*)

The *Autorité* considers that the impact of this extension will lead to 70% of the operations being examined within a shorter time period of roughly three weeks, the same proportion as that observed at the European Commission level.

Creation of a new ultra-simplified and dematerialized notification procedure

Those operations benefiting from the simplified procedure in its current form will now be able to be notified on the *Autorité* website through an online form.

Via this dematerialized procedure, the *Autorité* wishes to participate in the modernization of the State's intervention methods and to take into account the constraints of efficiency expressed by the companies and their counsels.

This online form will enable the concerned companies and their advisers to benefit from a framework providing guidance to submit their notification file (especially on the scope of the information to be provided).

Most of these regulatory and guideline measures could be implemented rapidly, before the end of 2018.

New guidelines for 2019

Finally, the *Autorité* engages, as of now, in a wider revision of its merger control guidelines. This relates to the update of the soft law rules which detail the substantive outlines and analysis framework for of merger operations, in order to take into account the case-law developments of the decision-making practice of the *Autorité* in recent years and the simplifications proposed above.

The *Autorité* already invites any interested third party to forward to it any suggested amendments to the current guidelines via the following email address, until 28 September 2018:

Email

The *Autorité* will organize a public consultation at the beginning of 2019 on the grounds of the project drafted from the propositions received, in order to be able to adopt new guidelines in the spring 2019.

> See the contributions to the public consultation

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