RÉPUBLIQUE FRANÇAISE

Autorité de la concurrence

Merger Control Guidelines of the *Autorité de la concurrence*

2020

INTRODUCTION

These Guidelines are intended to be an evolving educational tool, providing guidance on the merger control procedures and practice of the Autorité de la concurrence

1. The purpose of this document, which has no normative scope, is to provide undertakings and their counsel with an educational presentation on the scope of merger control in France, on the conduct of proceedings before the *Autorité de la concurrence* ("the *Autorité*") and on the objectives, criteria and methods used to analyse a case on its merits. It replaces the Guidelines published in July 2013 and builds on ten years of merger control practice by the *Autorité*.

2. This guide cannot set out in detail all possible applications of the *Autorité*'s analytical methodology in merger control. For the *Autorité*, it constitutes a directive binding on undertakings and enforceable by them. In order to ensure undertakings maximum legal certainty, the *Autorité* commits to apply the guidelines whenever it examines a merger, provided that there are no circumstances specific to the merger or any considerations in the general interest that would justify an exemption from them.

3. In order to take into account developments in its past decisions, regulatory or legislative changes and case law, parts of this document may be updated.

Sources of merger law in France

4. Merger control was created in France by the Law of 19 July 1977. The rules applicable to it have been amended in particular by the Ordinance of 1 December 1986 on Pricing Freedom and Competition, the Law of 15 May 2001 on New Economic Regulations, the Law of 4 August 2008 on the Modernisation of the Economy, which transferred this power from the French Minister of the Economy to the *Autorité*, which has exercised it since 2 March 2009, and the Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

5. Merger control isdefined by Articles L. 430-1 to L. 430-10 of the French Commercial Code (*Code de commerce*). Its implementation is specified by Articles R. 430-2 to R. 430-10 of the regulatory part of the French Commercial Code.

6. Certain provisions of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("the EC Merger Regulation") are also directly applicable, in particular:

– Article 1, which sets the limits of the respective competences of the European Commission ("the Commission") and the national competition authorities according to the turnover of the undertakings concerned by the merger;

– Article 5, which specifies the method for calculating the turnovers mentioned in Article L. 430-2 of the French Commercial Code;

– Articles 4 (paragraphs 4 and 5), 9 and 22, which provide the mechanisms for referral of a merger between the Commission and the national competition authorities of the Member States.

7. The other provisions of the EC Merger Regulation are not directly applicable to merger control by the *Autorité*. However, in the interest of consistency and harmonisation with European practice, the *Autorité*, in determining the scope of the various concepts relating to merger control used in the French Commercial Code, refers to the concepts mentioned in the EC Merger Regulation. In addition, the various documents published by the Commission on these subjects are useful guides for the *Autorité*'s analysis.

8. In addition, the *Autorité*'s organisation, powers, and the general rules of procedure, decision and appeal are defined by Title VI of Book IV on pricing freedom and competition of the French Commercial Code. The *Autorité*'s internal rules of procedure clarify certain practical details of the procedure.

9. The application of these texts includes the case law of the French Administrative Supreme Court (*Conseil d'État*), the judge in merger control decisions.

10. When making a decision, the *Autorité* furthermore refers to its own and the Commission's past decisions, as well as to the case law of the General Court[1] and the Court of Justice of the European Union (CJEU)[2].

11. Finally, in order to ensure the effectiveness of merger control, where the exact scope of a provision cannot be assessed, it should be interpreted on the basis of both its purpose and its overall meaning in the context of merger control.

12. With the exception of decisions taken under Article L. 430-8 of the French Commercial Code, the *Autorité*'s decisions taken pursuant to Title III of Book IV of the French Commercial Code are not sanctions and do not fall within the scope of Article 6 of the European Convention on Human Rights.

[1] General Court of the European Union, formerly the Court of First Instance of the European Communities.

[2] Formerly Court of Justice of the European Communities (CJEC).

I. Scope of merger control

14. The scope of merger control is specified in Articles L. 430-1 and L. 430-2 of the French Commercial Code. Article L. 430-1 defines what a merger is. Article L. 430-2 sets the turnover thresholds for which national merger control is applicable.

15. These provisions are applicable in mainland France and the French overseas territories, with the exception of French Polynesia, in accordance with Article L. 940-1.

16. These provisions, as well as the entirety of Book IV of the French Commercial Code, do not apply to New Caledonia, as specified in Article L. 930-1.

A. CONCEPT OF MERGER

Article L. 430-1 of the French Commercial Code

I. *A merger shall be deemed to have occurred where:*

1° *two or more previously independent* ***undertakings*** ***merge****;*

2° *one or more* ***persons*** *already having* ***control*** *of at least one undertaking or when one or more undertakings acquire control of all or part of one or more other undertakings, directly or indirectly, whether by the acquisition of a holding in the capital or by purchasing assets, a contract or any other means.*

II. *The creation of a* ***joint venture*** *performing on a lasting basis all the functions of an autonomous economic entity shall constitute a merger as defined in this article.*

III. *For the purposes of applying this title, supervision will arise from rights, contracts or any other means which, either separately or in combination and having regard to the factual and legal considerations involved, confer the possibility of exercising a* ***decisive influence*** *on an undertaking, in particular by:*

- ownership or the right to use all or part of the assets of an undertaking;

- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

17. To determine whether a transaction is a merger, the *Autorité* analyses both the factual and legal circumstances in accordance with III of Article L. 430-1. Merger control could not be effective if the examination were limited to legal aspects alone: any transaction, from the moment it constitutes an economic merger, having the effect of modifying the structure of the markets, must be subject to the *Autorité*'s control, whatever legal arrangements have been adopted.

1. CONCEPTS OF UNDERTAKING AND PERSON

a) Concept of undertaking

18. An undertaking can be defined as "every entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed"[3], economic activity being understood as "offering goods and services on the market"[4].

19. A merger may concern one or more undertakings, but also assets which form part of an undertaking, such as trademarks or patents, as long as these assets constitute a business with a market presence to which a turnover can be unambiguously attributed[5].

20. This is particularly the case when the assets concerned by the transaction are certain to generate turnover within a reasonable period of time. For example, the acquisition of real estate assets constitutes a merger when those assets generate, at the time of acquisition, turnover (including rents) with one or more third parties independent of the parties. Where the real estate asset does not generate turnover at the time of the acquisition of control, the transaction constitutes a merger only when the existence of turnover is made certain over time, for example within a maximum period of three years from the acquisition. This is particularly the case for "pre-marketing", even partial, of the asset to one or more third parties independent of the parties[6]. On the other hand, when no turnover can be attached to the asset, for example in the context of a property complex that is not pre-marketed, the asset is not an undertaking and the transaction does not constitute a merger within the meaning of Article L. 430-1.

21. In the remainder of this guide, the term "undertaking" will be used generically, whether it is an undertaking as a whole or only assets that meet the above criteria or an economic activity controlled by a person.

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[3] CJEC Judgment of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161.

[4] CJEC Judgment of 16 June 1987, *European Commission v. Italian Republic*, C-118/85, EU:C:1987:283.

[5] Decision of 22 December 2005, *Vattenfall/Elsam and E2 Assets*, Commission COMP/M.3867 and *Autorité* Decision 18-DCC-192 of 6 November 2018 on the acquisition of sole control of six "PSA Assur" businesses by ECL.

[6] *Autorité* Decision 15-DCC-156 of 7 December 2015 on joint control of an office real estate asset by Sogecap and Predica.

b) Concept of person

22. A "person", within the meaning of Article L. 430-1, includes private law legal persons, public law bodies[7], including the State itself, when acting through an undertaking[8], and individuals. However, an acquisition of control or the creation of a joint venture by individuals is likely to constitute a merger only if those persons carry out economic activities on their own account or if they control at least one other undertaking prior to the transaction.

> **Example**: in Letter 09-DCC-73 of 9 December 2009, the *Autorité* considered that the joint takeover of Ormoison by ITM Entreprises and Mr and Mrs Somnard as individuals did not fall within the scope of Article L. 430-1 of the French Commercial Code, insofar as Mr and Mrs Somnard did not control any undertaking at the time of the transaction.

2. CONCEPT OF MERGER

23. According to the provisions of Article L. 430-1, a merger is created "when two or more previously independent undertakings merge".

a) De jure merger

24. Under the first paragraph of Article 1844-4 of the French Civil Code (*Code civil*), "a company [...] may be absorbed by another company or participate in the formation of a new company by merger".

25. Legal mergers are thus carried out according to these two methods. In the case of absorption, the transaction leads to the disappearance of the legal personality of the absorbed undertaking (undertaking A absorbs undertaking B, which disappears within A) while the merger leads to the disappearance of the legal personality of all the merging undertakings (undertaking A and undertaking B become undertaking C).

b) De facto merger

26. *De facto* mergers are subject to merger control in the same way as *de jure* mergers, where the transaction leads to combining the business activities of previously independent undertakings within a single economic entity.

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[7] Commission Decision on Case IV/M.157, *Air France Sabena* of 5 October 1992 on the Belgian State and *Autorité* Decision 12-DCC-129 of 5 September 2012 on the acquisition of sole control of the Keolis group by SNCF-Participation.

[8] Paragraph 193 of the Commission Consolidated Jurisdictional Notice should not be read as excluding the State or public undertakings from the concept of undertaking or person. When it specifies that "Member States (or other public bodies) are not considered as 'undertakings' under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4)" (emphasis added), it is only for the purpose of calculating turnover. It continues as follows: "Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision."

Indeed, there can be a merger from an economic point of view without there being a merger in the legal sense. This is particularly the case where the undertakings party to the transaction each retain their legal personality.

Example: in Decision 17-DCC-115 of 21 July 2017, the *Autorité* considered that the acquisition of the Hopps Group by Mr Pommier and Mr Pons constituted a *de facto* merger between the Hopps Group and Colis Privé, itself owned by Mr Pommier and Mr Pons, giving the latter access to detailed and strategic information on the activities of each undertaking.

27. The existence of a permanent, single economic management is a necessary and sufficient condition for determining whether there is such merger. To this end, the *Autorité* takes into account all the legal and factual circumstances that describe the transaction. It may also take into account in its assessment various factors, such as the existence of cross-shareholdings, the consolidation of their accounts, the internal profit and loss compensation between the undertakings brought together by the transaction, the revenue distribution between the various entities, the existence of a common management, the joint liability of the various entities, and a common overall policy, particularly in terms of communication.

28. The fact that an undertaking becomes a member of a high-ranking association, an economic interest grouping (EIG) or any other structure that allows the pooling of financial resources, the filing of combined accounts, the development of financial solidarity and whose board of directors defines the strategic orientations of the members, must be analysed as a merger.

Example 1: in Decision 17-DCC-104 of 5 July 2017, the *Autorité* considered that the creation of a *union mutualiste de groupe* (UMG), a French legal structure providing for consultation on the strategic orientations of its members, the establishment of centralised governance, the creation of financial solidarity mechanisms and joint accounts to ensure centralised coordination on financial decisions constituted a *de facto* merger.

Example 2: in Decision 11-DCC-154 of 24 October 2011, the *Autorité* took into account the fact that an EIG provided a number of services for its members, including financial and legal management, secretarial functions, human resources, technical management and research and development, that the EIG's board of directors was responsible for taking strategic business decisions on behalf of its members, that it also exercised a power of sanction and was composed primarily of members of the boards of directors of its members. In addition, all the members of the EIG had the same chief executive and the EIG participated in recruiting management staff.

29. In the mutual insurance sector, the legal structures used for the merger (either a *union mutualiste de groupe* , UMG, or a *société de groupe d'assurance mutuelle*, SGAM), which involve significant and lasting combined financial links between the entities concerned and joint accounts, generally constitute *de facto* mergers.

> **Example:** in Decision 13-D-01 of 31 January 2013, the *Autorité* considered that a partnership agreement between two joint social protection groups, setting up a steering committee to study possible synergies between its members, constituted a *de facto* merger.

30. Finally, a *de facto* merger may be characterised by taking into account the scope of certain legal provisions defining special categories of companies, such as Article L. 931-2-2 of the French Social Security Code (*Code de la sécurité sociale*) or certain provisions of the French Monetary and Financial Code (*Code monétaire et financier*).

> **Example:** in Decision 16-DCC-185 of 2 December 2016, and following the adoption of Ordinance 2015-378 of 2 April 2015 on access to insurance and reinsurance business, which enabled the Confluent joint provident group to transform itself into Apicil, a *société de groupe assurantiel de protection sociale* (SGAPS, a social protection insurance group company, which is considered as an undertaking as defined by competition law), the *Autorité* considered that the entry of Mutuelle du bâtiment et des travaux publics du Sud-Est and Mutuelle du bâtiment et des travaux publics du Nord into Apicil constituted a *de facto* merger, as it led to the merging of business activities of previously independent undertakings within the same economic entity.

3. CONCEPT OF CONTROL

31. In Judgment C-248/16 of 7 September 2017, the CJEU reiterated that the concept of merger must be defined in such a way that it covers transactions leading to a lasting change in the control of the undertakings concerned and thus in the structure of a market.

32. Determination of the prior independence of the undertakings in question is an essential point, as a transaction may turn out to be merely an internal restructuring of a group, in which case it does not constitute a merger within the meaning of Article L. 430-1.

Example: in Letter 09-DCC-44 of 10 September 2009, the *Autorité* considered that the affiliation of MutRé Union with MutRé SA constituted an internal restructuring in so far as these two entities acted as a single economic entity prior to the transaction.

33. This determination is based on the concept of control, which is assessed according to the principles set out below. If none of the undertakings involved undergoes a change as regards the identity of the undertakings or persons controlling it or the quality of that control (sole or joint control), the transaction is not a merger.

34. An undertaking is controlled by another undertaking if the controlling undertaking can exercise decisive influence over the activity of the controlled undertaking. This possibility must be real, but it is nevertheless not necessary to demonstrate that the decisive influence is or will be effectively exercised. Furthermore, control does not imply that the controlling undertaking has the power to determine the day-to-day management of the controlled undertaking. What is important is its power of control over the strategic decisions of the controlled undertaking.

35. These concepts of "control" and "decisive influence" are specific to national and European merger control law, which use the same definition. However, the concept of "control" in national merger control law is not identical to the concept of "control" in corporate law or in other areas such as prudential rules, taxation, air transport or the media. The concept of "decisive influence" is also not to be confused with the concept of "significant influence" used in accounting consolidation.

a) Criteria for assessing decisive influence

Rights conferred on the shareholder

36. The existence of decisive influence is assessed in terms of the power that one undertaking has over the strategic decisions of another undertaking, which concern:

- decisions on the strategic plan;
- investment decisions below a certain amount[9];
- decisions relating to the budget;

[9] Paragraph 71 of the Commission Consolidated Jurisdictional Notice stresses in this connection: "where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture." This amount shall be assessed in the case in point, in particular taking account of the economic sector concerned and the amount of investment made by the undertaking concerned over the previous three years.

– decisions on the appointment and dismissal of key executives.

37. It is generally the voting rights conferred on the majority shareholder for many of these decisions that determine the exercise of control over an undertaking. However, a minority shareholder may have a decisive influence. Exceptionally, an undertaking may have decisive influence without any capital participation.

> **Example:** in Opinion 91-A-09 of 15 October 1991, the *Conseil de la concurrence* held that Gillette's holding of bonds convertible into shares in Eemland, which owned the Wilkinson brand, and the existence of agreements enabling Gillette to influence the commercial policy of the Wilkinson brand, although not conferring any voting rights, conferred on Gillette a decisive influence on Eemland and had to be analysed as a merger.

38. Other elements, such as contractual or financial relationships, in addition to the rights conferred on a minority shareholder, may establish *de facto* control.

39. All these criteria are assessed by the *Autorité* according to the method of the convergent legal and economic body of evidence, even if each of these criteria alone would not be sufficient to confer a decisive influence.

40. In particular, it is apparent from the *Autorité*'s past decisions that, in the case of certain distribution networks, the combination of very minority shareholdings in the capital of the operating companies, the provisions of the standard articles of association imposed on them and the provisions of the trade name contracts, gives the head of the network joint control over those companies.

41. In the case of the E. Leclerc retail network, a decisive influence was noted, whereas the head of the network does not hold any interest in the capital of the operating companies but imposes on the members of its association of distributor centres very specific standard articles of association which are combined with the provisions of the trade name contract. In addition to the clarifications provided below, issues specific to distribution networks and the control exercised by the head office over independent stores are addressed in Appendix B of this document.

42. A minority shareholding may also enable a shareholder to exercise decisive influence if it is accompanied by rights which go beyond what is normally granted to minority shareholders in order to protect their financial interests or if these rights, examined according to the body of evidence method, are such as to demonstrate the existence of decisive influence.

Example: in Decision 11-DCC-10 of 25 January 2011, the *Autorité* took the view that the fact that a minority shareholder had a veto right over the approval of the target's annual budget and the modification of its business plan in order to protect its financial interests gave it the possibility of exercising decisive influence over the target.

43. In order to determine whether a minority shareholder has a decisive influence, the *Autorité* first examines the rights conferred on the minority shareholder and the manner in which they are exercised. A veto over the strategic plan, the appointment of key executives, investments or the budget may thus be sufficient to confer decisive influence. For example, the *Autorité* also takes into account:

- the possibility of benefiting from special rights conferring, immediately or in the future, a decisive share in the decisions of the undertaking;
- the possibility of appointing certain managers to the undertaking's governing bodies;
- the possibility of a subsequent increase in the capital, either as a result of special agreements, or through the holding of securities convertible into shares, or due to the existence of call options; in themselves, such options cannot confer control over the period prior to their exercise, unless this option is exercised in the near future in accordance with legally binding agreements; however, they may provide further evidence of a decisive influence;
- holding of pre-emptive or preferential rights;
- the possibility of obtaining detailed information on the undertaking's activities, in particular those generally reserved for managers or the majority shareholder.

44. The *Autorité* also analyses whether the distribution of shares held is likely to give the minority shareholder's participation a greater practical impact in the deliberations. Where necessary, the review is based on the minutes of the boards of directors over several years, which can be used to determine the distribution and actual influence of shareholder votes.

Example 1: in Decision M.4994 of 29 April 2008, the Commission considered that Electrabel, although a minority shareholder, had sole control of CNR since it was the largest shareholder with other shares widely scattered and held an absolute majority of the voting rights present or represented.

Example 2: in Decision 11-DCC-182 of 2 December 2011, the *Autorité* considered that a minority shareholder could hold the majority of the votes cast at an ordinary general meeting, due to a double voting right, frequently enabling it to represent more than half of the votes cast at the general meeting.

45. In some cases, it is necessary to assess whether certain shareholders need to coordinate their decisions due to:

- a shareholders' agreement or any other express agreement leading them to act in concert or to facilitate coordination of their votes[10];
- sufficiently powerful common interests leading them not to oppose each other in the exercise of their rights[11].

Contractual relations

46. Contractual relationships alone are likely to confer a decisive influence on an undertaking only in very special cases. For example, paragraph 18 of the Commission Consolidated Jurisdictional Notice reiterates, "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)."

47. Article L. 430-1 III, as well as Article 3(2)(a) of the EC Merger Regulation refer to rights to use all or part of the assets of an undertaking as conferring the possibility of exercising control of that undertaking. For example, a management lease agreement, whereby the acquirer assumes control of management and resources despite the fact that ownership rights or shares are not transferred, may constitute a takeover if it leads to a structural change in the market.

[10] *Autorité* Decisions 12-DCC-98 of 20 July 2012 on the acquisition of sole control of Financière TWLC, Swiss Fashion Time, PT Switzerland, PE Time Design, Swiss Watch Group FZCO, Fortune Concept Limited and PT Far East Limited by L Capital Management SAS, and 13-DCC-37 of 26 March 2013 on the creation of a joint venture combining the animal feed activities of Unicor, Qualisol and InVivo in the south of France.

[11] *Autorité* Decision 10-DCC-06 of 21 January 2010 on acquisition of sole control of Thémis Grains by Unéal cooperative group. In the decision, the *Autorité* ruled out joint control of Cérémis (a union of agricultural cooperatives), having considered, in view of the low strategic stakes that the assets in question might represent, that the holdings held by the cooperatives (Océal, Céréna, Ax'ion, Force 5 and Capafrance) could not generate sufficiently powerful common interests to lead them not to oppose each other in the exercise of their rights. The *Autorité* thus considered that the operation resulted in the acquisition of sole control of Cérémis by Unéal.

Example 1: in Decision 09-DCC-46 of 28 September 2009, the *Autorité* considered that the management lease contract for the target hypermarket constituted a merger in so far as the contract gave the lease control over management and resources and structurally changed the market.

Example 2: in Decision 18-DCC-65 of 27 April 2018, the *Autorité* took the view that the management lease contract for the target did not lead to a structural change in the market due to the limited duration of the contractual relationship, the short notification period for terminating the contract and the possibility of termination by either party.

48. As stated by the Commission in its Consolidated Jurisdictional Notice, "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." For further details on franchise agreements, please refer to Appendix B of this document.

Other elements likely to enable exercise of control

49. In its assessment, the *Autorité* also takes into account economic links between undertakings, such as:

- being the main industrial shareholder of an undertaking, active in its sector or in related sectors, while the other shareholders are financial investors or shareholders with a low share of voting rights;
- the existence of significant long-term delivery contracts with the undertaking;
- the existence of highly privileged commercial relationships, including exclusive commercial contracts, rights to use or share trademarks, patents, distribution networks and production units;

Example: in Decision 13-DCC-37 of 26 March 2013, the *Autorité* considered that concluding a supply contract with a trademark licence and a supply contract with exclusivity were an insufficient basis for determining decisive influence.

- representing a very high share of the undertaking's turnover to such an extent that a breakdown in commercial relations would jeopardise its survival in the short term;
- significant intervention as a lender to the undertaking.

Example: in a decision of 31 January 2007, the French Administrative Supreme Court thus considered that BFCM exercised decisive influence over EBRA, taking into account its veto rights and its role as a lender: "[...] that, in addition, BFCM alone financed, for a total amount of €189 million, the takeover of SA Delaroche by EBRA, whose capital does not exceed €38,000; that this situation as a lender strengthens its power of influence over the latter's strategic decisions, especially since, in view of the voting rules laid down in Article 19 of the company's articles of association, it is also in a position to oppose any increase in shareholders' equity at the shareholders' meeting; that the fact that, by a current account agreement dated 22 May 2006, BFCM has undertaken not to demand repayment of its loan before the expiry of a period of three years is not such as to reduce this power in view, in particular, of the extent of the financial difficulties encountered by SA Delaroche and the size of the loan in relation to the latter's annual turnover."

b) Conditions for exercising control

50. Control may be sole, i.e. exercised by an undertaking acting alone, or joint, where it is exercised by two or more independent undertakings. There may also be no control within the meaning of merger law.

51. The analysis of the nature of the control exercised over an undertaking (or lack of control) is assessed on the basis of legal and factual elements.

Sole control

52. An undertaking has sole control when it can exercise, on its own, decisive influence over the activity of another undertaking. There are two ways to characterise the exercise of this type of control:

- where one undertaking has sole power to take the strategic decisions of another undertaking ("positive sole control");
- where one undertaking is the only one in a position to block the strategic decisions of the other undertaking, but is not in a position to impose those decisions by itself ("negative sole control").

Example: in Decision 12-DCC-98 of 20 July 2012, the *Autorité* took the view that negative sole control was characterised by the existence of a veto right over strategic decisions.

53. Where a transaction enables the holder of negative sole control to change to positive sole control, the quality of control is not considered to be modified by the transaction, which is not a merger within the meaning of Article L. 430-1[12].

[12] *A fortiori*, the change from "positive" sole control to negative sole control is not a merger.

54. Sole control is generally acquired when an undertaking obtains a majority of the capital and voting rights of a company or the parent company of a group of companies. Sole control may also arise automatically from a minority shareholding where special voting rights are attached to the shareholding, such as double voting rights, or where the minority shareholder has specific veto rights as a result of provisions in the articles of association or in a shareholders' agreement, or where the articles of association allow the minority shareholder to have a majority in the undertaking's governing bodies.

> **Example:** in Decision 11-DCC-13 of 31 January 2011, the *Autorité* considered that a shareholder who could appoint the chief executive officer as well as three of the five members of the board of directors, which takes strategic decisions by a simple majority of votes, acquired sole control of the target.

55. A shareholder who does not have an absolute majority of the voting rights may, under certain conditions, hold *de facto* sole control. This is, for example, the case when the shareholder is virtually certain to obtain a majority at the general meeting, taking into account the level of shareholding and the actual presence of shareholders at the general meeting in previous years, generally during the three years preceding the change in the shareholding likely to result in the acquisition of control.

> **Example 1:** in Decision M.4994 of 10 June 2009, the Commission considered that, because of the level of participation in the general meetings, Electrabel, although it did not have an absolute majority of voting rights, did in fact hold that absolute majority and therefore *de facto* control of CNR.
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> **Example 2:** in Decision 11-DCC-182 of 2 December 2011, the *Autorité* considered that a minority shareholder could hold an absolute majority at a shareholders' meeting, with or without double voting rights, and thus have *de facto* sole control.
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> **Example 3:** in Decision 19-DCC-36 of 28 February 2019, the *Autorité* considered that the acquirer, Cofepp, would have sole control of MBWS since, given the level of participation in the general meeting of that company in the three years preceding the capital increase to which Cofepp undertook to subscribe, it would have a majority of the votes cast. Participation rates were 55.76% in 2015, 64.32% in 2016, and 65.52% in 2017.

56. Conversely, a controlling interest does not necessarily result in sole or even joint control, although this is rare.

57. Undertakings must be careful when they are likely to acquire sole control. In a judgment of 26 October 2017[13], *Marine Harvest ASA v. European Commission*, T-704/14, the General Court of the European Union validated the Commission's interpretation that an undertaking had sole control of another undertaking when it acquired a minority shareholding in the latter's capital and not when it acquired a majority of the capital and voting rights because it was virtually certain of obtaining a majority at general meetings of shareholders.

Joint control

58. When two or more undertakings have the possibility of exercising a decisive influence over another undertaking, the control is joint. Each of the controlling undertakings must be able to block the strategic decisions of the controlled undertaking and the shareholders are therefore called upon to collaborate and agree on the strategy of the controlled undertaking.

59. Joint control shall be assessed on the basis of all legal and factual circumstances. The most traditional form of joint control is where two controlling undertakings share equally in the voting rights of a controlled undertaking. However, a situation of joint control may also arise where there is no parity between the two controlling undertakings in terms of votes or representation in decision-making bodies or where more than two controlling undertakings share control.

> **Example:** in Decision 10-DCC-34 of 22 April 2010, the *Autorité* considered that the minority shareholder, holding as many representatives as the majority shareholder on the advisory board, which deliberated on strategic decisions by simple majority, had joint control with the majority shareholder.

60. The entry of a new shareholder in the capital of an undertaking previously subject to sole or joint control constitutes a merger by way of an acquisition of joint control if, subsequent to that transaction, the new shareholder, alongside the former shareholder(s), has the power to block the strategic decisions of the undertaking. In this case, only shareholders with the power to block the strategic decisions of the undertaking will be considered to have joint control of the undertaking.

61. Where two or more undertakings acquire a target undertaking with a view to allocating the assets between them on a lasting basis upon completion of the transaction, the transaction does not constitute an acquisition of joint control but an acquisition of sole control by each of the controlling undertakings over the assets which it acquires. From a point of view of merger control, these are two separate transactions.

[13] Confirmed by the CJEU Judgment of 4 March 2020, *Marine Harvest ASA*, C-10/18, EU:C:2020:149.

Absence of control

62. Within the meaning of merger law, some undertakings may not be controlled where no shareholder or other undertaking is in a position to exercise decisive influence. This is the case, in particular, when the capital is distributed equitably among several shareholders, without any legal or factual element making it possible to reach a stable majority during the decision-making procedure and when a majority can be reached on a case-by-case basis according to the possible combinations of the votes of the minority shareholders. The undertaking is then subject to a fluctuating majority.

> **Example:** in Decision 17-DCC-104 of 5 July 2017, the *Autorité* took the view that in a UMG, the fact that each member is represented by a number of delegates proportional to its contribution to the institution's fund does not allow any one member to hold an absolute majority at the general meeting.

63. The acquisition of sole or joint control over a non-controlled undertaking constitutes a merger. On the other hand, if the entry of one or more new shareholders into the capital of an undertaking results in a situation of lack of control, the transaction does not constitute a merger.

4. CONCEPT OF A FULL-FUNCTION JOINT VENTURE

64. The II of the article L. 430-1 provides that "the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a merger as defined in this article". The creation of such a joint venture may result from:

- the creation of a completely new joint structure;
- the contribution of assets previously held by the parent companies individually to an existing joint venture, where such assets, whether contracts, know-how or other assets, enable the joint venture to expand its activities;
- the acquisition by one or more new shareholders of joint control of an existing undertaking.

65. In a judgment of 7 September 2017, *Austria Asphalt GmbH & Co. OG/Bundeskartellanwalt*, C-248/16, paragraph 35, the CJEU held that "a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity". Thus, for the change from sole to joint control over an undertaking, where the undertaking which previously had sole control over the target undertaking continues to exercise control over the latter, the *Autorité* considers that the criteria for a full-function joint venture must be met in order to qualify as a merger.

66. The *Autorité* may also be competent in the case of extending the activity of an existing joint venture. The Commission Consolidated Jurisdictional Notice specifies in paragraph 106: "The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration."

67. A joint venture shall be deemed to be full-function where (a.) it is jointly controlled, (b.) it operates on a lasting basis and (c.) it performs all the functions of an autonomous economic entity.

a) The undertaking must be joint

68. The undertaking must be jointly controlled by at least two independent undertakings. The test for joint control is that set out in Paragraphs 57 et seq. above.

b) The undertaking must operate on a lasting basis

69. The joint undertaking must operate on a lasting basis. Thus, if it is set up for a fixed period of short duration, such as the construction of a civil engineering structure, and intended to be dissolved at the end of that project, its creation is not a merger within the meaning of Article L. 430-1.

70. Conversely, the fact that the agreement between the parent companies provides for the dissolution of the joint venture in the event of failure does not preclude its classification as a merger.

c) The undertaking must perform all the functions of an autonomous economic entity

71. In order to qualify as a full-function joint venture, the undertaking must operate in a market, performing all the functions normally carried out by other undertakings in that market.

72. This concept of full function is not to be confused with the notion of autonomy from its parent company as defined by the *Autorité* in litigation of anticompetitive practices. Thus, as stated in the Commission Consolidated Jurisdictional Notice in paragraph 93, "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."

73. First, the joint venture is full-function if it has sufficient resources to operate independently in a market and in particular all the structural elements necessary for the operation of autonomous companies (human resources, budget, business responsibility). The resources necessary for its activity may be transferred by its parent companies: these may include personnel, intangible assets (brands, etc.), or their expertise in the field of design, manufacturing and marketing, by transferring all their activities in this sector, contracts, employees, and all the rights necessary for the exercise of the activity.

> **Example:** in Decision 11-DCC-171 of 25 November 2011, the *Autorité* considered that having autonomous determination of business and marketing policy by adopting the annual budget, business plan, pricing policy, quality of service to customers, promotional operations or advertising campaigns conferred sufficient autonomy on the joint undertaking to consider it as a full-function undertaking.

74. Second, the joint venture must have an activity going beyond a specific function for the parent companies. As stressed in paragraph 95 of the Commission Consolidated Jurisdictional Notice, "A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market." This is the case, for example, of central purchasing agencies acting on behalf of their parent companies or joint ventures whose role is limited to research and development or production, as the French Administrative Supreme Court held in a decision of 31 May 2000.

75. Thirdly, the joint venture shall not be totally dependent on its parent companies for either sales or purchases. For example, paragraph 98 of the Commission Consolidated Jurisdictional Notice states, "If the joint venture achieves more than 50% of its turnover with third parties, this will typically be an indication of full-functionality." In cases where the sales, or purchases, of the joint venture with its parent companies are of a lasting nature (beyond its start-up phase), the *Autorité* examines whether the joint venture is expected to play an active role in the market independently of these sales and

can be considered to be economically autonomous from a functional point of view.

> **Example:** in Decision 09-DCC-94 of 31 December 2009, the *Autorité* considered that an undertaking could not be regarded as a full-function joint venture if it provided services only on behalf of its parents, who also determine the price of the services.

76. However, the fact that the parent companies account for a significant proportion of the joint venture's sales or purchases does not preclude classification as a merger, provided that the joint venture deals commercially with its parent companies in the same way as with third parties and maintains commercial relations with them at market conditions. As pointed out in paragraph 98 of the Commission Consolidated Jurisdictional Notice, "...if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient that at least 20% of the joint venture's predicted sales will go to third parties" to demonstrate an active role of the joint venture in the market.

> **For example,** in Decision 14-DCC-86 of 23 June 2014, the *Autorité* took the view that the fact that the joint subsidiary had its own staff and obtained its supplies from its parents at market conditions provided it with the necessary resources to operate independently in the market.

77. Paragraph 97 of the Commission Consolidated Jurisdictional Notice states, "The fact that, for an initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character" and that this start-up period should not, in principle, exceed three years, depending on the specific conditions of the market in question.

> **Example:** in Decision 12-DCC-13 of 1 February 2012, the *Autorité* considered that if a joint venture achieves only one quarter of its sales to third parties in the long term, with the parents having committed to purchase exclusively from the joint subsidiary, then the joint subsidiary could not be considered to be fully functional.

5. SPECIAL CASES

a) Interdependent transactions

78. Recital 20 to the EC Merger Regulation explains that closely connected transactions should be treated as a single merger in that they are linked by condition.

79. The *Autorité* considers, in line with paragraphs 38 et seq. of the Commission Consolidated Jurisdictional Notice, that multiple transactions constitute one and the same merger where they are interdependent, in the sense that one transaction would not have taken place without the other. On the other hand, if the transactions are not interdependent, i.e. if the parties can complete one of the transactions even if the others fail, they must be assessed individually and each transaction constitutes a separate merger.

80. To qualify as interdependent, the transactions must meet three cumulative conditions: (i) there must be a conditional link between the transactions, (ii) the transactions must be carried out by the same acquirer, and (iii) each transaction must, in itself, constitute a merger.

81. First, in order to determine whether there is a conditional link between the transactions, the *Autorité* takes into account their legal and economic aspects. Transactions may be considered to be linked in law when the agreements themselves are bound by reciprocal conditionality.

> **Example 1:** in Decision 14-DCC-82 of 12 June 2014, the *Autorité* considered that two joint control transactions, linked by reciprocal conditionality and carried out simultaneously by the same acquirers, were interdependent.
>
> **Example 2:** in Decision 17-DCC-94 of 27 June 2017, the *Autorité* considered four takeover transactions with four different transferors to be interdependent transactions where, for each transaction, the completion of the other three was a condition precedent.

82. The demonstration of the interdependent nature of several transactions may also derive from evidence that, in economic terms, the transactions cannot be carried out without each other and therefore form part of an overall project.

> **Example:** in Decision 17-DCC-139 of 25 August 2017, the *Autorité* considered that the acquisitions of Terrena Grand Public and Agralys Distribution by InVivo Retail were part of an overall economic project. Indeed, the minutes of the InVivo Group's Board of Directors presented these two transactions as being part of the same project, entitled "Solstice".

83. In order to determine whether several transactions are indeed interdependent, the *Autorité* may take into consideration different elements, such as the formalisation of the transactions within a single instrument[14], the simultaneous conclusion of their agreements[15], or the statements made by the parties themselves, in any form of communication (internal documents, public statements, etc.)[16].

84. Second, transactions can be considered as a single merger only if, for each of them, control is acquired by the same undertaking(s) (or undertakings belonging to the same group)[17]. For example, where several undertakings share assets, the *Autorité* considers each transaction separately, even if each of these acquisitions is conditional on the completion of the others.

85. Third, each of the transactions must individually constitute a merger. Transactions that do not result in the acquisition of control, such as, for example, the acquisition of non-controlling minority interests, do not meet the criteria for inclusion in interdependent transactions.

b) Successive transactions

86. For the purposes of calculating the turnover of the undertakings concerned, the second subparagraph of Article 5(2) of the EC Merger Regulation provides that two or more transactions "which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction". The measurement of the time elapsed between two successive transactions must be made between the dates of signature of the legally binding agreements relating to these transactions (see Paragraph 112 below).

87. Pursuant to this article, successive transactions (each of which results in an acquisition of control) carried out within a two-year period between the same undertakings, or by undertakings belonging to the same groups, are to be treated as a single merger even if they are not subordinate to each other.

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[14] *Autorité* Decision 15-DCC-84 of 8 July 2015 on the acquisition of sole control of Avenir Danton Défense and Avenir Grande Armée by Gecina.

[15] Paragraph 43 of the Commission Consolidated Jurisdictional Notice stresses in this regard that a "A pronounced lack of simultaneity of legally inter-conditional transactions may likewise put into doubt their true interdependence".

[16] *Autorité* Decision 11-DCC-117 of 26 July 2011 relating to the merger by absorption of Eovi Mutuelle creusoise, Eovi Mutuelle du Limousin, Eovi la Mif, Eovi Roanne Mutuelle, Eovi Mutuelles Présence, Eovi Mutuelle Drôme Arpica by Eovi Novalia Mutuelle and the transfer of the portfolio of Eovi Languedoc Mutualité, a union of mutual companies, to Eovi Novalia Mutuelle.

[17] *Autorité* Decision 17-DCC-122 of 4 August 2017 on the acquisition of sole control of Eurosic by Gecina.

Example: in Decision 11-DCC-150 of 10 October 2011, the *Autorité* took the view that the divestiture of a branch of business which took place less than two years before the merger of the parties to the divestiture should be included in the scope of the transaction to be examined in this case, even though the divestiture was not notifiable in itself.

88. According to paragraph 50 of the Commission Consolidated Jurisdictional Notice, this rule does not apply "where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved".

89. It further specifies, "In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction."

Example: in Decision 11-DCC-150 of 10 October 2011, the *Autorité* took the view that, since the merged entity had two years earlier sold a business to the acquiring company, which had therefore acquired sole control, the two successive transactions should be examined as a single merger.

c) Transitional transactions

Acquisition by a credit or other financial institution for the purpose of resale, known as a "carry trade"

90. Article 3(5)(a) of the EC Merger Regulation states that a merger is not carried out 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".

91. The Commission applied this provision in Decision M.2978 of 7 January 2004, confirmed by a judgment of 13 September 2010 in Case T-279/04 of the General Court of the European Union.

92. The *Autorité* is guided by past European decisions in assessing the extent to which the provisional acquisition of a target asset by a financial institution, credit institution or insurance company, with a view to its resale to a third party, constitutes a merger or not. To this end, it verifies that the provisional acquirer cannot exercise, alone or jointly, a decisive influence on the target assets during the term of the carry trade. For example, it either does not exercise the voting rights attached to the securities it has acquired or is represented by one or more independent directors. Insofar as it does not acquire decisive influence over the target assets, their provisional acquisition does not constitute a merger. Like the Commission, the *Autorité* shares the Commission's view that this acquisition is provisional if the financial institution's holding of the assets in this way does not exceed one year. Only the merger consisting of the resale of these assets to the final acquirer is therefore likely to be notified to the *Autorité* if the turnover thresholds mentioned in Article L. 430-2 are met.

93. Pursuant to Article L. 430-4, the *Autorité* also verifies that the carry transaction does not confer on the final acquirer, prior to final unwinding, a decisive influence on the target assets[18], resulting in the transaction being carried out without clearance. Moreover, the finalisation of the carry trade and thus the resale of the assets to the final acquirer cannot take place before the *Autorité* has taken its decision. This may be subject to commitments or be accompanied by injunctions.

Other cases of transitional transactions

94. A merger involves a lasting change in control over an undertaking. Two cumulative conditions must be met in order to assess whether a transitional transaction constitutes a change of control which is not of a lasting nature. The transitional nature of the transaction must be agreed between the different acquirers in a legally binding manner and there must be no doubt as to the speed of the second stage. If these two conditions are not met, the first step should be considered as a separate merger.

Example 1: in Decision 15-DCC-145 of 27 October 2015, the *Autorité* considered that the exercise by a company of decisive influence over the target for a period of more than three years prior to the acquisition of sole control was not a purely transitional transaction.

Example 2: in Decision 17-DCC-32 of 14 March 2017, the *Autorité* considered that the exercise of joint control for more than two years prior to the acquisition of sole control did not qualify as a transitional transaction.

[18] In the event that the third party proposed to be the ultimate acquirer already exercises joint control over the target, the *Autorité* ensures that the carry trade does not enable it to acquire sole control of those assets.

95. It is also envisaged in cases where the resale is only partial "...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 examined by the Commission"[19].

96. The *Autorité* is guided by these provisions in assessing the controllability of acquisitions of control of assets intended to be resold in the short term. In contrast to the case of a provisional acquisition by a financial institution in the context of a carry trade, the transitional transaction does indeed give the provisional acquirer decisive influence over the assets acquired and the legally binding nature of the unwinding of the carry trade as well as its speed are essential elements. The *Autorité* thus considers that the acquisition by the head of a network of a group of independent traders of an operating company with a view to resale to new operators does not need to be notified where the acquisition by an identified acquirer is certain and will take place within one year. Only this second transaction may be notifiable if it constitutes a merger and if the turnover thresholds mentioned in Article L. 430-2 are met.

Example: in Decision 10-DCC-07 of 25 January 2010, the *Autorité* took the view that the acquisition of a franchisee's shares in the company by the head of the network for resale to a third party on the same day constituted a single merger.

B. CONTROL THRESHOLDS

1. THRESHOLDS FOR NATIONAL MERGER CONTROL

97. In addition to the thresholds applicable to all transactions (a), there are specific thresholds (b) for transactions involving undertakings operating retail stores and (c) for transactions involving undertakings operating in certain French overseas territories.

[19] Commission Consolidated Jurisdictional Notice., paragraph 47.

a) Thresholds applicable to all transactions

98. Pursuant to Article L. 430-2 of the French Commercial Code, which defines the thresholds for national merger control, and Article 3 of the EC Merger Regulation, which defines the European thresholds, a merger is subject to control by the *Autorité* if the following three conditions are met:

- the combined worldwide turnover exclusive of tax of all of the undertakings or of all of the individuals or legal entities involved the merger is greater than €150 million;
- the combined aggregate turnover exclusive of tax earned in France by at least two of the undertakings or groups of individuals or legal entities concerned is greater than €50 million; and
- the transaction does not fall within the jurisdiction of the European Commission (it is not of "European scope").

99. According to Article 1(2) and (3) of the EC Merger Regulation, a transaction has a European Community dimension where:

> "2. a) the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion; and
>
> b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €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 concentration which does not meet the thresholds laid down in paragraph 2 shall have a Community dimension where:
>
> – the combined aggregate worldwide turnover of the undertakings concerned is more than €2.5 billion;
>
> – in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than €100 million;
>
> – 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 €25 million; and
>
> – the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €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."

b) Thresholds for undertakings in the retail trade

100. The retail sector is subject to specific provisions as regards the thresholds applicable to the controllability of mergers in the sector.

101. According to II of Article L. 430-2:

> "II - When at least two of the parties to the concentration operate one or more retail outlets, any concentration operation as defined in Article L. 430-1 shall be subject to the provisions of Articles L. 430-3 et seq. of this Title when the three conditions below are met:
>
> – the combined aggregate turnover exclusive of tax earned worldwide by all of the undertakings or of all of the individuals or legal entities involved in the merger is greater than €75 million;
>
> – the total turnover exclusive of tax generated in France, in the retail business sector, by at least two of the undertakings or groups of individuals or legal entities concerned is greater than €15 million.
>
> – the operation does not fall under the scope of the aforementioned Council Regulation 139/2004 (EC) of 20 January 2004."

102. This provision enables the *Autorité* to control mergers not subject to merger control under the thresholds of I of Article L. 430-2 which could substantially weaken competition in certain local catchment areas.

103. In order to verify that a transaction exceeds the first threshold of €75 million, account should be taken of all the activities of the undertakings concerned, not only those relating to retail trade. On the other hand, the second threshold of €15 million applies only to the retail activities themselves.

104. The concept of retail trade must be defined by reference to the rules applicable to commercial equipment. A retail store is defined as a store that sells goods to consumers for domestic use for more than half of its turnover. This includes the sale of second-hand objects (flea markets, consignment stores, etc.). A number of services are traditionally treated as retail trade, although they do not constitute the sale of goods: dry cleaning, hairdressing and beauty care, shoe repair, photography, vehicle maintenance and tyre fitting.

105. The concept of retail trade always excludes services of an intangible or intellectual nature (such as banking, insurance and travel agencies), as well as service or equipment hire establishments (such as laundromats, video stores and gyms) and restaurants.

106. The concept of retail trade also excludes undertakings that carry out all their sales online or by mail order, or through direct deliveries to consumers, as II of Article L. 430-2 specifies that only undertakings that operate at least one store are concerned.

> **Example:** in its Letter 10-DCC-141 of 25 October 2010, the *Autorité* took the view that the thresholds set out in II of Article L. 430-2 of the French Commercial Code could not be applied, insofar as the target's activity consisted in the distribution of heating oil and lubricant to private individuals and businesses, by direct delivery with tankers and not through shops.

107. Finally, even if an undertaking operates at least one retail shop, the turnover it achieves, where appropriate, through online sales, mail order or direct deliveries to consumers will not be taken into account under II of Article L. 430-2 for calculating the €15 million threshold.

> **Example 1:** a transaction involving two undertakings, one with an aggregate turnover of €30 million, exclusively in retail trade, and the other with an aggregate turnover of €50 million, of which €20 million in retail trade, will be subject to merger control. All of the undertakings concerned have an aggregate turnover exceeding €75 million. The first threshold is therefore crossed (even if they have a total turnover of only €50 million in the retail trade). As each has more than €15 million in retail sales, the second threshold is also crossed.
>
> **Example 2:** an undertaking owns a chain of stores that together have a turnover of €17 million, of which €12 million is achieved by selling goods to consumers for household use, with the balance coming from related activities carried out in the same sales outlets, such as sales to business customers or equipment hire. Since the undertaking's stores have more than half of their turnover by selling goods to consumers for domestic use, they are therefore considered to be retail stores. As their turnover is greater than €15 million, the undertaking crosses the second threshold provided for in II of Article L. 430-2.

Example 3: a manufacturer of consumer goods sells some of its products in its own stores and some through independent distributors. If that manufacturer has an aggregate turnover of €50 million, including €10 million in its own stores, the undertaking does not exceed the second threshold laid down in II of Article L. 430-2. The company has a turnover of only €10 million in the retail sector.

Example 4: if an undertaking has a turnover of €10 million through a combination of shops selling goods to consumers for household use and €8 million through online sales, this undertaking has a turnover of only €10 million in the retail sector and therefore does not cross the second threshold of II of Article L. 430-2.

108. The thresholds provided for in II of Article L. 430-2 apply only to undertakings operating at least one retail store in France. An undertaking that operates retail stores abroad, but none in France, will not be subject to the thresholds of II of Article L. 430-2. It remains, however, subject to the thresholds applicable to all transactions, as provided for in I of Article L. 430-2.

c) Thresholds applicable to undertakings operating in certain French overseas territories

109. For mergers concerning certain French overseas territories, Article L. 430-2 III specifies:

> "III. - When at least one of the parties to the concentration exercises all or part of its business in one or more French overseas *départements*, in the *département* of Mayotte, the Wallis and Futuna Islands or the overseas territories of Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy, any concentration operation, as defined in Article L. 430-1, shall be subject to the provisions of Articles L. 430-3 et seq. of this Title, when the following three conditions are met:
>
> – the combined aggregate turnover exclusive of tax earned worldwide by all of the undertakings or of all the individuals or legal entities involved in the merger is greater than €75 million;
>
> – the total worldwide turnover exclusive of tax generated separately in at least one of the French overseas territories concerned by at least two of the undertakings or groups of individuals or legal entities concerned is greater than €15 million, or €5 million in the retail sector without this threshold having to be reached by all the undertakings concerned in the same French overseas territory;
>
> – the transaction does not fall within the scope of the EC Merger Regulation of 20 January 2004, cited above."

110. The individual threshold which must be reached in at least one French overseas territory must be crossed by at least two undertakings. In order to assess whether this second threshold has been crossed, account should be taken of the total turnover of the undertaking concerned in each of the French overseas territories separately.

> **Example 1:** if an undertaking has total turnover of €8 million excluding tax in La Réunion and €8 million excluding tax in Mayotte, this undertaking has not reached the threshold of €15 million.
>
> **Example 2:** if one of the undertakings has a total turnover excluding tax of more than €15 million in La Réunion, while the other undertaking has no activity in this territory but has a total turnover excluding tax of more than €15 million in Mayotte, then the second threshold has been reached.

2. METHODS FOR CALCULATING TURNOVER

111. Article L. 430-2 V provides that the methods for calculating turnover applicable to national merger control are those set out in Article 5 of the EC Merger Regulation. These conditions have been commented on and explained by the Commission in its Consolidated Jurisdictional Notice in paragraphs 157 to 220.

112. All these provisions aim to ensure that the calculated turnover figures reflect the real and actual economic strength of the undertakings concerned in the market, while remaining relatively easy to implement so undertakings can easily determine whether a transaction is controllable and whether it has a European or a national dimension.

113. Article 5(2) of the EC Merger Regulation contains a specific provision to ensure that undertakings do not split a transaction into a series of asset disposals spread over time in order to escape merger control by falling below the controllability thresholds: this is the special case of successive transactions.

114. In the case of successive transactions, the merger must be notified to the *Autorité* as soon as the consolidated turnover of the undertakings concerned reaches the thresholds for compulsory notification, both as regards the aggregate worldwide turnover exclusive of tax of all the undertakings concerned and as regards their individual turnover. Measurement of the time elapsed between two successive transactions shall be made between the dates of signature of the legally binding agreements relating to such transactions, since the date on which the controllability of a transaction is to be assessed is the date of notification to the *Autorité* and a merger may be notified once a sufficiently binding agreement has been concluded.

Example: in Decision 11-DCC-150 of 10 October 2011, the *Autorité* considered as successive transactions an asset sale concluded on 30 June 2009 and a draft merger agreement dated 15 February 2011. The sale of assets that took place two years earlier has therefore been included in the scope of the merger.

115. As this document merely reiterates the key points for calculating turnover, see the Commission Consolidated Jurisdictional Notice for any more specific questions raised by a particular case (in particular paragraphs 157 et seq.).

a) Concept of undertaking concerned

116. Whereas the French Commercial Code uses the expression "undertakings or groups of individuals or legal entities party to the merger", the EC Merger Regulation uses the expression "undertakings concerned". To the extent that these two expressions cover the same reality, the latter expression is used in this guide.

117. The identity of an undertaking concerned depends on the type of merger under examination:

- in the case of a merger, the undertakings concerned are the merging undertakings;
- in the case of acquisition of sole control, the undertakings concerned are the undertaking taking control and the target undertaking;
- in the case of an acquisition of joint control over an already existing undertaking, the undertakings concerned are the undertakings acquiring control and the pre-existing undertaking acquired[20]; however, where the pre-existing undertaking was under the sole control of one company and one or more new shareholders acquire joint control, while the original parent company remains, the undertakings concerned are each of the undertakings exercising joint control (thus including the original shareholder). In this case, the target company is not an undertaking concerned and its turnover is part of that of the original parent company;

[20] This rule also applies in the case of a change from joint control to another joint control, as mentioned in the Commission Consolidated Jurisdictional Notice in paragraphs 143 and 144.

– in the case of a change from joint to sole control, the undertakings concerned are the undertaking acquiring control and the target undertaking, as the transferring undertakings are not considered concerned;

– in the case of an acquisition of joint control over a newly created joint venture, the undertakings concerned are the controlling undertakings. The newly created undertaking is not considered as "concerned" as it has no turnover of its own before the transaction. If one of the controlling undertakings contributes assets to the newly created undertaking, the turnover relating to those assets shall be taken into account in calculating the turnover of that controlling undertaking.

118. In the particular case of interdependent transactions with different sellers, individual turnover thresholds are calculated for each of the targets.

> **Example:** In the case of acquisitions by undertaking A of targets B and C controlled by companies not belonging to the same group, referred to as a "single merger", the "undertakings concerned" are A, B and C. Consequently, in the event that neither the individual turnover of B nor that of C reaches the individual turnover thresholds provided for in Article L. 430-2, the "single merger" transaction in question does not have to be notified to the *Autorité* as long as the individual turnover thresholds are not met by at least two of the undertakings concerned. On the other hand, if either B or C meets the individual threshold, the transaction is notifiable even if the second target undertaking does not meet the threshold.

b) Concept of turnover

119. The calculation of turnover must make it possible to assess the economic strength of the undertaking concerned as a whole, and not only that of the legal entities involved in putting the transaction together.

120. In the context of a takeover, for each of the acquirers, the calculation must take into account all of the business of the group and not only that of the subsidiaries directly involved in the transaction or that relating to the markets concerned or affected by the transaction. For the transferor, only the turnover of the undertaking transferred is taken into account, as Article 5(2) of the EC Merger Regulation provides, "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".

121. Article 5(4) of the EC Merger Regulation specifies that the total turnover to be taken into account for an undertaking concerned shall be determined as follows:

"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, direct 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;

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 undertakings' 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)."

122. The criteria used to identify the undertakings whose turnover can be attributed to the undertaking concerned are different from the criteria of decisive influence used to establish control. An undertaking may exercise decisive influence over another undertaking without having half the capital, the power to exercise half the voting rights, the power to appoint more than half the members of the supervisory or administrative board or bodies legally representing the undertaking or the right to manage the undertaking's affairs.

123. State aid granted to undertakings must be included in the calculation of turnover as soon as it is directly linked to the sale of the undertaking's products and services, since it increases the undertaking's economic weight in the market by enabling it to sell at prices below those which it would be able to charge in the absence of such State aid.

c) Handling of "internal" turnover

124. Article 5(1) of the EC Merger Regulation states, "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." The purpose of this exclusion of intra-group business is to avoid double counting of the turnover concerned

when all the activities of the group must be taken into account. Failure to exclude intra-group sales would amount to artificially overestimating the economic weight of the undertakings in the markets since intra-group trade would be counted initially at the level of the upstream undertaking whereas these products are intended for resale (possibly after processing) and therefore also enter into the calculation of the turnover of the downstream undertaking.

125. In contrast, where only part of an economic entity is sold, the exclusion of internal turnover between the divested party and the transferring party would prevent some or even almost all of the economic activity of the sold party from being taken into account, which is contrary to the general principle that calculating turnover is intended to measure the actual economic weight of each undertaking involved in a merger. Paragraph 163 of the Commission Consolidated Jurisdictional Notice states that where an entity had only internal revenues in the past, and its acquisition constitutes a merger, turnover should normally be calculated on the basis of the previously internal turnover, unless that turnover does not appear to correspond to a market valuation of the activities in question.

> **Example:** in Decision 11-DCC-214 of 29 December 2011, the *Autorité* considered that where part of an economic entity was sold, the exclusion of internal turnover between the part sold and the transferring party prevented the economic activity of the part sold from being taken into account.

126. This is also the case when certain activities previously carried out internally are outsourced, with the associated assets being taken over by a third party.

127. Where the transaction results in a change from joint to sole control of an undertaking by one of the parent companies, in order to avoid double counting of the turnover of the joint venture, the turnover of the undertaking acquiring sole control should be calculated without taking into account the turnover of the target and the turnover of the target should be calculated without taking into account the turnover of the acquiring shareholder.

> **Example:** in Decision 09-DCC-18 of 20 July 2009, the *Autorité* considered that in the change from joint to sole control, the undertakings concerned whose turnover was to be taken into account were the acquirer and the joint venture.

128. In the specific case of joint ventures between several undertakings concerned, the turnover of the joint ventures shared with third parties shall be attributed equally to the different undertakings concerned, irrespective of the share of capital or voting rights they hold.

d) Turnover adjustments

129. The notifying party must provide turnover figures which reflect the economic situation of the undertakings concerned at the time of signing the binding act or the sufficiently completed plan which enables notification. All turnover must be valued at the date of the last financial year ended on the basis of the audited accounts. They may be corrected, where appropriate, only to take account of permanent changes in the economic reality of the undertaking, following mergers, disposals or acquisitions or following subsequent terminations of activities.

> **Example:** in Decision 10-DCC-44 of 25 May 2010, the *Autorité* considered that where a company had acquired a business in the year preceding the notified transaction, the turnover of the business, although not yet certified, should be taken into account in the turnover completed by the acquirer.

130. Similarly, when an undertaking has been set up during the year, taking into account the turnover over a period of a few months does not give an idea of the economic reality of the undertaking. A full year straddling two fiscal years can then be taken into account.

> **Example:** in Decision 09-DCC-45 of 28 September 2009, the *Autorité* took the view that, in order to take account of the economic reality of an undertaking, a full year of activity must be considered. Therefore, for an undertaking whose activity which began only in June 2008, the *Autorité* retained the turnover for the period between June 2008 and May 2009.

131. In contrast, according to the Commission Consolidated Jurisdictional Notice, where agreements for the sale of assets of the undertaking have been signed but the sale has not yet been completed, such agreements are not taken into account unless the sale is a precondition for the notified transaction.

e) Geographical allocation of turnover

132. The geographical allocation of the turnover must be to the place where competition takes place, i.e. as a general rule to the place where the customer is located. For the sale of goods, the place where the contract was concluded and the place of delivery shall take precedence over the invoice address. In the case of services, the place of supply is taken into account.

133. In addition, merger control applies to all undertakings, whatever their nationality or location, whether or not they have assets or a business structure in France, and whether or not the transaction is carried out outside France, provided that they have a turnover in France and exceed the controllability thresholds.

> **Example:** in Decision 12-DCC-83 of 13 June 2012, the *Autorité* considered that the merger between several German agricultural cooperatives was notifiable in France, as two of the merging parties had a turnover of more than €50 million in France.

f) Specific business sectors

134. In the specific case of credit and financial institutions, Article 5(3) of the EC Merger Regulation specifies that turnover shall be replaced by the sum of interest and similar income, income from securities (income from shares and other variable-yield securities, income from participating interests, income from shares in affiliated undertakings), commissions receivable, net profit on financial transactions, and other operating income, less, where appropriate, value added tax and other taxes linked to such income, by gross banking income.

135. For insurance undertakings, according to the same article, the concept of turnover shall be 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 insurance undertakings, including also ongoing 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".

136. In certain sectors of activity, such as package holidays and advertising, where the sale of the service may be carried out through intermediaries, paragraph 159 of the Commission Consolidated Jurisdictional Notice specifies: "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."

137. In the case of distribution networks involving independent members coordinated by a network head (franchise networks, cooperatives, etc.), the general arrangements for allocating turnover provided for in Article 5(4) of the EC Merger Regulation apply (see Paragraph 123 above). As a general rule, therefore, the turnover of the head office does not include sales by members to the public. In contrast, it includes sales made by the head to its members to supply them or remuneration for services for which the head invoices its members.

g) Case of public undertakings

138. Recital 22 of the EC Merger Regulation lays down the principle of non-discrimination between the public and private sectors. However, if, as stated in paragraph 193 of the Commission Consolidated Jurisdictional Notice, Member States are not, per se, considered as "undertakings", they may hold interests in undertakings fulfilling the conditions set out in Article 5(4). In this case, the turnover of the undertaking concerned should be calculated.

139. For the purposes of merger control, "...for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision". It is therefore appropriate, when calculating the turnover of public undertakings concerned by a merger, to go beyond the criterion of holding more than half of the capital or voting rights.

140. The autonomous nature of the decision-making power of a public undertaking is determined on the basis of various indices depending on the case in point (analysis of governance and shareholders' agreements, presence or absence of directors common to the undertakings, method of management of shareholdings by the State, provisions governing the communication of information and strategic documents, findings on the past competitive behaviour of the undertakings concerned, etc.). On the other hand, the exercise of the powers of control by the State will not preclude the ability of that undertaking to define its strategy autonomously where those powers are limited to the protection of interests similar to those of a minority shareholder.

Example: in Decision M.7850 of 10 March 2016 clearing the acquisition of NBB by EDF and GCN, the Commission reiterated that two public undertakings do not belong to the same economic entity if they have independent decision-making power from each other and if they are independent from the State to which they belong. It further stated that the assessment of autonomous decision-making power included the assessment of the autonomy of the public undertaking from the State in deciding its strategy, business plan and budget, as well as the assessment of the possibility for the State to coordinate the commercial conduct of the undertakings by imposing or facilitating their coordination (in particular with regard to the existence of common directorships between the undertakings

141. Thus, in cases where an undertaking is acquired by a public undertaking, in order to determine the scope to be taken into account for the calculation of turnover, the following steps must be followed:

– first, it is necessary to establish whether the target undertaking will have autonomous decision-making power after the transaction (if so, the transaction does not constitute a merger);

– second, if the target undertaking alone does not constitute an economic unit with autonomous decision-making power, it is necessary to determine which "acquiring entity" will constitute, together with the target undertaking, an economic unit with autonomous decision-making power. Belonging to the same economic grouping is analysed with regard to the identity of the leading state entity and the existing links between the public institutions concerned;

– third, it is necessary to determine which undertakings or units held by the "acquiring entity" are to be taken into account for the calculation of turnover.

II. Procedure

A. OBLIGATION TO NOTIFY

142. As soon as a merger is controllable within the meaning of Articles L. 430-1 and L. 430-2 of the French Commercial Code, it must be notified to the *Autorité*.

143. In accordance with Article L. 430-3, the notification "shall be submitted by the individuals or legal entities acquiring control of all or part of an undertaking or, in the event of a merger or creation of a joint venture, by all the parties concerned which must therefore make the notification jointly". In the particular case of the entry of new shareholders acquiring joint control, all parties with joint control, including those who already had control before the transaction, must make the notification jointly. Furthermore, the referral to the *Autorité* of all or part of a merger notified to the Commission, pursuant to Article 9 of the EC Merger Regulation, shall constitute notification within the meaning of Article L. 430-3.

144. Under the first subparagraph of Article L. 430-3, "the merger must be notified to the *Autorité de la concurrence* prior to its completion. This notification shall be made when the party or parties concerned are able to present a project that is sufficiently advanced to enable the processing of the file, and particularly when they have signed an agreement in principle, a letter of intent or, after the announcement of a public bid". The assessment of whether a project is "sufficiently successful" is made on a case-by-case basis. As a general rule, the *Autorité* can declare the notification of a proposed merger receivable if the notifying party provides the *Autorité* with evidence of its intention to enter into a firm commitment, indicating the purpose and details of the proposed merger, the identity of the parties to the transaction, the scope of the merger and its expected timetable.

145. While no provision sets a time limit on the validity of clearances granted by the *Autorité*, transactions must nevertheless be carried out within a reasonable time and in any event without any legal or factual changes. If a plan is cleared, but undergoes significant changes before it is carried out, the clearance decision is no longer valid. In this case, the *Autorité* will have ruled on a different plan from the one that was actually carried out. The notifying party is therefore invited to re-notify the transaction, before it is put into effect, in order to obtain regulatory clearance of the plan that will actually be implemented. In order to verify compliance with these provisions, the *Autorité* may request the party which has benefited from a clearance decision based on a draft agreement to communicate irrevocable agreements to the *Autorité* once they have been signed.

B. SUSPENSIVE EFFECT OF THE PROCEDURE AND EXEMPTIONS

146. Pursuant to Article L. 430-4, "the merger can be effectively completed only after the *Autorité de la concurrence* has given its consent or, when he has evoked the transaction pursuant to Article L. 430-7-1", the consent of the Minster for Economic Affairs. This provision obliges the notifying party concerned to notify the transaction prior to its implementation, as set out above, but also, once the transaction is notified, not to implement the transaction before the *Autorité* or, where appropriate, the French Minister of Economy, has taken a decision.

147. A transaction is effective as soon as the control, within the meaning of III of Article L. 430-1, is constituted. For example, in a transaction where the rights of use over the target undertaking are transferred before the ownership rights, the transaction is completed upon the transfer of the rights of use.

1. EXEMPTION FROM THE SUSPENSIVE EFFECT OF THE CONTROL PROVIDED FOR IN ARTICLE L. 430-4

148. The second paragraph of Article L. 430-4 provides that "In the event of a duly justified special need, the notifying parties may ask the *Autorité de la concurrence* for an exemption allowing them to carry through all or part of the merger without waiting for the decision referred to in the first paragraph and without prejudice to that decision". The granting of such an exemption is, by definition, exceptional. Takeover bids for undertakings in liquidation or receivership are among the cases that may lead to the granting of an exemption.

149. The notifying party, when submitting the notification file, must specify the reasons for the exemption request. In particular, this written request, separate from the notification file, must specify the context of the transaction, the procedures under way and their timetable. In addition to the question of the viability of the undertaking concerned, the urgency of the matter necessitating the granting of the exemption must also be duly justified. Such a request for exemption may also be submitted later in the course of the procedure. Since the request for an exemption is of an exceptional nature, it should in any event not be submitted where the foreseeable time limits for the examination of the request for clearance are compatible with the requirements of the timetable for the notified transaction.

150. Undertakings seeking to benefit from this exemption are asked to apply for it as soon as they are aware of the cause that may justify their request, and in any event in sufficient time before the event that is to take place, for example at least five working days before the decision of the commercial court in the case of an offer made with a view to a takeover. This request should be accompanied by a notification (rather than a pre-notification) file,

which should be as complete as possible and include, at least, a presentation of the parties and the transaction, the justification for the request for exemption, a preliminary competitive analysis of the effects of the transaction and the mandate of the counsels, if any.

151. In the case of the takeover of undertakings in difficulty, a potential acquirer may be led to consider making an offer for all or part of a business, without having access to a large amount of information, and in particular without being able to ascertain the value of the turnover associated with the envisaged target. To the extent that the potential acquirer is not in a position to exclude that the proposed transaction is subject to the notification requirement, a notification may then be filed even if it does not include the turnover of the target, and which may be withdrawn if appropriate. In such a circumstance, the notifying party will nevertheless be required to provide certain data in order to obtain an initial estimate of the turnover of the target.

152. During the examination of the request, the case handler may exchange with the notifying party and request any professional documents deemed necessary. Moreover, as soon as the letter granting the exemption is sent, the *Autorité* may point out the existence of potential competition risks anticipated in the transaction.

153. The granting of an exemption by the *Autorité* in no way prejudices the final decision taken after examination of the case. It is possible that an undertaking in insolvency proceedings may be the subject of several competing takeover bids. The *Autorité* may thus, where appropriate, grant several exemptions for the acquisition of the same undertaking. It is also possible that the court will accept the bid of an undertaking which was not subject to the obligation to notify the transaction (in the event that the undertakings concerned did not exceed the controllability thresholds). If the commercial court were to uphold a takeover bid made by an undertaking that had been granted an exemption, the Mergers Unit would examine the transaction without taking that fact into account, since the grant of an exemption is neutral from the point of view of the competitive analysis of the effects of the transaction.

154. In addition to the documents listed in Appendix 4-3 of the French Commercial Code, detailing the contents of a complete notification file, in the case of proceedings before the commercial court, the court's judgment must also be sent to the *Autorité* as soon as it is received by the notifying undertaking, so that the file can be declared complete.

155. The granting of an exemption by the *Autorité* in no way prejudices the final decision taken after examination of the case. The *Autorité* can thus impose remedies, or even block the transaction if the latter harms competition. In this particular case, the execution of the *Autorité*'s decision will therefore imply that the repurchase transaction will be undone.

Example: in Decision 18-DCC-95 of 14 June 2018, the *Autorité* considered, after an in-depth investigation, that although an exemption from the suspensive effect of merger control was granted to Cofigeo, the transaction was likely to lead to a significant lessening of competition. In order to clear the transaction, it used its injunction power and ordered Cofigeo to divest a brand and production capacity.

156. The notifying party should therefore ensure that, during the period preceding the final decision, it refrains from taking any action or implementing any measure which would be likely to change the structure of the transaction, such as, for example, disposing of assets belonging to the target or implementing the transaction irreversibly.

157. The exemption concerns the prohibition to carry out the transaction before it has been cleared and does not have the effect of exempting the transaction from that clearance. Exemptions granted by the *Autorité* are therefore automatically null and void if, within three months of the completion of the transaction, the notification file has not been acknowledged with the receipt provided for in the third paragraph of Article R. 430-2, i.e. if it has not been completed by the notifying party, thus preventing its examination by the *Autorité*.

2. EXEMPTION FROM THE SUSPENSIVE EFFECT OF THE CONTROL FOUND IN ARTICLE R. 430-5

158. A second mechanism for exemption from the suspensive effect of the procedure is provided in Article R. 430-5: "When a merger is carried out by purchase or exchange of securities in a regulated market, its effective completion, within the meaning of Article L. 430-4, occurs when the rights attached to the securities are exercised. The absence of a decision by the *Autorité de la concurrence* shall not prevent the transfer of the said securities". Thus, since the transfer of ownership of the securities does not constitute the completion of the merger, it may be carried out before the transaction is approved by the *Autorité*.

159. This exemption does not apply to the use of voting rights associated with the transfer of securities. As long as the transaction has not been cleared by the *Autorité*, the exercise of these rights, except in the case of an individual exemption as provided for in the second paragraph of Article L. 430-4, shall effect the merger and, as a result, is subject to a fine under Article L. 430-8. This mechanism applies to takeover bids, public exchange offers or the acquisition of control by the simple purchase of securities on a regulated market without launching a takeover bid.

160. In the case where control is obtained by the simple acquisition of securities on a regulated market without launching a takeover bid (or, if required by stock exchange law, without a takeover bid being necessary to obtain control), the notifying party may also benefit from the automatic exemption only with regard to the transfer of securities.

161. Another case may result from the acquisition, through an over-the-counter agreement, of a "controlling" interest resulting in an obligation to file a takeover bid for the remaining capital. The inseparable nature of the different stages of a takeover is based on the law or local rules (in France, the Monetary and Financial Code). The triggering event for control of the merger is then the two events taken together, which moreover follow one another in the short term, namely the conclusion of the off-market agreement and filing of the takeover bid. Such inseparable two-step securities transfer transactions may be notified at the stage of the conclusion of the off-market agreement, if the proposed merger is sufficiently completed, or after the launch of the takeover bid, where the merger is irrevocable. In this case, the suspension of the effective execution of the transaction within the meaning of Article L. 430-4 applies both to the exercise of rights attached to securities acquired off-market and to the exercise of rights attached to securities that are part of a public offer.

162. In the event of "private" bids on markets that are not subject to the takeover rules for regulated markets (open market or over-the-counter), there is no automatic exemption from the suspension of the transaction. Consequently, unlike two-stage transactions involving intervention on a regulated market (takeover bids), similar transactions, but for which the second stage would consist solely of a "private" offer to buy back shares on an over-the-counter market, are subject to the obligation to notify as soon as control is acquired by any means.

163. As in the case of the exemption provided for in Article L. 430-4 of the French Commercial Code, the notifying party must ensure, during the period preceding the final decision, that it refrains from taking any action or implementing any measures that would be likely to modify the structure of the transaction, such as, for example, disposing of assets belonging to the target or implementing the transaction irreversibly.

C. FINES PROVIDED FOR IN ARTICLE L. 430-8 OF THE FRENCH COMMERCIAL CODE

1. FAILURE TO NOTIFY (I OF ARTICLE L. 430-8)

164. Undertakings which carry out a controllable merger transaction without having notified it in advance are liable to the fines provided for in I of Article L. 430-8:

"I. If a merger has been carried out without being notified, the *Autorité de la concurrence* directs the parties, subject to a progressive coercive fine, as provided in II of Article L. 464-2 ,to notify the merger, or return to the state prior to the merger. The procedure specified in Articles L. 430-5 to L. 430-7 then becomes applicable.

Furthermore, the *Autorité* may impose on the persons responsible for the notification, a financial penalty that shall not exceed, for legal entities, 5% of their pre-tax turnover made in France during the last closed fiscal year, plus, if applicable, the turnover that the acquired party made in France during the same period, and, for individuals, €1.5 million."

165. This provision punishes both an intentional offence and an omission through simple negligence. In its assessment, the *Autorité* shall in particular take into account the circumstances which led to the failure to notify and the conduct of the undertakings.

166. The application of this Article shall be subject to *inter partes* proceedings before the Board of the *Autorité*. In application of Article L. 462-5 III, the General Rapporteur proposes that the *Autorité* examine the situation of the undertaking concerned with regard to Article L. 430-8 I on its own initiative. If the *Autorité* takes up the matter, a report is sent to the undertakings concerned, who will have two months in which to submit their comments in response. The undertakings will then be heard in session by the Board of the *Autorité*. The decision shall be communicated to the notifying party and published on the *Autorité*'s website.

167. The conformity of this procedure "with the principles of independence and impartiality inseparable from the exercise of sanctioning powers by an independent administrative authority" was validated by the French Constitutional Court (*Conseil constitutionnel*) in Decision 2012-280, Priority Ruling on Constitutionality of 12 October 2012, Canal Plus Group and others.

168. Since its creation, the *Autorité* has on three occasions fined groups that had failed to notify a transaction falling within the scope of the provisions of Articles L. 430-1 et seq.[21].

169. The *Autorité* considered that the result of Articles L. 430-1, L. 430-3 and L. 430-8 is that the failure to notify a merger should be attributed to the individual(s) or legal entity (or entities) on which the obligation to notify arose, i.e. the person(s) ultimately acquiring control of the target, and not to the only person legally signatory to the acquisition agreement.

[21] *Autorité* Decisions 12-D-12 of 11 May 2012 concerning the situation of Colruyt with regard to I of Article L. 430-8 of the French Commercial Code, 13-D-01 of 31 January 2013 concerning the situation of Réunica and Arpège with regard to I of Article L. 430-8 of the French Commercial Code and 13-D-22 of 20 November 2013 concerning the situation of Castel with regard to I of Article L. 430-8 of the French Commercial Code. Decision 13-D-22 has however been partially reformed, in a judgment of 15 April 2016 by the French Administrative Supreme Court: the penalty of €4 million imposed by the *Autorité* was reduced to €3 million. First, the notification of the transaction was made within a short period of time after the initial requests for justification by the *Autorité* and secondly, account was taken of the absence of any intention to circumvent the competition rules by carrying out the transaction without prior notification.

170. On this point, in a decision of 14 December 2012, the French Administrative Supreme Court rejected the request for referral to the French Constitutional Court for a priority ruling on constitutionality submitted in support of an application for annulment against the *Autorité*'s Decision 12-D-12 of 11 May 2012. In particular, it considered that Articles L. 430-3 and I of L. 430-8 designated in a sufficiently clear manner the author of the failure to notify a merger transaction, who is also the individual or legal entity liable to be fined.

171. Furthermore, the *Autorité* considered that, in the absence of a provision relating to the specific limitation period for the application of I of Article L. 430-8, Article L. 462-7, which provides that "Facts dating back more than five years may not be referred to the *Autorité* if no attempt has been made to investigate, establish or punish them", to include, without distinction, all the "facts" that the *Autorité* may be required to punish. Consequently, the five-year limitation period is applicable to facts falling under I of Article L. 430-8[22].

172. With regard to the starting point of this prescription, the *Autorité* considered that the facts referred to in I of Article L. 430-8 concern the omission of a notification that must take place at a specific time, and that the implementation of a merger takes place in a single stroke of time, even if its effects are likely to continue. Accordingly, the implementation of a merger without prior notification constitutes a continuing infringement whose limitation period begins on the day on which the change of control occurs.

> **Example:** in Decision 12-D-12 of 11 May 2012, the *Autorité* adopted a five-year limitation period for the infringement provided for in Article I of L. 430-8. It considered that this infringement was permanent, and that the limitation period had therefore begun on the day the contracts for the sale of the securities were formed, thus making concrete the change of control of the companies.

173. In order to determine the penalty, the *Autorité* takes into account the gravity of the facts, having regard to the circumstances of the case and the individual situation of the undertakings concerned. Failure to comply with the obligation laid down in Article L. 430-3 constitutes, by its very nature, a serious breach of public economic policy, insofar as such a failure deprives the *Autorité* of any possibility of controlling a proposed merger prior to its implementation, regardless of the possible effects of the proposed transaction on competition. The characterisation of the breach sanctioned by I of Article L. 430-8 does not therefore require the demonstration of an infringement of competition that could be caused by the non-notified merger.

[22] In Decision 2012-280, Priority Ruling on Constitutionality of 12 October 2012,, the French Constitutional Court considered that Article L. 462-7 applied to facts falling within the scope of IV of Article L. 430-8.

However, the *Autorité* shall, when determining the amount of the penalty, take into account the specific circumstances of the case, whether aggravating or mitigating, including the following:

– the more or less obvious controllability of the transaction;

– the size of the undertaking and the resources, in particular legal resources, at its disposal;

– the fact that the undertaking of its own accord has brought the lack of notification to the *Autorité*'s attention;

– the possible intention of its officials to circumvent the legal obligation to notify, in particular where the transaction was likely to cause a substantial adverse effect on competition; and

– the cooperation provided by the undertaking during the procedure.

Example: in Decision 12-D-12 of 11 May 2012, the *Autorité* held that the acquirer had deliberately ignored its legal obligation to notify in order to implement the proposed merger rapidly.

On the contrary, in the decision of 15 April 2016, taken following the appeal lodged by Copagef against Decision 13-D-22, the French Administrative Supreme Court considered that the *Autorité* had not provided sufficient evidence of an intention to circumvent the competition rules. Moreover, in its view, the fact that the undertaking finally notified the transaction shortly after the first questions raised by the *Autorité* should have been taken into account as mitigating circumstances. The French Administrative Supreme Court thus reduced the penalty imposed by the *Autorité* from €4 million to €3 million.

2. OFFENCE OF EARLY IMPLEMENTATION OF A MERGER, OR GUN JUMPING (II OF ARTICLE L. 430-8)

174. Article L. 430-8 II provides, "If a notified merger not benefiting from the exemption specified by the second paragraph of Article L. 430-4 has been carried out before the decision specified by the first paragraph of the same article has been given, the *Autorité de la concurrence* may impose on the notifying persons a financial penalty that may not exceed the amount defined in I", i.e., for legal entities, 5% of the turnover excluding taxes made in France during the last financial year ended, increased, where applicable, by the turnover made in France during the same period by the acquired party, and, for individuals, €1.5 million.

175. The purpose of this provision is to ensure the effective exercise of the *Autorité*'s power of control over the transaction notified to it and to avoid any structural change in the markets affected by the transaction in the event that the notifying party were to renounce it, in whole or in part, on its own initiative or as a result of the merger control procedure.

176. The purpose this article is to prevent the parties to the transaction from ceasing, prior to the clearance date, to behave like competitors and instead behaving like a single entity and to prevent the acquirer from prematurely exercising control over the target in law or in fact.

177. When assessing whether a transaction has been carried out in advance, the *Autorité* shall analyse in particular whether the acquirer's behaviour has led the acquirer in any way to exert a decisive influence on the target in advance, based on an analysis grid similar to that used to assess the level of concentration of a transaction. To this end, it takes into account in particular the actual behaviour of the parties to the transaction, in order to assess the extent to which they continued to behave as competitors defending their respective interests or, on the contrary, as a single entity already sharing a single objective.

178. Certain types of behaviour require particular vigilance on the part of undertakings in this respect.

179. Thus, the conclusion of memoranda of understanding between the acquirer and the target to govern their relationship during the period up to the conclusion or clearance of the transaction, for example in order to protect the value of the acquirer's investment, does not in itself characterise an early implementation of the transaction. The parties must, however, ensure that this type of agreement does not result in the acquirer taking control of all or part of the target before the transaction is cleared by the *Autorité*. In this respect, when assessing the compatibility of a memorandum of understanding with the provisions of III of Article L. 430-8, the *Autorité* takes into account the letter of the contract, i.e., not only its scope and purpose, but also the practical arrangements for its application. The information exchanged prior to the transaction between the acquirer and the target also requires particular vigilance with regard to the nature of the data exchanged, the persons to whom it is communicated and the practical arrangements for such exchanges. In order to assess the suitability of the information exchanged in relation to the applicable legal framework, the parties may usefully refer to the case law on exchanges of sensitive information between competitors.

180. Furthermore, in order to avoid any situation of early implementation of the merger, the acquirer should refrain from interfering in the internal management of the target or reducing its autonomy; thus, the situation in which a buyer would effectively assign functions to a new head of the target, during the suspensive period, would be a strong indication of its decisive influence.

181. Finally, the pre-transaction period must not lead the parties to adopt commercial behaviour which they would not have adopted before the transaction, for example by concluding commercial agreements which would deviate from normal market practice.

182. In determining the amount of the penalty, the *Autorité* shall take account, in particular, of the circumstances that led to the acquisition of control and the conduct of the undertakings concerned.

183. Article L. 430-8 II has been implemented in only one case to date.

> In Decision 16-D-24 of 8 November 2016, the *Autorité* established that the conduct of Altice Luxembourg and SFR Group led to the completion, prior to clearance, of the transactions whereby Altice took sole control of SFR and of Omer Telecom Limited. In particular, the *Autorité* noted the active role of Altice in the operational management of both SFR and Omer Telecom Limited and the existence of exchanges of strategic information between the parties. With regard to the acquisition of control of SFR, the *Autorité* noted in particular that, during the suspensive period of merger control, Altice intervened in the operational management of SFR before clearance (validation of strategic decisions, suspension of a promotional offer) and that the parties coordinated their acquisition of Omer Telecom Limited and, more generally, strengthened their economic links in order to put in place coordinated strategies in addition to exchanging strategic information. The *Autorité* found that, during the suspensive period of merger control, Altice took strategic decisions on the acquisition of control of Omer Telecom Limited and set up weekly monitoring of economic performance. In addition, Altice had access to commercially sensitive information. The *Autorité* took into account the scale and particular importance of the activities concerned, the duration of the infringement, the risks of anticompetitive effects of the conduct in question and the willingness of those responsible to deliberately circumvent the legal obligation of suspension. As a result, the *Autorité* fined Altice €80 million[23]. This penalty amount took into account a mitigating circumstance, as the respondent undertaking had agreed to a settlement procedure.

184. Lastly, it should be mentioned that gun jumping can also lead to the infringing undertakings being fined for adopting anticompetitive practices, whether in the form of an illegal restrictive practice or an abuse of dominant position. Such a risk is all the more important in the presence of a transaction between competitors.

[23] This decision was not appealed before the French Administrative Supreme Court.

3. OMISSION OR INACCURATE STATEMENT (III OF ARTICLE L. 430-8)

185. Article L. 430-8 III provides, "In the event of an omission or incorrect declaration in a notification, the *Autorité de la concurrence* may impose on the notifying persons a financial penalty that may not exceed the amount defined in I." This sanction, under I of Article L. 430-8, may amount to up to 5% of turnover for legal entities.

186. In determining the amount of the fine, the *Autorité* takes into account, in particular, the circumstances leading to the omission or incorrect declaration and the conduct of the undertakings concerned during the proceedings. The implementation of this sanction mechanism is subject to *inter partes* proceedings before the Board of the *Autorité*.

187. In addition, where the omission or inaccuracy in the notification is discovered after the decision clearing the transaction has been taken, the penalty may be accompanied by the withdrawal of that decision. In this case, "Unless the situation is returned to the state prevailing prior to the concentration, the parties shall be required to notify the merger again, within one month from the withdrawal of the decision"; otherwise, they incur the penalties provided for carrying out a transaction without prior notification.

> In letter C2006-96 of 13 November 2006, the French Minister of Economy fined Vico €10,000 for failing to report the acquisition of another company operating in the same product market as the one concerned by the transaction. In addition, Vico had wrongly stated that the target was not present in certain business segments. However, the inaccuracies and omissions were identified at the initiative of the parties and before the transaction was completed, which indicated that they were unintentional. Moreover, the inaccuracies and omissions noted were not such as to alter the nature of the decision. The French Minister of Economy has thus taken these circumstances into account when calculating the amount of the fine by imposing a moderate fine on Vico. As the Minister had already made the clearance decision based on erroneous reasons, he withdrew it and adopted a new decision.

D. DIFFERENT PHASES OF THE PROCEDURE

188. Merger control is characterised by different phases, generally framed by successive legal deadlines: case team allocation request (1.), pre-notification (2.), phase 1 (3.), phase 2 (4.), evocation by the French Minister of Economy (5.). At any time during the procedure, the notifying party may withdraw its case (6.).

1. CASE TEAM ALLOCATION REQUEST

189. In order to anticipate the forthcoming notification of a merger, undertakings may approach the Mergers Unit with a request for the appointment of a case team, who will be in charge of examining the case.

190. This request, which is optional, should be sent directly by e-mail to: controle.concentrations@autoritedelaconcurrence.fr. It must include the following:

- contact details of the parties and, where appropriate, their counsel;
- precise information on the type of file concerned (request for a comfort letter, notification of a transaction with or without a pre-notification phase, under the normal or simplified procedure, following a referral from the European Commission);
- the undertakings concerned and their respective turnover;
- a precise description of the proposed transaction (nature of the transaction, economic activities of the parties, markets concerned and, where appropriate, affected, presentation of the competitive effects resulting from the transaction);
- where appropriate, the other Member States in which the transaction is also notifiable;
- the foreseeable date for sending the draft pre-notification or notification.

191. Following this request, the name of the deputy head of the Mergers Unit responsible for examining the file shall be communicated to the notifying party within five working days.

2. PRE-NOTIFICATION PHASE

192. The pre-notification phase, which is optional, is triggered at the initiative of undertakings wishing to submit their proposed merger to the Mergers Unit, in particular where there are uncertainties as to the controllability of the transaction or to anticipate discussions on market delineations or complex competitive analysis. Pre-notification may also be made where the notifying party intends to make a referral to the Commission.

193. The pre-notification phase gives undertakings the opportunity to informally exchange with the Mergers Unit to complete their notification file and be in a position to present a file likely to receive the acknowledgement of receipt provided for in Article R. 430-2 on the day it is filed. The *Autorité*'s experience shows that a notification dossier which has undergone an effective pre-notification phase, during which a preliminary version of the notification dossier complying with Appendix 4-3 of the French Commercial Code was transmitted and at the end of which the undertaking was informed that the information provided was considered sufficient for its investigation, is generally declared complete

on the day it is submitted.

194. The pre-notification phase is also useful for the analysis of anticompetitive effects.

195. In order to trigger this phase, the notifying party submits a detailed presentation of the transaction, including a description of the undertakings concerned and the proposed transaction, as well as an analysis of the controllability of the merger, supplemented by information on relevant markets, competitors and market shares. This presentation may take the form of a preliminary version of the notification file in accordance with Appendix 4-3 of the French Commercial Code.

196. The pre-notification file can be sent directly by e-mail to: controle.concentrations@autoritedelaconcurrence.fr. It is not necessary to attach all of the anticipated appendices, which may be forwarded at a later stage at the request of the case handler if they are found to be necessary for the examination of the dossier at the pre-notification stage. After it is received, the name(s) of the case handler(s) responsible for the examination of the notification shall be provided to the notifying party within five working days if the party has not made use of the mechanism for requesting a case team allocation described above. This period will be shorter if the notifying party has made use of the mechanism for requesting a case team allocation.

197. The pre-notification phase can be initiated by undertakings regardless of the degree of completion of the proposed merger. However, this must be sufficiently advanced so as not to constitute a theoretical transaction. However, if the main objective of the notifying party is to minimise the risk of the notification file being incomplete, consulting the Mergers Unit must be initiated sufficiently in advance of the date on which the notifying party intends to notify the transaction, by providing information relating to the transaction and the markets concerned which is as detailed as possible, and finally the draft notification file must be completed by taking into account the questions put by the case handler.

198. Where the notifying party is concerned about the control of a transaction, the Mergers Unit will examine the evidence provided. If, in the light of this information, it appears that the proposed transaction is not to be controlled by the *Autorité*, the notifying party will be informed by means of a comfort letter signed by the Head of the Mergers Unit. However, if there are new issues relating to controllability, undertakings may be invited to notify the transaction so that these issues can be decided by the *Autorité* in a formal investigation.

199. However, the *Autorité*'s units are not empowered to respond to requests for legal advice and cannot therefore respond to requests, particularly for verifiability, relating to theoretical cases.

200. Where the notifying party intends to attach *ad hoc* economic studies to its notification file, working meetings may be held with the Mergers Unit and the Chief Economist's team, in particular to ensure that the proposed methodology is sufficiently robust for the results of the studies to be accepted for the investigation. The earlier these meetings take place, the greater the possibility they can include an effective contribution of economic studies to the analysis carried out by the *Autorité*. For further details, please see the *Autorité*'s recommendations for submitting economic studies.

201. The entire pre-notification phase is strictly confidential: it is not publicised on the *Autorité*'s website or in contacts with third parties. Nevertheless, subject to the prior written consent of the notifying party, a market consultation (market test) may be carried out in order to gather more precise information without waiting for the notification and thereby help to minimise the risk of incompleteness of the notification or to anticipate possible competition concerns.

3. PHASE 1

a) Submission of the notification file

202. For cases which are not eligible for the electronic notification procedure[24], a paper copy of the notification file should be sent to the Mergers Unit at the following address:

Autorité de la concurrence
Attn: Head of the Mergers Unit
11, rue de l'Échelle – F-75001 Paris, FRANCE

203. The notification file may also be submitted on working days between 9 a.m. and 7 p.m. at the reception desk of the *Autorité*, 11 rue de l'Échelle, Paris. Upon receipt or deposit, notification packages shall be stamped with a date of arrival at the *Autorité*.

[24] The electronic notification procedure is described in Paragraphs 234 et seq. below.

204. In addition, Article 27 of the *Autorité*'s internal rules of procedure specifies that a digital file in portable document format (PDF) must also be provided. This copy may be attached to the paper copy, on a physical medium, or sent directly and together with the submission of the paper file to controle.concentrations@autoritedelaconcurrence.fr, mentioning, where appropriate, the reference of the file under which the case team allocation request or the pre-notification was registered.

205. On receipt of the notification file, the *Autorité* sends a digital copy to the French Minister of Economy (Article L. 430-3).

206. Following this filing, if the notifying party has not made use of the mechanism for requesting a case team allocation described above and the transaction has not been pre-notified, the name of the case handler(s) responsible for examining the notification shall be provided to the notifying party within five working days.

207. Where certain documents required by Appendix 4-3 of the regulatory part of the French Commercial Code are written in a foreign language, the translation of those documents required by paragraph 1(a) of the above-mentioned appendix may be limited to the passages necessary to enable the *Autorité* to exercise its office in merger control matters.

208. The Mergers Unit checks that the file is complete and sends an acknowledgement of receipt stating the date of the filing of the notification to the notifying party pursuant to III of Article R. 430-2. If the file is incomplete, the Mergers Unit will send the notifying party a letter of incompleteness detailing the elements that need to be completed or rectified. Acknowledgement of receipt of a complete dossier or letter of incompleteness is usually sent within ten working days after notification. The accounting of the investigation deadlines starts at 0:00 a.m. of the working day following the one mentioned on the acknowledgement of receipt.

b) Content of the notification file

209. Article R. 430-2 states that "[t]he notification file referred to in Article L. 430-3 includes the items listed in Appendices 4-3 to 4-5 of this book." A standard notification form is available on the *Autorité*'s website. It consists of five parts:

- a description of the transaction;
- the presentation of the undertakings concerned and the groups to which they belong;
- the presentation of the markets concerned (market delineation, market shares of the parties);

– a detailed presentation of each of the markets affected;

– a statement on the accuracy and completeness of the information provided.

210. The transaction description must include a non-confidential summary of the transaction, to be published on the *Autorité*'s website as detailed in (c) below. This summary, limited to 500 words, is essentially intended to clarify the scope of the transaction so that third parties can comment on the proposed merger. It must therefore specify all information enabling third parties to easily identify the undertakings concerned and their economic activities. This summary must not contain any preliminary assessment of the effects of the transaction.

211. As part of the description of the transaction, the notifying party should also specify the list of States in which the transaction has been or will be notified and the dates of the various notifications. If the transaction is notifiable in other Member States of the European Union, the *Autorité* will promptly inform the authorities of the other Member States and the Commission that a notification file has been submitted and will inform them of the name and contact details of the case handler responsible for the dossier at the *Autorité*, in accordance with the procedural guide of the network of European Competition Authorities (ECA) Notice system for mergers in multiple jurisdictions. The exchange may enable competent authorities to coordinate their timetables as far as possible, as well as to exchange non-confidential information, such as an assessment on the definitions of relevant markets. With the agreement of the parties, they may exchange confidential information. Furthermore, this mechanism may also facilitate the joint implementation of the referral of the transaction to the Commission pursuant to Article 22 of the EC Merger Regulation.

212. A detailed presentation of markets is requested only where a market is affected, within the meaning of Appendix 4-3, in order to simplify the notification file for the simplest transactions.

213. In addition, where required by the investigation, the competitive analysis of local areas may be based, for the markets affected, on maps delineating those areas, showing the location of the sites from which the parties are active and of their competitors and indicating the time travel curves from the sites relevant for the market under consideration.

214. With regard to the markets affected, the notifying party shall pay particular attention to the indications of their main competitors, customers and suppliers. This information must be carefully verified as it will be used, where appropriate, for the purpose of sending questionnaires for a market test. The notifying party shall provide contact details (individual e-mail address and direct telephone number) of qualified contact persons or, failing that, the head of the undertakings concerned.

215. Finally, a copy of the legal documents necessary for a proper understanding of the transaction shall be attached to the notification file, such as, for example, agreements between the parties, distribution contracts, franchise agreements, the decision of the Commercial Court in the case of undertakings taken over in the context of collective proceedings, etc. In a decision of 9 April 1999, the French Administrative Supreme Court, which was asked to rule on the nature of this information, included "the information necessary to identify the undertakings with which The Coca Cola Company is economically linked, as well as to determine the markets to be taken into account and to calculate the shares held on these markets by the parties to the merger".

216. In case of doubt as to the precise content of the file, the notifying party may contact the Mergers Unit, in advance of the notification, e.g. in the context of a pre-notification, in order to clarify what elements are necessary for the examination of the proposed merger.

217. In any event, it is the responsibility of the notifying party to provide accurate, complete and verified information as part of its notification file. Indeed, the communication of inaccurate or incomplete information in a notification file constitutes an infringement which may be sanctioned under III of Article L. 430-8 of the French Commercial Code.

218. The notification file is strictly confidential with regard to third parties. The Commission d'accès aux documents administratifs (CADA) considered that the documents of the notification file, other than the summary, the publication of which is provided for in Article L. 430-3, and its appendices, are covered either by the secrecy of economic and financial information or by the secrecy of commercial strategies and that they are therefore protected by II of Article 6 of the Law of 17 July 1978 on Communicating Administrative Documents[25]. In addition, Law 2011-525 of 17 May 2011 for the Simplification and Improvement of the Quality of Law exempted all "documents drawn up or held by the *Autorité de la concurrence* in the exercise of its powers of investigation, instruction and decision" from the scope of application of the provisions organising access to administrative documents.

Markets concerned

219. According to the definition set out in Appendix 4-3, a market concerned is "a relevant market, defined in both product and geographic terms, on which the notified transaction has a direct or indirect impact".

[25] CADA Notice 20141669 of 22 May 2014.

220. The notification must therefore include a definition of each market concerned, as well as a precise description of the arguments leading to the proposed delineation, taking into account in particular the previous decisions of national and European competition authorities.

221. Information related to market definition and market shares is the most frequent reason for the incompleteness of a file and therefore requires special attention. The notifying party must present the parties' market shares and those of competitors by considering all of the possible segmentations retained or envisaged by the past decisions of the national and European competition authorities.

Markets affected

222. According to Appendix 4-3, a market concerned is considered to be affected if at least one of the following three conditions is verified:

- two or more of the undertakings concerned or groups to which they belong are active on this market and their combined market shares are 25% or more;
- at least one undertaking concerned is active on that market and another of those undertakings or groups is active on an upstream, downstream or related market, whether or not there are supplier-customer relationships between those undertakings, where, on any of those markets, the aggregate market share of all those undertakings or groups exceeds 30%;
- the transaction leads to the disappearance of a potential competitor in one of the markets in which the parties are active.

223. For each market affected, the notifying party must provide a detailed presentation of the market and the undertakings active on it. Appendix 4-3 lists the information which must be included in the file.

224. Where the notifying party encounters difficulties in assembling the required information, it shall promptly inform the designated case handler, particularly if this arises during the pre-notification phase of the case.

Calculation of market shares

225. For each market concerned and affected, the notifying party must estimate the market shares of the undertakings concerned and the groups to which they belong, as well as those of their main competitors.

226. In order to facilitate a rapid examination of the case, the notifying party is invited to present the parties' market shares and those of competitors by considering all the possible segmentations envisaged or adopted by the past decisions of competition authorities, in particular the narrowest ones, even if it does not agree with the analysis that led to these delineations.

227. As a general rule, the value of an undertaking's market share is calculated by dividing its pre-tax turnover by the pre-tax turnover of all operators on the market concerned. However, in certain cases, it is not possible or of little relevance to take into account in the analysis only the market share by value calculated on the basis of turnover. Data relating to volumes or capacity can sometimes be used as an alternative measurement of the position of undertakings in the market. For example, for retail markets relying on distribution through physical stores, it is usual to analyse market shares calculated on the basis of sales areas, in addition to or in the absence of market shares in value terms. The notifying party may propose alternative ways of calculating market shares, justifying its proposal and clearly indicating the assumptions used, without exempting the notifying party from submitting market shares calculated according to the usual method.

228. The assessment of market shares depends on the reliability of the source data used. The notifying party is invited to indicate precisely all stages of the calculation, to specify its sources and, where appropriate, to attach relevant data, whether from public data, professional statistics, market research or any other source.

229. The *Autorité* may need to compare the estimates provided by the notifying party with information obtained from its competitors, suppliers or customers. This cross-check is carried out while protecting the business confidentiality of the parties and third parties questioned. It is therefore important for the notifying party to specify whether the sources used are public and available to all undertakings in a market (such as, for example, the data published by Arcep in the telecommunications sector) or whether they are confidential.

Common base of the notification file

230. The content of the notification file may be simplified for undertakings that make a significant number of notifications per year, such as investment funds or major companies in the retail sector. They may, after the closure of the annual accounts, provide the Mergers Unit with a common base in electronic format, containing general information which may be repeated in all notifications for the coming year. They may then limit the content of their notification to information specific to the transaction, unless a major event occurs during the year and subject to the updating of turnover following the acquisitions (or divestitures) carried out.

Simplified file

231. The content of the notification file may also be reduced for the following transactions, which are presumed *a priori* not to be likely to affect competition and which are eligible for a simplified procedure:

- where the combined market share of the undertakings concerned is less than 25% in markets consistently defined by past decisions;
- in the case of an overlap in the economic activities of parties, where the combined market share of the undertakings concerned is less than 50% and the addition of market shares resulting from the transaction is less than 2 percentage points in markets consistently defined by past decisions;
- in the case of presence on vertically related markets, where the combined market share of the undertakings concerned in those markets is less than 30% in markets consistently defined by past decisions;
- in the case of presence in related markets, where the market shares of the undertakings concerned in the related markets are below 30% in markets consistently defined by past decisions;
- in the case of acquisitions of sole control of undertakings, where the acquirer exercised joint control of the target prior to the transaction;
- where the transaction concerns the creation of a full-function joint venture whose economic activity is only outside France;
- where the transaction concerns the acquisition of joint control of a real estate asset for sale in a future state of completion.

232. For such transactions, the notifying party may, in the following items of the notification form provided for in Appendix 4-3:

- for 2c, provide a summary table of the financial data only for the last financial year ended;
- for 2e, not provide the "list and description of the activity of the undertakings 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 transaction, the nature and description of these ties".

233. The Mergers Unit verifies as soon as possible that the transaction fulfils the conditions set out above and is eligible for the simplified procedure. If so, the notifying party will be informed of this at the same time as the acknowledgement of receipt of completeness provided for in III of Article R. 430-2.

234. However, even if a transaction would *prima facie* fulfil the above conditions, a complete file, in accordance with the provisions of Appendix 4-3, may still be requested from the notifying party if justified by the specific nature of the case. In this case, the transmission of the additional information requested will be required prior to sending an acknowledgement of receipt of the file.

Electronic notification

235. Some of the transactions mentioned above may be notified electronically. It concerns:

– any transaction notified in application of II of Article L. 430-2 as long as it does not involve a change in the trade name of the retail store(s) concerned;

– any transaction that does not result in an overlap of activities between the parties, whether horizontal, vertical or conglomerate in nature.

236. The first condition essentially covers the numerous transactions carried out by the network heads of the large retail food distribution groups for the management of these networks. As regards transactions relating to car dealerships, the vehicle brands of the car dealers can be considered as a trade name and transactions relating to the acquisition of car dealerships can benefit from this electronic procedure.

237. The second condition encompasses most transactions carried out by investment funds. It is also fulfilled when the undertakings concerned include no investment funds but are not simultaneously present in the same or related or vertically connected markets. On the other hand, transactions involving investment funds holding controlling stakes in undertakings located in the same markets or in markets related or vertically connected to those of the target assets do not benefit from the electronic procedure.

238. transactions concerning the French overseas *départements*, the *département* of Mayotte, the Wallis and Futuna Islands or the overseas territories of Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy shall benefit from this electronic procedure if the conditions set out above are met.

239. However, the *Autorité* may, where it considers it necessary, decide to take a decision outside this procedure, even if the transaction fulfils the conditions specified above.

240. For each type of transaction, there is a pre-notification form enabling exchanges between the notifying party and the case handler in charge of the dossier, and a notification form:

- Form for pre-notifying a merger using the electronic procedure - retail food sector;
- Form for notifying a merger using the electronic procedure - retail food sector;
- Form for pre-notifying a merger using the electronic procedure - automotive sector;
- Form for notifying a merger using the electronic procedure - automotive sector;
- Form for pre-notifying a merger using the electronic procedure - no overlapping economic activity;
- Form for notifying a merger using the electronic procedure - no overlapping economic activity.

241. For each of these forms, please supply the following information:

- the mandate or contact details of the representative of the notifying party;
- acts subject to notification;
- a summary of the transaction containing no confidential information, to be published on the *Autorité*'s website;
- a description of the legal aspects of the transaction;
- the countries in which the transaction will be notified;
- the presentation of the undertakings concerned and the groups to which they belong: description of the undertakings and company or consolidated accounts;
- the summary table of financial data for the last financial year ended (template available online);
- the list of merger transactions carried out over the last two years (model available online);
- the relevant markets identified by past decisions and competitive analysis (model available online);
- the declaration concluding the notification.

c) Publication of the statement relating to submission of the file

242. Article L. 430-3 provides that the *Autorité* shall publish a statement when it receives a notification file or the total or partial referral of a merger with a European dimension within five working days. This statement is posted on the *Autorité*'s website.

243. This statement contains the information requested in Article R. 430-4:

- the names of the undertakings concerned and the groups to which they belong;
- the nature of the transaction (merger, acquisition of control, creation of a joint venture);
- the economic sectors concerned;
- the period within which interested third parties are invited to submit their comments;
- the non-confidential summary of the transaction provided by the notifying party under their sole responsibility and which should, as indicated in Paragraph 209 above, enable the undertakings concerned and their business to be readily identified; and
- a specific mention if it concerns a referral of a merger with a European dimension.

244. Interested third parties are invited to submit their comments by e-mail (controle.concentrations@autoritedelaconcurrence.fr), specifying the references of the transaction on which they wish to make a contribution. They can also contact the Mergers Unit by telephone at +33 (0)1 55 04 01 72.

245. The period within which interested third parties are invited to submit their comments is generally 15 working days from the date of such publication. It is generally reduced to ten working days when the transaction is eligible for a simplified procedure. This period may be reduced where the particularities of the case justify it.

246. This time limit is not mandatory: any comments received by the *Autorité* before its decision is taken may be taken into account in the examination of the transaction. However, given the internal deadlines for processing files, a comment received after the deadline runs the risk of not being taken into account in the decision.

247. The notifying party is invited to take into account the consequences of such publication in organising communication concerning its transaction, particularly with regard to the representatives of the employees of the undertakings concerned.

d) Review periods

248. The time limits governing merger control are given in working days. Working days do not include Saturdays and Sundays or public holidays. The list of public holidays is that given by Article L. 3133-1 of the French Labour Code (*Code de travail*) in the wording in force on the day the notification is filed.

Framework for the phases of the procedure

249. Phase 1 starts on the working day following the date on which the complete notification file is received by the *Autorité* and lasts for 25 working days (I of Article L. 430-5). Proof of this date is an acknowledgement of receipt of the complete file sent to the notifying party. Phase 1 is automatically extended by 15 working days if the *Autorité* receives commitments proposed by the notifying party (II of Article L. 430-5)[26]. This period represents a maximum period which may be reduced where the circumstances of the case so permit. However, the time limit may never be less than the period within which interested third parties are invited to make their comments known, which is specified in the *Autorité*'s notice posted on its website.

250. In the case of the simplified procedure, the time limit within which the *Autorité* shall give its decision shall be 15 working days on average.

251. Phase 2 lasts sixty-five working days (I of Article L. 430-7). The in-depth investigation commences with a decision to open an in-depth investigation. Where the notifying party submits commitments or modifications to commitments already offered less than 20 working days before the end of the Phase 2 period, the Phase 2 period shall expire 20 working days after receipt of the commitments or modifications to commitments already offered, within a maximum of 85 working days from the initiation of the in-depth investigation (II of Article L. 430-7).

Suspension of time limit at the initiative of the Autorité

252. Pursuant to Articles L. 430-5 and L. 430-7, the *Autorité* can implement a "stop the clock" procedure at its own initiative. This mechanism allows for the suspension of the review period in two cases:

– If the notifying party fails to inform the *Autorité* of any new fact as soon as it arises during the investigation, the time limit may be suspended from the time of the occurrence of the new fact until the date on which the notifying party informs the *Autorité*. The system is similar to the one used in European law.

[26] Time limits may also be suspended in the event of implementing Article 22 of the EC Merger Regulation.

Article 9(3)(c) of Commission Regulation (EC) 802/2004 specifies that where the notifying party fails to inform the Commission of changes in the facts or new information, the time limit is suspended "for the period between the change in the facts referred to therein and the receipt of the complete and correct information". Article 9(4) of the same Regulation further provides 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.";

– If the notifying party does not provide the *Autorité* with all or part of the information requested from it within the time limit specified or if the parties in any way prevent third parties from responding to requests for information from the *Autorité*, the time limit may be suspended for the period between the end of the time limit specified in the request for information and the receipt of complete and accurate information required in that request.

253. In either of these cases justifying application of this procedure, the notifying party shall be informed of the suspension of the time limit by means of a letter from the Head of the Mergers Unit.

254. In any case, the time limit shall not start running again until the cause giving rise to the suspension has disappeared and complete and accurate information has been provided to the *Autorité*. The notifying party shall be informed of the end of the suspension of time limit by a letter from the Head of the Mergers Unit.

Suspension of time-limit at the initiative of the notifying party

255. The notifying party may also request a suspension of the time limit for examination within 15 working days (II of Article L. 430-5 and Article L. 430-7). The request may arise "in case of special need, such as the finalisation of the commitments". It must therefore be justified.

e) How the Phase 1 examination is conducted

256. In view of its very brief nature, justified by the concern not to unnecessarily delay mergers which are subject to severe economic constraints, the Phase 1 examination is necessarily conducted in a spirit of cooperation between the parties and the *Autorité* in order to gather the necessary information for a reasoned decision.

257. The Mergers Unit will examine the proposed transaction and shall rely, as necessary, on the Chief Economist's team and the Legal Service of the *Autorité*.

258. In accordance with Article L. 450-1, the *rapporteurs* (case handlers) of the Mergers Unit, as agents of the *Autorité*'s Investigation Services empowered for this purpose by the General Rapporteur, may carry out any investigation necessary for the application of the provisions of Title III (economic merger) of the French Commercial Code in France.

259. Pursuant to Article L. 450-3, the *rapporteurs* may request access to all professional documents and collect the information and evidence they deem necessary for the investigation of the cases for which they are responsible, both from the parties and from third parties. In the absence of a questionnaire sent on the basis of Articles L. 430-5 and L. 430-7 of the French Commercial Code, requests for additional information made to the notifying party do not suspend the time limit triggered on the date mentioned in the acknowledgement of receipt of the completeness of a notification file, but the notifying party is invited to respond with all due diligence in order to remove any doubts resulting from incomplete information, failing which it may incur liability. If necessary, such a questionnaire could be transformed into a "stop the clock" questionnaire.

260. Article L. 464-2 V provides, "Where an undertaking or body does not obey a summons or does not answer within the specified deadline to a request for information or a request to provide documents made by one of the officials referred to in I of Article L. 450-1 in the exercise of the powers vested in him by Titles V and VI of Book IV, the *Autorité* may, at the request of the General Rapporteur, pronounce an order against the undertaking or body, together with a coercive fine, within the limits set out in II. Where an undertaking obstructs the investigation or the instruction, in particular, by providing incomplete or inaccurate information or by sending incomplete or altered documents, the *Autorité* may, at the request of the General Rapporteur, and after having heard the undertaking in question and the representative of the Minister of the Economy, decide to impose a financial penalty on the undertaking. The maximum amount of the penalty for the said undertaking may not exceed 1% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were perpetrated."

261. In addition, Article L. 450-8 stipulates, "If anyone challenges, in any way whatsoever, the exercise of the functions with the agents mentioned in Article L. 450-1 are entrusted pursuant to this book, this shall be punished by a prison sentence of two years and fine of €300,000."

262. The designated case handler checks whether the transaction is verifiable under Articles L. 430-1 and L. 430-2, analyses whether the delineation of the relevant markets proposed by the notifying party is appropriate, assesses the effects of the transaction on competition and, where appropriate, the appropriateness of the proposed commitments. The objectives, methods and criteria used for the analysis of the merits of the case are described in III of these guidelines.

263. The President of the *Autorité*, who is competent in Phase 1 to take the decision on behalf of the *Autorité*, may delegate a Vice-President to decide on a transaction. In all cases, the President may also appoint one or more persons, chosen from among the Vice-Presidents or members of the Board, to provide an informal opinion.

264. In carrying out the analysis, the case handler relies on the data and arguments provided by the notifying party. In the course of the investigation, the case handler may request from the notifying party additional information necessary to further investigate certain aspects of the merger. The case handler compares this information with the past decisions of the competition authorities, any publicly available information and any evidence brought by third parties, in particular in the context of a market test. Where justified by the sector concerned by the transaction, the case handler may also contact the independent administrative authorities or competent administrative units for further information on the functioning of a sector and the issues at stake in the transaction under review[27].

265. The *Autorité* considers that the rapid sharing of the competitive assessment and the frank and constructive exchange with the notifying party, in particular where remedies could be necessary, is essential for the success of merger control. The organisation of meetings with the notifying party at key points in the procedure may contribute to this objective. This voluntary and optional approach may indeed help the *Autorité* to complete its information, give it the opportunity to review the file with the notifying party and enable the latter to anticipate the preparation of the subsequent stages of the procedure. The *Autorité* may therefore take the initiative to organise such meetings on a case-by-case basis.

266. Where the investigation so requires, the case handler may perform various procedural acts, including:

- sending questionnaires to the notifying party, possibly including the communication of internal documents of the notifying party;
- carrying out a market test with customers, suppliers and competitors of the parties, possibly including the disclosure of internal documents of third parties;
- hearing the notifying party or any other market participant.

[27] See in this respect Decision 19-DCC-157 of 12 August 2019 on the creation of a joint venture by France Télévisions, TF1 and Métropole Télévision in which the *Autorité* relied on Opinion 2019-05 of 17 July 2019 of the Conseil supérieur de l'audiovisuel.

267. Undertakings active in sectors where a merger is contemplated are strongly encouraged to submit any information and comments on the possible risks to competition arising from the transaction in order to enable the *Autorité* to inform its competitive analysis, as referred to in (c)above. In any event, the objective of merger control is to safeguard competition and not individual competitors. Consequently, third parties cannot rely on a right to have their comments included in the *Autorité*'s analyses, or on a right to obtain certain remedies or types of decision.

268. In accordance with Article L. 430-10, third parties may request confidentiality with regard to their replies to the questionnaires, as well as with regard to their hearings and comments submitted to the *Autorité*.

269. Therefore, third parties are invited to submit a non-confidential version of their contributions which can be made available to the notifying party. Third parties may also request their responses remain anonymous.

270. A special regime for managing business secrecy is provided for merger control in Article R. 463-15-1. It differs from that applicable to other procedures of the *Autorité,* in order to avoid delays which are detrimental to undertakings.

271. For documents containing information covered by business secrecy reported by the persons who provided the *Autorité* with that information, and which are to be disclosed to third parties or to the notifying party, the case handler may prepare a non-confidential version of the documents concerned or transmit directly the non-confidential version prepared by those parties.

272. At the request of the notifying party, a summary of the third parties' replies to the market test, taking into account any requests for confidentiality, may be provided to the notifying party, usually orally.

273. Where the investigation leaves serious doubts as to the effects of the transaction on competition, the Mergers Unit will inform the notifying party of its analysis and give it the opportunity to express its position and support it by providing additional information.

274. The notifying party shall be informed orally of the fact that the transaction raises serious doubts within a reasonable time before the end of the period provided for in Article L. 430-5.

f) Phase 1 commitments

275. Article L. 430-5 II states, "The parties to the transaction may undertake to adopt measures aimed in particular at remedying, if applicable, the anticompetitive effects of the transaction either on the occasion of the notification or at any time before the expiration of the twenty-five business day period from the date of receipt of the complete notification, as long as the decision specified by I has not been delivered".

276. The commitments may be offered at any time during the course of the investigation. They may be discussed in pre-notification, attached to the notification file or proposed during the course of phase 1, as early as possible in the procedure to facilitate their consideration in the analysis.

277. Where commitments appear to be necessary but the notifying party has not offered them, the *Autorité* will invite the notifying party to do so.

278. The submission of signed commitments automatically extends the maximum period for Phase 1 by 15 working days. Furthermore, the examination periods may be suspended, at the request of the notifying party, up to a maximum of 15 working days in cases of special need, such as the finalisation of commitments.

279. Commitments shall take the form of a letter, signed by the legal representative or counsel of the notifying party, which shall contain a precise, detailed and exhaustive list of the actions or conduct to which the notifying party commits itself in order to be able to carry out the proposed transaction.

280. In the case of structural commitments, the notifying party must provide the means to ensure, during the transitional period between the clearance of the transaction and the completion of the divestitures, the independence, economic viability, value and competitiveness of these assets.

281. In the case of behavioural commitments, the notifying party shall demonstrate their operational feasibility and the proposed means of verification.

282. Whatever commitments are proposed, they must explicitly refer to the means by which they will be monitored by the *Autorité*. For further details on the nature of the commitments, see the section on remedies.

283. The Mergers Unit assesses the admissibility of the commitments proposed according to the threats to competition that the transaction is likely to generate. These commitments may be tested among stakeholders in the markets concerned, while respecting the business secrets of the parties. For this purpose, the notifying party must submit a non-confidential version of its commitments.

g) Phase 1 decisions

284. Article L. 430-5 III states, "The *Autorité de la concurrence* may:

> - either find, in a reasoned decision, that the transaction notified thereto does not fall within the scope defined by Articles L. 430-1 and L. 430-2;
>
> - or clear the transaction, possibly by subordinating this clearance, in a reasoned decision, to the actual implementation of the commitments made by the parties;
>
> - or, if it deems that there remains a serious doubt of an adverse impact on competition, conduct an in-depth examination as specified in Article L. 430-6".

285. Article L. 461-3 IV specifies that the decisions provided for in Article L. 430-5 may be taken by the President or a Vice-President appointed by the President.

286. The *Autorité* informs the notifying party and the French Minister of Economy of its decision (Article R. 430-7).

287. The decisions of the *Autorité* are published with respect for the legitimate interest of the notifying party and the persons cited in the decision and will not disclose their business secrets (Article D. 430-8).

288. The *Autorité* shall ensure protection of business secrets of third parties by taking into account in particular requests made during the investigation. The notifying party has a period of fifteen calendar days to indicate, by e-mail, the business secrets that it wishes to be concealed (Article R. 430-7).

289. The determination of what is or is not covered by business secrecy is always made on a case-by-case basis. It is therefore imperative that the notifying party requesting that certain data be withheld does so in a precise and detailed manner. Items for which the requested concealment has not been justified, or has been supported by justifications considered insufficient, will not be concealed. Where the notifying party's requests for concealment are not accepted in their entirety, the Mergers Unit shall send an amended version of the decision to the notifying party, prior to its publication, for comments.

290. There are certain elements that cannot, in principle, be concealed:

- information whose publication is mandatory pursuant to the regulations in force in France or in another country of the European Union. If a disclosure obligation is imposed on undertakings by virtue of the regulations, but the undertakings have not complied with this obligation (e.g. annual filing of accounts with the trade and companies register), the undertakings will not be able to claim that they have failed to comply with this obligation in order to justify the confidential nature of the data;
- information disclosed by the undertaking itself, over and above its legal and regulatory obligations: annual reports, website;

– easily accessible information, in particular that resulting from the reprocessing of public data (information in Internet databases, information accessible through research institutes, etc.);

– information that has lost its commercial importance (through the passage of time or for any other reason). In principle, there is no reason to conceal data that are five years old or more;

– information forming part of the competitive analysis or a description of the commitments given by the notifying party, the latter forming an integral part of the clearance decision.

291. Requests for concealment may include, but are not limited to:

– information such as manufacturing secrets, industrial secrets, internal organisation or the commercial strategy of the undertaking;

– figures: non-public sales figures, market shares, number of employees, financial information (production costs, cost price, margins, investment projects, etc.), deadlines for implementing structural commitments. Except in special cases, market share levels shall be replaced by the following ranges:

  - between 0 and 4.99%: [0-5]%;
  - between 5 and 9.99%: [5-10]%;
  - between 10 and 19.99%: [10-20]%;
  - between 20 and 29.99%: [20-30]%;
  - between 30 and 39.99%: [30-40]%;
  - etc.

292. In order to take account of the legitimate interests of third parties in the protection of their business secrets, the Mergers Unit may also withhold or replace certain aspects of the decision with ranges, even where they have not been notified of it by the notifying party.

293. In any event, the *Autorité* is not bound by requests for concealment made by the notifying party, and it is for the *Autorité* to reconcile the legitimate interest of the notifying party to protect its business secrets with the interest of third parties and the market to be properly informed of its decisions. In particular, no reference may be made to applications for the concealment of elements which are the necessary support for the decision and the concealment of which would deprive that decision of its meaning in relation to third parties.

294. The Minister may, under I of Article L. 430-7-1, request the *Autorité* to open a Phase 2 within five working days. The expiry of this period shall be specified in the letter sent by the Mergers Unit to the notifying party.

295. Moreover, in accordance with IV of Article L. 430-5, if the *Autorité* has not taken any decision within the specified deadline, it shall notify the Minister. In which case, the transaction is deemed to have been cleared at the end of the deadline granted to the Minister under I of Article L. 430-7-1 (clearance by "tacit agreement").

296. Pursuant to Article R. 430-6, the *Autorité* shall make public the nature of the decision within five working days of its adoption, by publishing on its website the information that the transaction has been the subject of (i) a finding that its control is inapplicable, (ii) clearance, (iii) clearance subject to commitments, (iv) a tacit agreement or (v) a Phase 2 review.

4. PHASE 2 (OR IN-DEPTH EXAMINATION PHASE)

a) Initiation of phase 2

297. Phase 2 can be initiated:

- either at the initiative of the *Autorité* pursuant to III of Article L. 430-5 where there is a serious suspicion of harm to competition at the end of phase 1;
- or at the request of the French Minister of Economy. I of Article L. 430-7-1 stipulates that "within five business days as from the date on which it received the *Autorité de la concurrence*'s decision or was notified thereof pursuant to Article L. 430-5, the Minister for Economic Affairs may ask the *Autorité de la concurrence* to conduct a detailed examination of the concentration as provided in Articles L. 430-6 and L. 430-7 ". As the decision of the *Autorité* taken at the end of phase 1 is notified to the notifying party and to the Minister at the same time, the date on which the Minister receives the decision is the same as the date of its notification to the notifying party.

298. As regards the request for an in-depth examination by the Minister, the *Autorité*, which has the status of an independent administrative body, examines the merits of such a request, but is not bound to consent to it. The *Autorité* shall take a decision on such a request within five working days of its receipt. It shall notify the notifying party of the request immediately upon receipt and shall notify it of its decision at the same time as the Minister. However, the *Autorité* does not notify the notifying party if the Minister does not avail himself of this prerogative.

299. A serious suspicion of harm to competition may arise when:

- there are not sufficient past decisions relating to the relevant markets or important and recent developments on the relevant markets are likely to warrant a significant amendment to those past decisions;

– the competitive analysis raises particularly complex issues and requires further examination at the end of phase 1, for example relating to the definition of the relevant markets, the extent of the barriers to entry, the existence of harm to competition or efficiency gains;

– despite the harm to competition identified in phase 1, the notifying party has not proposed any commitments or has proposed insufficient commitments or commitments whose operational implementation cannot be guaranteed.

300. The initiation of phase 2 can, in some cases, have legal repercussions. For example, Article 231-11 of the General Regulation of the French Financial Regulator allows companies to include in their public cash offer a condition precedent linked to obtaining a phase-1 clearance. The parties may also have included this type of provision in their contractual agreements. If such a condition has been stipulated, the decision to initiate phase 2 automatically causes the offer to lapse. Despite this lapsing, the investigation of the merger case can still continue when the firm notifies the *Autorité* of its intention to continue with its proposed merger.

b) Phase-2 examination procedure

301. In order to enhance the notifying party's visibility of the phase-2 examination of the transaction, the Mergers Unit provides it, at the start of phase 2, with an indicative provisional timetable setting out the main stages in the forthcoming procedure (for example, additional questionnaires, state-of-play meetings, where applicable, expected date of submission of the report and of the hearing). This timetable may, however, be amended, for example if new information likely to influence the competitive analysis of the transaction by the *Autorité* comes to light.

302. The phase 2 procedure is governed by Article L. 430-6. During this phase of the investigation, the case handler conducts a more in-depth examination of the key points of the definition of the relevant market and the competitive analysis on which phase 1 of the investigation had not reached a conclusion. The objectives, criteria and methods used for the analysis of the merits of the case are described in Chapter III of these guidelines.

303. Commitments may also be proposed by the notifying party during phase 2. Point II of Article L. 430-7 reads as follows: "after they have learnt about the opening of a detailed examination pursuant to the last paragraph of III of Article L. 430-5, the parties may propose commitments that will remedy the anticompetitive effects of the concentration."

304. If the notifying party submits these commitments to the *Autorité* less than twenty working days before the end of the investigation period, this period shall expire twenty working days after the date the commitments are received but no later than eighty-five working days after the beginning of the examination.

305. The formal procedures to be observed and the procedure for testing the commitments are the same as during phase 1.

306. The actions undertaken in the phase 2 procedure are subject to the same conditions as in phase 1, particularly as regards the protection of business secrecy.

307. The *Autorité* may request the opinion of the competent sectoral regulatory body. The *Autorité* refers a matter to the competent administrative authorities by sending a document presenting the transaction.

308. This consultation serves to clarify certain aspects of the functioning of the relevant markets, which are subject to specific regulations, as well as to better organise merger control and regulatory procedures specific to these sectors[28].

309. Where applicable, the sectoral regulatory body consulted may submit any observations within a deadline of only one month due to the urgency of the situation.

310. These observations are appended to the case file. The *Autorité* is not bound to seek the opinion of a sectoral regulatory body in order to issue an opinion. This consultation procedure has no impact on the deadlines applicable to the *Autorité*.

311. This procedure is specifically intended for the audiovisual sector (the French Broadcasting Regulator (*CSA*) is consulted pursuant to Article 41-4 of law 86-1067 of 30 September 1986) and the banking and insurance sector (the Prudential Supervision Authority is consulted pursuant to Article L. 612-22 of Order 2010-76 of 21 January 2010 merging the banking and insurance sector licensing and supervisory authorities).

312. Phase 2 of the investigation gives rise to the drafting of a report that presents the parties, the transaction, the relevant markets, the competitive analysis of the transaction and, where applicable, its economic efficiency gains and an analysis of the commitments proposed by the notifying party and the remedies being considered by the *Autorité*. When drafting its report, the Mergers Unit guarantees the protection of the business secrets of the parties and third parties in accordance with the provisions of Article L. 463- 4.

[28] Such an approach was adopted in decision 17-DCC-92 of 22 June 2017 on the review of the injunctions in Decision 12-DCC-100 of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi SA and Canal Plus Group, in which the *Autorité* requested the opinion of ARCEP (Opinion 2016-1551 of 16 November 2016 of the French Telecommunications and Posts Regulator). It should be noted that this case was also referred to the French Broadcasting Regulator (*CSA*), which responded in Opinion 2017- 04 of 22 February 2017.

313. This report is then communicated to the notifying party and to the *representative of the minister of the economy*, who are given fifteen working days to submit their observations. Pursuant to Article L. 463-2, the report is accompanied by the documents on which the assessment of the Mergers Units is based.

314. When it is ready to be examined by the Board, the President of the *Autorité* assigns the case to one of the panels mentioned in Article L. 461-3. A hearing is then organised in accordance with the conditions stipulated in Article L. 463-7 and Title IV of the internal rules of procedure of the *Autorité* . During the hearing, the case handler presents the conclusions of the investigation. The General Rapporteur or the Deputy General Rapporteur and the representative of the minister of the economy present their observations. During the hearing, the Board may also hear interested third parties and the works councils of the companies that are parties to the transaction. These witnesses, who are invited to respond to the questions of the members of the Board, do not attend the whole of the hearing. They are heard in the absence of the notifying party, which is asked to leave the hearing room. Lastly, the Board hears the notifying party, which can present its own analysis and answer the questions of the members of the panel.

c) Phase 2 decisions

315. The competent panel of the *Autorité* deliberates in accordance with the rules established in Title V of the internal rules of procedure.

316. When, at the end of the in-depth analysis, the Board of the *Autorité* intends to clear the transaction subject to injunctions or block the transaction, the draft decision is communicated to the notifying party so that it can submit its observations within a reasonable deadline. This deadline is set taking into account the date on which the notifying party communicated the last information required by the *Autorité* to issue its decision.

317. The *Autorité* notifies its decision to the notifying party and to the French Minister of Economy.

318. As with phase 1 decisions (see paragraphs 286 et seq. above), after receipt of the decision, the notifying party has fifteen calendar days to indicate the information that is subject to business secrecy that it wishes to have concealed (Article R. 430-7). As with phase 1 decisions, publication takes place in accordance with the legitimate interests of the parties and third parties.

319. Moreover, in accordance with V of Article L. 430-7, if the *Autorité* has not taken any of the decisions stipulated in III and IV within the specified deadline, it shall notify the French Minister of Economy. In which case, the transaction is deemed to have been cleared at the end of the deadline granted to the French Minister of Economy under II of Article L. 430-7-1 ("tacit approval" decision).

320. Regardless of the final decision taken pursuant to Article L. 430-7, the *Autorité* shall publish a summary of the decision within five working days of said decision (Article R. 430-6) : (i) clearance, (ii) clearance subject to commitments, (iii) clearance subject to injunctions and obligations, (iv) prohibition or (v) tacit approval.

321. Lastly, the *Autorité* publishes its decisions online on its web site, including in the case of tacit approval, once the information subject to business secrecy has been redacted.

5. POWER TO EVOKE A CASE OF THE FRENCH MINISTER OF ECONOMY

322. This power is laid down in II of Article L. 430-7-1.

323. The date on which the minister receives the decision of the *Autorité* is usually the same as that of the notification of the decision to the notifying party, as the decision is notified to the minister and the notifying party simultaneously.

324. Within five working days of its decision, the minister publishes a summary of the decision (Article R. 430-6).

325. The reasoned decisions of the minister are also published in the electronic version of French Official Bulletin on Competition, Consumer Affairs and Fraud Control (Article D. 430-8). The decisions of the minister are published in accordance with the legitimate interests of the parties and the persons cited not to have their business secrets disclosed (Article D. 430-8).

326. Since the adoption in 2008 of the new legislative framework applicable to merger control, the French Minister of Economy has made use of his power of evocation on one occasion only at the end of the phase 2 examination, in his decision of 21 June 2018 on the acquisition of sole control of a part of the ready meals arm of Agripole group by Financière Cofigeo. This transaction, which was cleared by the *Autorité* subject the an injunction to divest itself of a brand and a factory, was evoked by the French Minister of Economy, who invoked reasons of general interest other than upholding competition, i.e., maintaining employment and industrial development. In his decision of 19 July 2018, the French Minister of Economy cleared the transaction without the asset divestiture condition initially imposed by the *Autorité*, but subject to an employement safeguard commitment.

327. The decisions of the minister taken pursuant to II of Article L. 430-7-1 may be appealed before the French Administrative Supreme Court (*Conseil d'Etat*). In a decision of 21 December 2012, the French Administrative Supreme Court (*Conseil d'Etat*) confirmed that, insofar as Decision 12-DCC-10 of the *Autorité* of 23 July 2012 did not harm the general interest relating to employment maintenance, the minister had not committed any legal error or clear error of judgement in deciding not to make use of his power of evocation.

6. WITHDRAWING A CASE

328. At any time during the procedure, the notifying party may withdraw its case. If the case has already been notified, the notifying party must communicate all documents attesting to the abandonment of the planned merger.

E. REFERRALS AND COOPERATION BETWEEN COMPETITION AUTHORITIES

1. REFERRALS

329. The EC Merger Regulation establishes the turnover thresholds and the respective scope of powers of the Commission and the competition authorities of the Member States in the field of merger control. However, in Article 4, paragraphs 4 and 5, Article 9 and Article 22, the regulation establishes referral mechanisms allowing, under certain specific cases, for the examination of transactions with a national dimension by the Commission and, conversely, the examination of transactions with a Community dimension by national competition authorities. Application of the referral procedures established in Articles 4(4) and 4(5) can be requested by the companies at the pre-notification stage. The referral provided for in Articles 9 and 22 is requested by Member States after receipt of the notification.

330. These referral mechanisms meet two objectives: to allow a merger to be examined by the competition authority best placed to conduct the examination or to allow businesses to benefit, where applicable, from a "one-stop-shop" system managed by the Commission in respect of mergers involving multiple notifications in the European Union.

331. The conditions of application of these referral mechanisms are specified in the Commission Notice on Case Referral in respect of concentrations of 5 March 2005.

a) Referrals to national authorities

332. Referrals of cases with a Community dimension to national competition authorities can be made either at the request of the companies or at the request of the Member States, where applicable at the invitation of the Commission.

Article 4(4)

333. A party notifying a merger transaction falling under the scope of the EC Merger Regulation may request that the Commission refer, in whole or in part, the planned transaction to the competent authorities of the Member State pursuant to Article 4, paragraph 4 of the EC Merger Regulation. To this end, prior to notifying the merger, the notifying party must inform the Commission, by means of a reasoned submission, "that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State". The Commission then communicates the submission to all Member States. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Beyond this period, it shall be deemed to have agreed. The Commission shall take its decision to refer the case or not to the national authorities within twenty-five working days starting from the date of receipt of the reasoned submission by the Commission. If the Commission agrees to a request to refer a transaction to the *Autorité*, national merger law shall apply. In which case, the notifying party must submit a notification to the *Autorité*. If the Commission does not agree to the request, the notifying party must notify the transaction to the Commission.

Article 9

334. Referral, in whole or in part, of a merger transaction notified to the Commission can be requested by the competent authorities of a Member State pursuant to paragraphs 1, 2 and 3 of Article 9 of the EC Merger Regulation when "the 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 "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), the latter case relating mainly to markets with a regional or local geographical dimension. The Member State may decide to request referral of the case for examination for all of the markets for products and services located within its territory or for only some of them. The request may not relate to relevant markets located outside the national territory. Nonetheless, it is possible to refer cases affecting local markets in cross-border areas if, for reasons linked to the functioning of the market, only the national part has to be included in the relevant market.

Example 1: in Decision M.2898 of 13 December 2002, the Commission considered that, on the retail sales markets, the national markets were best placed to examine the effects of the Leroy Merlin/Brico transaction due to the local characteristics of the relevant markets.

Example 2: in Decision M.3373 of 4 June 2004, the Commission considered that the partial referral request by France in relation to the casino market and the Accor-Barrière transaction was admissible since this market was a local one and, in the affected areas, the evidence seemed to suggest that foreign casinos were not exerting any competitive pressure on French casinos.

335. The request must be submitted within fifteen working days of receipt by the relevant national authority of a copy of the notification filed by the notifying party with the Commission. It can be submitted at the initiative of the Member State, which is exercised in France by the *Autorité*, or at the invitation of the Commission. The request must be reasoned by the requesting Member State "based on a preliminary analysis". The Commission assesses the relevance and admissibility of the request in respect of the conditions established in Article 9. However, in the case of a request submitted pursuant to Article 9.2.b, if the Commission notes that the conditions are met, it does not have the power to refuse the requested referral. If the Commission agrees to the referral request, the Commission's decision shall constitute a notification under national law and therefore the national control deadlines commence as of the date of the referral decision.

336. The fact that a referral request pursuant to Article 9 is based on a threat that the merger will significantly harm competition in a market in no way prejudges the conclusions of the examination on the merits to be conducted by the *Autorité* if the referral is accepted. The Court of First Instance of the European Communities recalled this in Judgment T-119/02 Royal Philips Electronics NV v European Commission of 3 April 2003. Competitors of Seb had challenged the Commission's decision to refer the case to France, invoking the contradiction between the reasoning of the referral decision, which invoked harm to competition, and the decision of the French Minister of Economy, who had cleared the transaction without conditions based on the consideration that the a failing company defence was applicable. The notifying party argued that the French competition authorities were bound by the terms of the referral decision and that they could not clear the transaction without requiring commitments. The court rejected this plea on the grounds that the two disputed decisions did not have the same object and that there was no link between them. The Court confirmed that the examination of the competitive situation conducted by the Commission in respect of the referral was a *prima facie* examination, the purpose of which was solely to ascertain whether the referral conditions 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 for referral, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets". The findings of this *prima facie* examination do not therefore prejudge the conclusions of the national competition authorities following a detailed analysis they may make of the transaction.

337. Pursuant to Article L. 430-3, the referral, in part or in whole, of a transaction with a Community dimension must be made public by the *Autorité* via a press release. These merger transactions are published on the website of the *Autorité* under the section on Mergers under examination in the same way as the transactions notified directly to the *Autorité*.

b) Referrals to the Commission

338. Mergers with a national dimension may be referred to the Commission at the request of the undertakings pursuant to paragraph 5 of Article 4 of the EC Merger Regulationor at the request of the Member States pursuant to Article 22.

Article 4(5)

339. When a merger does not have Community dimension but needs to be notified in three or more Member States, the EC Merger Regulation, with a view to "ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible", allows the notifying party to request referral to the Commission prior to any notification to the competent national authorities.

340. The notifying party must notify the Commission via a reasoned submission that it wishes to notify the transaction to it. This request can be addressed to the Commission when the merger could be examined by at least three Member States, without any other justification being required. The Commission communicates the submission by the notifying party to all Member States. Any Member State competent to examine the merger under its national law may, subject to a deadline of fifteen working days following receipt of the submission, express its disagreement with the referral request. If the national authority fails to respond within this deadline, it shall be deemed to have expressed its agreement. When at least one Member State has expressed its disagreement within the required deadline, the Commission notifies the notifying party and the Member States and the merger is not referred to the Commission: the notifying party must, in that case, notify the merger to each of the competition authorities in the relevant Member States. If, however, no Member State objects to the referral, the party notifies the transaction to the Commission. In such cases, European merger control law shall apply.

Article 22

341. Article 22 of the EC Merger Regulation allows one or more Member States to request the Commission to examine a merger that does not have a Community dimension but "affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request". As indicated in Decision 20-D-01 of 16 January 2020 regarding a practice implemented in the digital terrestrial television broadcasting sector, the *Autorité* considers that this provision "applies in principle even if the relevant merger transaction is not subject to mandatory notification in the Member State that initiated the referral"[29].

342. The members of the ECA (European Competition Authorities) have defined as follows the main criteria justifying implementation of Article 22 :

> " - the geographical dimension of the relevant market(s) affected by the merger is broader than national, and the main effect of the merger on competition is linked to this market/these markets;
> – The national competition authorities expect to encounter difficulties in collecting the information due to the fact that the parties concerned or the main third parties are based outside their Member State;
> – There are potentially significant risks of harm to competition on a number of national or regional markets in the EEA, and the national competition authorities expect to encounter difficulties in identifying and/or applying, where applicable, the appropriate and proportionate remedies, in particular in cases where the appropriate remedies cannot be implemented by the national competition authorities under their national law or by establishing cooperation between them".

343. The Commission notifies the competent authorities of the Member States and the relevant undertakings of this request. The other Member States then have fifteen working days to join the request. The *Autorité* can therefore implement Article 22 of the EC Merger Regulation for mergers taking place in France, whether or not they have been notified to the *Autorité de la concurrence*, or for mergers in another Member State[30].

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[29] The *Autorité* stated, in its contribution to the debate on competition policy and the challenges raised by the digital economy published on 19 February 2020, that "use of the referral pursuant to these provisions would allow national authorities to request referral to the European Commission for examination of a limited number of merger transactions that fall under the thresholds, but which raise significant competition concerns. "

[30] See Decision 20-D-01 of 16 January 2020 on a practice implemented in the digital terrestrial television broadcasting sector. §125.

Example: in 2018, the *Autorité de la concurrence* joined the referral request filed by the Austrian competition authority relating to the takeover of Shazam by Apple[31]. In the same year, the *Autorité* submitted a referral request relating to the acquisition of sole control of Les Chantiers de l'Atlantique by Fincantieri, which was joined by the German authority[32].

344. At the end of this period of 15 working days, the Commission must decide within ten working days whether or not to examine the merger and notify the Member States and the relevant undertakings. If no formal decision is taken, the Commission shall be deemed to have accepted the request. The national deadlines are suspended until this decision has been taken. As soon as a Member State notifies the Commission and the relevant undertakings that it does not wish to join the request, suspension of its national deadlines ends. If the Commission accepts the referral, all the Member States that have submitted or joined a request shall cease to apply their national law to the merger in question. The Commission can also request that the undertakings concerned notify it the transaction.

345. Any use of the referral mechanism pursuant to Article 22 shall be raised with the notifying party as early as possible, where applicable during the pre-notification phase.

2. COOPERATION BETWEEN COMPETITION AUTHORITIES

346. As specified in recital 14 of the EC Merger Regulation, with a view to ensuring that a case is dealt with by the most appropriate authority while ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible, it is necessary to have efficient arrangements for information-sharing and consultation.

347. Each Member State receives all the notifications received by the Commission and arrangements should be made to communicate the information relating to implementation of the referral mechanisms.

– For transactions subject to parallel notifications in several Member States, the Member States meeting within the framework of the ECA have, since 2001, developed a mechanism for the systematic exchange of minimum information to allow for more in-depth contacts where necessary.

[31] See Commission Decision of 6 February 2018 in case M. 8788.

[32] See Commission Decision of 8 January 2019 in case M. 9162.

For all transactions that can be notified in several countries, the competent Member States draw up, upon receipt of the notification, an information sheet describing the transaction and provide their contact details. This information sheet is communicated to all Member States and to the Commission;

– Lastly, best practices for cooperation among EU national competition authorities in merger review were developed within the framework of the European Competition Network (ECN) and published on 8 November 2011. National competition authorities can therefore ensure that they have convergent information and exchange their points of view on transactions, the characteristics and functioning of the relevant markets, as well as the remedies being considered and the risks of conflicting decisions. Protection of the business secrets disclosed by undertakings is guaranteed. In particular, undertakings are requested to approve the exchange of information relating to transactions that have not yet been notified but in relation to which the undertakings concerned have established contact within the framework of the pre-notification procedure. This cooperation can also take place between national authorities and the Commission.

348. Where necessary, the *Autorité de la concurrence* can also request information from authorities that are not members of the ECN.

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

349. The EC Merger Regulation recalls in Article 21, paragraph 3, that the Commission has exclusive competence over merger controls within its remit. Member States may not apply their national competition legislation to these merger transactions unless they are referred to them by the Commission.

350. However, for mergers with a Community dimension, pursuant to paragraph 4 of Article 21, 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 prudential 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."

351. The Commission has already legislated for the fact that other scopes could legitimately be covered by Article 21, paragraph 4.

> **Example**: in Decision M.567 of 21 December 1995, the Commission recognised the legitimate interest of the United Kingdom authorities in applying its regulations on essential water distribution services and specific consumer protection in this respect.

F. REMEDIES

1. PRINCIPLES OF REMEDIES

a) Definitions

352. When a merger causes significant harm to competition and the economic efficiency gains that it generates are insufficient to offset this harm and the failing company defence[33] cannot be invoked, the merger may only be cleared if it is accompanied by remedies that repair or offset the harm to competition. These remedies vary greatly and can be grouped into two categories: structural and behavioural. The first remedies change directly and by their essence the structure of the market; the second remedies merely regulate the behaviour of the companies that have undertaken commitments. In 2020, the *Autorité* published a study of behavioural commitments designed to take stock of the past decisions of the *Autorité de la concurrence* in terms of behavioural commitments, and providing material for broader reflection on the subject. The study thus provides undertakings with the tools to prepare for merger transactions that may be subject to a clearance decision subject to remedies.

353. These remedies may take the form of commitments undertaken by the notifying party pursuant to II of Article L. 430-5 in phase 1 or II of Article L. 430-7 in phase 2. They may alternatively take the form of injunctions and obligations imposed by the *Autorité* pursuant to III of Article L. 430-7 after completion of inter partes proceedings, in phase 2 only.

354. It is the responsibility of the notifying party to propose commitments that are sufficient to remedy the competition concerns identified by the *Autorité* and to provide the information needed to assess these commitments. The *Autorité* may, however, consider that the proposed commitments are insufficient if they do not remedy the risks of harm to competition that have been identified.

[33] See *below*, paragraphs 785 et seq.

355. To be more precise, in order to be accepted, the commitments must be assessed globally and meet several criteria:

- they must be necessary and effective, i.e., they effectively remedy the harm to competition identified[34]. For example, it is essential that the effectiveness of the commitments does not depend on the due diligence of the notifying party;
- they must be proportionate; in particular, a commitment is not intended to increase the level of competition that existed on a market prior to the merger[35];
- their implementation must not generate any doubts, which implies that they must be drafted precisely, unambiguously and that the operational arrangements for carrying them out are described in sufficient detail[36];
- their implementation must be swift, as competition cannot be upheld until they have been implemented;
- it must be possible to monitor the commitments. The notifying party must make provision for a monitoring system, where necessary by appointing an independent trustee, which enables the *Autorité* to oversee their effective implementation.

356. Injunctions and obligations are rarely imposed. The *Autorité* only considers imposing this type of remedies when the notifying party refuses to propose commitments in cases where the transaction harms competition significantly or the commitments proposed are insufficient.

357. The *Autorité* ensures that:

- the injunctions are neutral: their aim is to protect competition rather than specific competitors. In particular, the injunctive power of the *Autorité* is not a protectionist tool designed to protect national economic stakeholders;
- the injunctions are necessary and proportionate, i.e., that the burdens placed on the undertakings, which run counter to the freedom of entrepreneurship, are strictly necessary to maintain or restore sufficient competition[37] and that the same result cannot be achieved through less restrictive remedies[38].

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[34] Decisions of the French Administrative Supreme Court (*Conseil d'État*) 390457 of 15 April 2016 and 390774 of 6 July 2016 partially annulling Decision 15-DCC-53 of 15 May 2015.

[35] Decision of the French Administrative Supreme Court (*Conseil d'État*) 373065 of 5 November 2014 Wienerberger.

[36] Judgment of the General Court T-342/07 of 6 July 2010 Ryanair Holdings plc. v Commission.

[37] In this regard, the French Administrative Supreme Court (*Conseil d'État*) recalled, in Decision 362347 handed down in the Canal Plus Group case, that "it is the responsibility of the *Autorité de la concurrence* to make use of its powers to block mergers or to attach injunctions, obligations or conditions to its clearance decisions in order to ensure effective implementation of the commitments entered into by the parties, which are conferred upon it under Articles L. 430-6 et seq. of the French Commercial Code (*Code de commerce*) proportionately to the need to maintain sufficient competition in the markets affected by the transaction".

[38] Decision 12-DCC-100 of the *Autorité* of 23 July 2012 on the acquisition of sole control of TPS and Canal Satellite by Vivendi and Canal Plus Group and Decision 362347 of the French Administrative Supreme Court (*Conseil d'État*) of 21 December 2013.

In issuing injunctions, the *Autorité* seeks to remedy the competition issues it has identified whilst preserving the economic interest of the transaction for the parties[39]. The fact that implementation of these injunctions may force the parties to modify their legal structure cannot be used as sufficient grounds to consider that the injunctions cannot, *a priori*, be envisaged.

358. As a general rule, for both commitments and injunctions, there is no need to take account of any efficiency gains linked to the transaction when analysing the proportionality of the remedies to which the clearance decision is subject. Nonetheless, where it is possible to effectively remedy the anticompetitive effects of the transaction while preserving these efficiency gains, the corresponding remedies will, a priori, be preferred by the *Autorité*.

b) General procedural principles

Commitment submission procedure

359. Commitments can be proposed by the notifying party at any time during the procedure, but the *Autorité* encourages the notifying party to propose commitments as early as possible in the procedure so that an assessment of their sufficiency can be conducted under optimal conditions. These commitments can be submitted:

– during the pre-notification phase;

– during the notification phase;

– at any time prior to expiry of the phase 1 procedure deadlines, providing the decision of the *Autorité* has not been issued; once the commitments have been received by the *Autorité*, the procedural deadline is automatically extended by 15 working days. To finalise its commitments, the notifying party can also request that the *Autorité* suspend the deadlines for examining the merger for a maximum of 15 working days;

[39] Decision 18-DCC-95 of the *Autorité* of 14 June 2018 on the acquisition of sole control of a part of the ready meals arm of Agripole group by Financière Cofigeo.

– in the case of the phase 2 procedure, after being notified of the initiation of an in-depth examination and at any time prior to expiry of the phase 2 procedural deadline, providing the decision of the *Autorité* has not been issued; when commitments or amendments to commitments that have already been proposed are submitted to the *Autorité* less than 20 working days prior to the end of the initial deadline of 65 days, the deadline for issuing its decision shall expire 20 working days after the date of their receipt, but no later than 85 working days after the initiation of the in-depth examination;

– in the event of evocation of the case by the French Minister of Economy, whose decision may be predicated upon their effective implementation. The purpose of the commitments accepted within this context can be expanded to include reasons of general interest (other than preserving competition, including industrial development, the competitiveness of the undertakings concerned in respect of foreign competitors or creating or safeguarding employment), which the minister can use as a basis for his decision in respect of the transaction concerned. One example is the Decision of the minister of 19 July 2018, in which the merger was cleared subject to an employment safeguard commitment.

360. The substance of the commitments depends on the phases during which they are proposed. Phase 1 commitments do not have to meet the same standard as phase 2 commitments, insofar as the former are intended to dispel doubts whereas the latter are intended to prevent the restraint of competition[40]. Commitments made following a phase 2 decision are intended to prevent harm to competition, in particular through the creation or strengthening of a dominant position, whereas phase 1 commitments are designed to dispel any serious doubts in this respect[41].

361. If the commitments proposed are not *prima facie* insufficient, they are likely to be tested on market participants. Submitting commitments at an excessively later stage in the procedure may lead to the transaction being blocked or requiring the imposition of injunctions.

362. A divestiture commitment template can be found in Appendix F of these guidelines. Due to the diverse nature of the behavioural commitments, such a template is not proposed for these commitments. The notifying party will use the parts of the divestiture commitment template relating to the trustee and the revision of commitments as a basis for their behavioural commitments.

[40] Judgment of the Court of First Instance of 4 July 2006 T-177/04 EasyJet Airline Co. Ltd.

[41] Judgment of the General Court of 7 June 2013 T-405/08 Spar Österreichische Warenhandels.

Injunctions procedure used by the Autorité

Injunction due to insufficient commitments

363. At the end of the phase 2 procedure, if no commitments or insufficient commitments are proposed and if a blocking decision seems disproportionate in relation to the anticompetitive effects identified, the *Autorité* may impose appropriate targeted measures to offset these effects.

364. The *Autorité* may impose injunctions if it considers, based on the information collected during the investigation, that commitments are not likely to address the competition concerns that have been identified.

365. The injunctions thus imposed may not exceed what is required to restore sufficient competition pursuant to the ruling of the French Administrative Supreme Court (*Conseil d'État*) in its Decision of 21 December 2012 on the appeal against Decision 12-DCC-100 lodged by Canal Plus Group.

366. As with commitments, these measures may be tested on market participants.

Injunction due to non-fulfilment of commitments

367. Since enactment of Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities, the third indent of IV of Article L. 430-8 provides that, in the event of non-fulfilment of a commitment, the *Autorité* may "enjoin the parties, who were subject to the unfulfilled obligation, subject to a coercive fine in accordance with the provisions of II of Article L. 464-2, to comply with injunctions or obligations imposed in lieu of the unfulfilled obligation within a deadline set by it".

368. Pursuant to these provisions, when the *Autorité* notes that a commitment has not been fulfilled, it may replace it by one or more new injunctions that establish a new deadline for implementation of the obligations contained in the initial commitments by placing their implementation, where necessary, under the supervision of a trustee. The *Autorité* can add a fine to these injunctions.

> **Example 1**: in Decision 17-D-04 of 8 March 2017 regarding the compliance with the commitment taken in the decision allowing the acquisition of SFR by Altice regarding the agreement concluded with Bouygues Telecom on 9 November 2010, the *Autorité* handed out fines to Altice Group worth 40 million euros for failing to fulfil one of the commitments undertaken at the time of its acquisition of SFR. Altice had committed to continuing to roll out the network co-financed by Bouygues Telecom, including final connection of its network to apartment buildings. However, the *Autorité* observed that the pace of connections had slowed down significantly after the transaction was completed, and had not picked up again until a year later, causing a substantial delay with regard to the commitment.

The *Autorité* also noted that its network had not been maintained satisfactorily in breach of the commitments undertaken. In addition to the fine handed out to Altice, the *Autorité* ordered several injunctions to prevent continuation of this behaviour. It also set a new timetable for Altice to complete these connections, accompanied by late completion fines.

Example 2 : in Decision 18-D-16 of 27 July 2018 regarding the compliance with commitments annexed to Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac, the *Autorité* handed out a fine to Fnac Darty worth 20 million euros for failing to divest itself of three of its six outlets covered by the commitments within the prescribed deadlines. It ordered it to divest itself two other sales outlets in lieu of these stores.

Publication of the remedies

369. Insofar as they form part of the clearance decision, the remedies are published on the website of the *Autorité*.

370. Publication of the remedies differs according to the type of remedy. Some aspects of structural remedies may be subject to business secrecy (divestiture timetable, for example) whereas behavioural remedies are usually published in full, which serves to inform the other market participants of the obligations placed on the relevant undertaking, some of which may have an effect on their own situation.

371. All information needed to monitor the remedies is also published on the website of the *Autorité*.

c) Structural remedies

Specific objectives of structural remedies

372. The aim of structural remedies is usually to guarantee competitive market structures through divestiture of business or certain assets to an appropriate buyer that is likely to act as a real competitor, or the elimination of capital ties between competitors. This type of remedy is particularly relevant for remedying horizontal competition concerns.

373. All of the following remedies can meet this type of objectives depending on the circumstances at hand;

- divestiture of tangible assets: subsidiaries, stores, plants, warehouses, branches;
- divestiture of intangible assets: contracts, brands, operating licences;

– termination of a franchise agreement;

– non-acquisition of an asset included in the initial scope;

– definitive amendment of statutory or contractual clauses;

– termination of structural ties with a competitor;

– divestiture of minority capital stake.

374. This list and the examples below are not exhaustive, as specific remedies can be tailored to each case.

375. The main structural remedies are described below.

Business divestiture

Characteristics of the divested business

376. In order for a business divestiture to constitute an efficient remedy, it must include all assets and all of the staff required for its smooth operation.

377. This scope must be described precisely and unambiguously in the remedy. The tangible and intangible assets divested (brands, intellectual property rights, know-how and goodwill) must be described in detail. The notifying party must specify which licences, permits and authorisations issued by public bodies are required to perform the divested business and include them explicitly in the scope of the divestiture. It must explicitly list which client contracts are being assigned. It must also indicate, as a general rule, which staff are being assigned, including seconded staff, and mention the teams or members of staff that are essential to the viability and competitiveness of the business that it is committing to assign along with ownership of the business and agreeing not to re-hire subsequent to completion of the divestiture, usually for a period of two years. Lastly, it must mention the ownership of rights by third parties that enable them to object to the divestiture or to restrict its terms (business partners, lessors, partners in the performance of a contract that is key to the viability of the company, etc.) and, more generally speaking, any risk, either proven or potential, likely to compromise the viability, competitiveness or assignability of the assets (litigation under way, regulatory changes, compliance with standards, etc.).

378. In order to assess whether these criteria have been met, the *Autorité* may request the notifying party to communicate the information mentioned in Article L. 141-1 of the French Commercial Code (*Code de commerce*), which lists the mandatory information to be included in the deed of assignment of a sales outlet, including:

– statement of the liens and assignments on the asset;

– the turnover for the last three tax years preceding the year of the sale;

– the operating results for the same period;

– the lease, its date and term and the name and address of the lessor and the transferor, where applicable.

379. The asset covered by the remedy must display all the structural features required to guarantee *prima facie* implementation of said remedy without difficulty. Thus, for example, the *Autorité* may question the notifying party about the economic viability of the asset covered by the remedy by analysing, for example, its company accounts and its annual report or by requesting it to produce *proforma* financial statements. The asset divested may not be subject to economic difficulties, unless sufficient proof of the assignability of said asset is provided. In order to dispel any doubts about the assignability of the asset, the notifying party may consider proposing a "fix-it-first" or "upfront buyer"-type commitment to the *Autorité*, which entails respectively fulfilling the commitments before the decision is issued or after the decision has been issued but prior to completion of the transaction. It may also commit to making investments or performing work, to be completed prior to the draft transaction.

380. The transferors are required to commit to preserving the viability of the divested assets until the divestiture has been completed.

381. On markets where competition is primarily based around tenders, the divestitures may include, subject to the approval of the awarding authorities, the contracts held by the operators, where applicable accompanied by the assets needed for their performance.

> **Example** 1: in Decision 10-DCC-198 of 30 December 2010, the *Autorité* considered that assigning public service delegation contracts and the assets related to these networks allowed new players or existing competitors to circumvent barriers to entry and acquire valuable experience in forthcoming tenders, in which the number of bidders should increase.
>
> **Example 2**: in Decision 11-DCC-34 of 25 February 2011, the *Autorité* considered that proposing to unilaterally terminate public service delegation contracts with local authorities gave competitors an opportunity to establish themselves locally and, therefore, to resolve the competition concerns.

382. The divestiture can also cover intangible assets, such as patents, licences or trademarks, on their own if such a divestiture is sufficient to remedy the harm to competition identified or in addition to the divestiture of other types of assets.

Example : in Decision 18-DCC-95 of 14 June 2018, the *Autorité* made the acquisition of sole control of Agripole by Cofigeo subject to the divestiture of one of the brands owned by the new entity (Zapetti) in order to address the competition concerns identified on the markets for the manufacturing and marketing of Italian and exotic canned ready meals.

383. The *Autorité* also accepted, in order to remedy horizontal effects, the commitment made by a company to divest itself of its portfolio of clients and not to seek to sell, or sell, to the divested clients for a period of five years.

Example: in Decision 17-DCC-12 of 31 January 2017, the *Autorité* considered that the divestiture of a client portfolio, accompanied by the termination of the contracts with clients that refused the transfer, and the interdiction to restore commercial ties with the divested clients for a period of five years, accompanied by a proposed exclusive licence to manufacture and sell the products on the markets affected by the transaction, was sufficient to eliminate the risks of harm to competition.

384. The notifying party can commit to divesting itself of alternative assets, for example when there are uncertainties about the assignability[42], viability or competitiveness of the assets proposed by the notifying party[43]. In its Decision of 15 April 2016 on the appeal by Primagaz against Decision15-DCC-53, the French Administrative Supreme Court (*Conseil d'Etat*) ruled, however, that, when the *Autorité* accepts an alternative commitment, the latter shall form "part of its clearance decision, which cannot, without prejudice to the possibility of challenging its legality before the court judging abuses of power, be kept confidential". Substitute commitments and their implementing measures are therefore published for the benefit of third parties.

385. The substitute commitment can entail the strict replacement of the object of the commitment with another commitment if, and only if, the latter resolves the competition concern observed in a more or less equivalent way to the former. Such a substitute commitment can also entail the extension of the scope of the first commitment when the latter is not fulfilled within a given deadline.

Example: in Decision 19-DCC-36 of 28 February 2019, the *Autorité* considered that extending the scope of divestiture of a brand to the global level in the event that the divestiture at national level was not completed within deadline constituted a valid substitute commitment.

[42] Decision 18-DCC-148 of the *Autorité* of 24 August 2018 regarding the acquisition of sole control of Jardiland by In Vivo Retail.

[43] Decision 19-DCC-36 of the *Autorité* of 28 February 2019 regarding the takeover of Marie Brizard group by Cofepp.

386. The notifying party can also commit to divesting itself of one of several assets that are deemed by the *Autorité* to address the competition issue identified.

> **Example**: in Decision 17-DCC-95 of 23 June 2017, the *Autorité* considered that Elsan could commit to divesting itself of one clinic from a list of three in order to address the risks of harm to competition in the Auvergne region.

387. Lastly, the remedies must stipulate that the divestors may not purchase the assets that they have divested themselves of for a period that is usually set at 10 years as of the decision of the *Autorité*.

Characteristics of a suitable buyer

388. A business divestiture is only effective if the buyer is suitable, i.e., if, at the very least:

- it is independent from the notifying party contractually speaking and in respect of its capital;
- it has the requisite skills and financial capacity to operate the business over the long term and further develop the business purchased and compete effectively with the notifying party;
- the purchase is not likely to create new harm to competition.

389. The *Autorité* does not choose the buyer. It only has the power to approve or reject a buyer that is presented to it and to check that it is an existing or potential viable competitor, which is independent from the notifying party and is not an affiliate of it, which has the requisite financial resources, proven expertise and motivation to be able to preserve and develop the capacity of the business, as well as to compete actively with the notifying party. Within the framework of the investigation into this authorisation request, the *Autorité* takes account of the potential buyer's current business activity, as well as its plans to operate the asset to be purchased in order to check that this buyer is in a position to restore effective and sufficient competition in the relevant market(s). The *Autorité* bases its decision regarding the authorisation request on the terms of the clearance decision, in particular in respect of the effects that the commitments were intended to address[44].

390. The buyer can be identified in three different ways

- prior to adoption of the decision (prior fulfilment of the commitments, known as "fix-it-first");

[44] Decisions414657 and 414654 of the French Administrative Supreme Court (*Conseil d'Etat*) of 26 July 2018 Fnac and M. A et al.

– after the adoption of the clearance decision by the *Autorité*, but prior to completion of the transaction (prior divestiture commitment, known as the "upfront buyer" commitment);

– within a certain deadline following adoption of the decision by the *Autorité* and completion of the transaction.

Fix-it-first-type commitments

391. The notifying party can notify the transaction by presenting straight away a buyer for the business or part of the business whose acquisition is generating problems regarding competition. In such a case, the *Autorité* assesses the impact of the merger taking into account the planned divestiture.

> **Example**: in Decision 19-DCC-15 of 29 January 2019, the *Autorité* considered that the proposal of Dr Oetker to conclude a licensing agreement with Sainte Lucie for the Ancel dessert mixes brand prior to effective acquisition of Alsa constituted a proportionate commitment and addressed the competition concerns.

392. Fix-it-first remedies can be imposed when the identity of the buyer is crucial for the effectiveness of the proposed remedy. The Commission Consolidated Jurisdictional Notice specifies in this respect that "this concerns cases where, given the circumstances, only very few potential buyers can be considered suitable, in particular as the divested business is not a viable business in itself, but its viability will only be ensured by specific assets of the buyer, or where the buyer needs to have specific characteristics in order for the remedy to solve the competition concerns".

393. The divestiture does not have to have been completed, or made dependent on the completion of the notified transaction, but it must not be a mere hypothesis and must have been subject to binding agreements. Depending on the status of completion of this divestiture, it can either form part of the notified information, with any backtracking therefore jeopardising the sincerity of the notification itself, or be explicitly subject to commitments. The fix-it-first solution is advantageous for the notifying party insofar as the latter can negotiate the divestiture of the assets concerned outside the constraints linked to the existence of commitments undertaken before the *Autorité*, which can encourage wait-and-see or opportunistic behaviour on the part of potential buyers. The *Autorité*, however, takes care to ensure that this solution does not foster coordinated behaviour in the relevant markets.

Upfront buyer-type commitments

394. The clearance decision can be taken subject to the notifying party committing to not effectively completing the transaction before the *Autorité* has approved a suitable buyer for the assets concerned. This provision modifies the incentives of the notifying party and limits the risk of its committing to divesting itself of the assets for which it is aware of specific difficulties likely to prevent the divestiture that have not been explicitly notified to the *Autorité*.

> **Example:** in letter C2002-14 of 17 May 2002, the French Minister of Economy considered that, due to the doubts regarding the possibility of finding a viable buyer for the assets that Panzani was committing to sell off, the latter should suspend completion of the acquisition of control of Lustucru until the *Autorité* had approved a buyer for the divested assets.

395. Fix-it-first or upfront buyer-type commitments can be prioritised when the circumstances so justify, including;
   - when no potential buyer has been identified during the investigation;
   - when there are uncertainties about the pre-emptive rights held by third parties, the possibility of transferring key contracts or intellectual property rights;
   - when there are serious doubts about the viability and assignability of the assets or risks of impairment of the value of the business.

Buyer identified after adoption of the decision and completion of the transaction within a set deadline

396. When the remedies have to be implemented within a deadline established by the commitments, once the buyer has been identified, the notifying party must notify the *Autorité*, which issues its approval if this buyer meets the above conditions. It is this option that has been most commonly used so far.

397. However, the experience of the *Autorité* in this respect shows that the incentives for the notifying party to propose to divest itself of assets that are free of all encumbrances in terms of their assignability and which are sufficiently viable and competitive to be of interest to potential buyers are weaker than with the two other options.

398. The *Autorité* is therefore particularly vigilant when analysing the viability and competitiveness of the proposed assets in order to guarantee swifter implementation of the remedy. This is because the divestiture is intended to remedy the effects of the transaction, which continue to exist until it has been completed. In addition, preserving the viability of the assets often depends on the time taken to complete the divestiture.

A substitute commitment relating to assets, the assignability and viability of which pose fewer difficulties *a priori*, can be a satisfactory fall-back solution that can be implemented swiftly in the event of the failed divestiture of a first set of assets within the deadlines set by the commitments.

Divestiture deadlines

399. In cases where they are set by the remedies without effective completion of the transaction being made subject to the approval of a buyer, the deadlines must be as short as possible. Competition is not preserved until the divestiture has been completed and the effectiveness of transitional remedies designed to preserve the viability and competitiveness of the assets can only be guaranteed for a limited period. To assess the proposed divestiture deadline, the *Autorité* takes account of the circumstances of the case and the legitimate interests of the parties in protecting the value of their assets.

400. This deadline varies according to the complexity of completion of the transaction, but it is usually less than one year.

Elimination of structural ties between competitors

401. In some cases, to break the ties with an important competitor, the remedies can provide for the divestiture of minority shareholdings in this competitor's business or in a jointly owned undertaking in order to reduce or eliminate the effects of an overlapping of market share or the effects of the presence of the parties in a vertically related or associated market.

402. The remedies can also, in exceptional cases, entail waiving the rights attached to minority shareholdings without transferring these shares. The waiver must have the same competitive effects as a transfer of shares. The waiver must be permanent and cover all the rights likely to have an influence on competitive behaviour, such as representation on a board of directors, veto rights and information rights.

403. Remedies designed to eliminate structural ties between competitors have been implemented in various transactions.

> **Example 1**: in Decision M.2690 of 9 April 2002, the Commission accepted a commitment to exit a joint venture designed to break certain structural ties that were likely to foster the adoption of stable coordinated behaviour.
>
> **Example 2**: in Decision M.2567 of 8 November 2001, the Commission accepted a commitment to remove representatives of Nordbanken from the board of directors of a competitor, Privatgirot.

Example 3 : such a remedy was also subject to an injunction imposed by the *Autorité* in Decision 12-DCC-100 of 23 July 2012, relating to the minority shareholding held by Canal Plus Group in Orange Cinéma Séries. If the structural ties were not eliminated through the transfer of the minority shareholdings, Canal Plus Group had to replace its representatives on the management body with a trustee or independent persons designated by the latter and approved by the *Autorité*.

Termination of franchise contracts

404. Structural remedies can also relate to contractual relations between a franchisor and one or more of its franchised stores. In order to eliminate an overlapping of business and enable a competitor to exert competitive pressure on the stores of the new entity, the notifying party can propose the unilateral termination by the franchisor (the notifying party or the target) of the franchise agreement for the sales outlet subject to said remedies. This termination must take place within a deadline set in the commitment letter or the injunctions and commencing on the date of notification of the decision. Given the uncertainties surrounding implementation of this type of commitments, they are usually only accepted if asset divestitures are not feasible.

405. The notifying party must, in conjunction with the entity that operates the store(s) concerned, seek an alternative solution with a competing franchisor that is active in the same market as the one affected by the transaction.

d) Behavioural remedies

Specific objectives of behavioural remedies

406. Behavioural remedies are usually designed to preserve or foster access to the market for existing or potential competitors. This access is usually jeopardised by risks of foreclosure of upstream or downstream markets directly linked to the vertical effects of the transaction or by the exercising of a leverage effect linked to the conglomerate effects of the transaction. More seldom, remedies designed to lower the barriers to market entry can serve to remedy the effects of an addition of market shares in the absence of appropriate structural remedies.

407. All of the following remedies can meet this type of objectives depending on the circumstances at hand;

– the granting of access to networks or infrastructure in a non-discriminatory and transparent manner[45];

– the banning of coupled sales[46];

– the granting of access to licences, patents, trademarks or technologies[47];

– the amendment of statutory or contractual clauses for a specific period of time[48];

– the adjustment of the conditions of distribution or supply of a product[49];

– the supervision of commercial behaviour[50];

– the supervision of the organisation of private tenders[51];

– the non-disclosure of sensitive information[52];

– the disclosure of information on a non-exclusive basis;

– the legal, commercial or accounting unbundling of the relevant entities[53].

408. This list and the examples below are not exhaustive, as specific remedies can be tailored to each case, some of which may be fix-it-first remedies.

409. As regards competitors' access to inputs, the remedies can, for example, relate to access to infrastructure, information or any other type of input, either directly or through limiting the exclusivities from which the new entity can benefit.

[45] Decisions of the *Autorité* 15-DCC-54 of 13 May 2015 on the acquisition of sole control of the Société Anonyme de la Raffinerie des Antilles by Rubis and 15-DCC-104 of 30 July 2015 on the acquisition of sole control of Société Réunionnaise de Produits Pétroliers by Rubis.

[46] Decisions of the *Autorité* 17-DCC-12 of 31 January 2017 on the acquisition of sole control of Anios group by Ecolab group and 16-DCC-55 of 22 April 2016 on the acquisition of joint control of Aqualande Group by Labeyrie Fine Foods and the agricultural cooperative Les Aquaculteurs Landais.

[47] Decision of the Commission M.8124 of 6 December 2016 Microsoft/LinkedIn.

[48] Decision 17-DCC-210 of the *Autorité* of 13 December 2017 regarding the merger by absorption of Coopérative des Agriculteurs de la Mayenne by the agricultural cooperative Terrena.

[49] Decision 13-DCC-101 of the *Autorité* of 26 July 2013 on the acquisition of sole control of Imerys TC "structural material" assets by Bouyer-Leroux.

[50] Decision 18-DCC-142 of the *Autorité* of 23 August 2018 on the acquisition of sole control of SDRO and Robert II by Bernard Hayot Group.

[51] Decision 16-DCC-167 of the *Autorité* of 31 October 2016 on the acquisition of sole control of Aéroports de Lyon by Vinci Airports.

[52] Decision 09-DCC-16 of the *Autorité* of 22 June 2009 on the merger between Caisse d'Épargne and Banque Populaire groups.

[53] Decision 12-DCC-100 of the *Autorité* of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi Canal Plus Group.

Example 1: in Decision 10-DCC-02 of 12 January 2010, the *Autorité* accepted a commitment guaranteeing competitors of the urban and interurban public passenger transport operator non-discriminatory access to the information and services conducive to fostering inter-modality between road and rail transport.

Example 2: in Decision 17-DCC-42 of 3 April 2017, the *Autorité* accepted a commitment by the notifying party to supply potential competitors with information required to submit the authorisation request required to enter the market or to operate as an eco-organisation once authorised.

Example 3: in Decisions 11-DCC-134 of 2 September 2011 and 18-DCC-142 of 23 August 2018, the *Autorité* considered that the position of Bernard Hayot Group in the markets for the supply of consumer goods in Martinique required commitments to preserve its competitors' access to trade cooperation products and budgets in food distribution markets.

410. As regards access to the client base, the *Autorité* has also, on several occasions, accepted behavioural commitments.

Example 1 : in Decision 09-DCC-54 of 16 October 2009, the *Autorité* accepted the commitments undertaken by SNCF group during its acquisition of Novatrans consisting of organising a competitive tender for train haulage between the different railway companies.

Example 2 : in Decision 16-DCC-167 of 21 October 2016, the *Autorité* accepted the commitment undertaken by Vinci Airports to apply precise rules to works, supply and service contracts in order to prevent vertical effects.

411. As regards behavioural remedies designed to prevent the exercising of leverage effects, they often entail supervision of the commercial practices of the companies concerned.

Example 1 : in Decision 09-DCC-54 of 16 October 2009, the *Autorité* accepted a commitment to establish separate sales of advertising spaces on TF1, and TMC-NT1 via separate advertising networks.

Example 2 : in Decision 12-DCC-20 of 7 February 2012, the *Autorité* accepted Électricité de Strasbourg's commitment not to sell combination offers by drawing on its capacity to offer regulated gas or electricity tariffs.

Example 3 : in Decision 14-DCC-50 of 2 April 2014, the *Autorité* considered that in the pay TV and free-to-air TV markets, remedies prohibiting coupled purchases were necessary to prevent Canal Plus group from exercising a leverage effect through its purchasing power in the pay TV markets and its acquisitions of broadcasting rights for free-to-air TV.

412. Behavioural remedies designed to limit the barriers to entry for new entrants were implemented within the framework of Decision 12-DCC-100 of 23 July 2012 on a merger in a duopolistic market, as well as Decisions 14-DCC-160 of 30 October 2014, 15-DCC-104 of 30 July 2015 and 15-DCC-54 of 13 May 2015.

413. In some cases, harm to competition caused by coordinated effects have been remedied through access guarantees designed to strengthen rival operators. Such remedies were accepted, for example, by the Commission within the framework of Decision M.2389 of 20 December 2001.

Duration of behavioural remedies

414. Behavioural remedies are always implemented for a specific duration. Barring exceptional circumstances, a minimum duration of five years, potentially renewable subsequent to a new competitive analysis, is generally considered to be necessary to compensate for the effects of a merger on the market structure. The duration of remedies can, however, be longer in order to maintain sufficient competition in the markets concerned.

Example : in Decision 16-DCC-167 of 31 October 2016, the *Autorité* considered that the behavioural commitments undertaken by Vinci within the framework of acquisition of sole control of Aéroports de Lyon should remain in place for the entire term of the concession contract, i.e., 30 years. In Decision 20-DCC-38 of 28 February 2020, the *Autorité* accepted behavioural commitments undertaken by Elsan for a period of 10 years.

e) Link between behavioural remedies and structural remedies

415. In the same way as the Commission, the *Autorité* prioritises structural remedies designed to guarantee competitive market structures through divestiture of business or certain assets to an appropriate buyer that is likely to act as a real competitor, or the elimination of capital ties between competitors.

416. The structural remedies can be supplemented by behavioural remedies designed to regulate the competitive behaviour of the undertaking resulting from the transaction.

417. The choice of the most suitable remedy, however, depends on the effects of the transaction. When the transaction causes harm to competition primarily due to the horizontal overlapping of business activities between the parties, asset divestiture is the most effective remedy. However, when it is necessary to remedy the risk of foreclosure of markets upstream or downstream, behavioural remedies aiming to guarantee competitors' access to inputs or customers may be sufficient, while preserving the efficiency gains linked to vertical integration. The same applies to conglomerate mergers.

Behavioural remedies combined with alternative structural remedies

418. In order to ensure the effectiveness of the behavioural remedies, a substitute structural remedy can be provided for in the event that the notifying party does not achieve the desired result through the initial behavioural remedy.

419. Behavioural remedies can also be considered as a prerequisite for structural remedies, in particular when it would be difficult to envisage a quick divestiture after completion of the transaction.

Behavioural remedies supplementing structural remedies

420. Behavioural remedies can be considered in order to supplement structural remedies. For example, for several transactions where the Commission concluded that the transactions harmed competition due to the elimination of a potential competitor, commitments that combined asset divestitures and granting access to essential infrastructure were undertaken in order to bolster the credibility of the competitors remaining in the market.

Example 1 : in Decision M.1630 of 18 January 2000, the Commission considered that the appointment of a third party by Air Liquide to manage a shareholding in a joint venture, the granting of licences for patents under non-discriminatory conditions and asset divestitures served to eliminate the risk of the creation of a collective dominant position in the wholesale markets for helium and special gases for the electronics industry.

Example 2 : in Decision M.1853 of 7 February 2001, the Commission considered that the commitment undertaken by EDF to waive its voting rights and its seat on the board of directors of CNR allowed the latter to become a strong competitor, and that this commitment and the access to EDF's production capacities granted to EDF's competitors through auctions served to avert the strengthening of the dominant position of EDF in the French market.

Example 3 : in Decision M.1439 of 13 October 1999, the Commission considered that the commitment undertaken by Telia and Telenor to grant their competitors access to the local loop under non-discriminatory conditions combined with divestitures in the cable television sector enabled consumers to benefit from the bulk breaking of the local loop.

Example 4 : in Decision M.7353 of 26 November 2014, the Commission authorised the creation of joint venture between Airbus and Safran in the airspace and defence sectors subject to keeping the electrical satellite propulsion business in a separate structure, as well as concluding a framework supply contract with Safran's current main client.

2. MONITORING REMEDIES

a) General remedy monitoring principles

Monitoring of remedies by the Autorité

421. The *Autorité* is responsible for monitoring the remedies implemented within the framework of a merger control decision. It is therefore solely responsible for identifying any breach of the commitments or non-compliance with the injunctions imposed. This task was assigned to the *Autorité* by the French Administrative Supreme Court (*Conseil d'Etat*) in a Decision of 21 March 2016, Numericable – Canal Plus Group: "Whereas, pursuant to these provisions [Article L. 430-7 of the French Commercial Code (*Code de commerce*)], it is the responsibility of the *Autorité de la concurrence* to ensure correct performance of the commitments undertaken by the parties before it with a view to remedying the anticompetitive effects of a merger transaction, of the injunctions attached for the same purposes to clearance of the transaction, or of the obligations imposed on the parties, […], throughout the term of performance of these commitments, injunctions or obligations […]".

422. The arrangements for monitoring the remedies must be specified in the notifying party's commitment letter or in the injunctions. These may include, where necessary, the appointment of a trustee.

423. In order to check for correct performance of the remedies, the Mergers Unit can submit information requests to the notifying party and third parties and make use of any information provided spontaneously by third parties or supplied regularly by the trustee. The *Autorité* can also, at its own initiative or at the request of the notifying party, issue the trustee, where necessary, with any instruction designed to ensure fulfilment of the remedy.

424. If the appointment of a trustee is not stipulated in the remedies[54], the notifying party must provide any information relating to the monitoring of the remedies directly to the *Autorité*.

Role of a trustee

Appointment and removal of the trustee

425. The notifying party is usually required to provide for the appointment of a trustee, who is responsible for overseeing correct implementation of the structural or behavioural remedies and reporting on implementation to the *Autorité*.

426. The provisions governing the appointment and removal of the trustee are to a large extent common to both types of remedies.

427. The notifying party must, within a deadline established in the commitment letter or the injunctions, and which is usually one month, propose a list of at least three persons or companies that could be appointed as trustees. The *Autorité* then approves one or more of the proposed trustees. In the event that several trustees are approved by the *Autorité*, the notifying party is free to choose which trustee is in charge of monitoring the commitment or injunction. If the *Autorité* does not approve any of the proposed trustees, a new list must be submitted by the notifying party within one week. If the new list is rejected, the *Autorité* shall appoint a trustee of its own choosing at the expense of the notifying party.

428. A trustee must meet three conditions to receive approval from the *Autorité*. It must be independent of the parties, have the requisite expertise and sufficient resources to perform its tasks, and not be or become subject to a conflict of interest.

429. The *Autorité* has discretionary power to approve or reject the proposed trustee mandate, subject to any modifications it deems necessary to achieve its obligations.

430. The trustee approval or rejection decisions and the name and details of the trustee chosen by the notifying party are published on the website of the *Autorité* on the page on which the decision relating to the commitments or injunctions has been published.

[54] See, for example, Decisions 18-DCC-142 of 23 August 2018 on the acquisition of sole control of SDRO and Robert II by Bernard Hayot Group and Decision 19-DCC-244 of 11 December 2019 on the acquisition of sole control of Audilab and its subsidiaries by William Demant Group.

431. The mandate of the trustee ends when the *Autorité* notes that all of the remedies have been implemented for the duration specified in the commitment letter or injunctions. The mandate can also be revoked by (i) the trustee for any legitimate cause and after providing the notifying party with written notice and the *Autorité* with a copy of the notice, (ii) the notifying party subject to the approval of the *Autorité* and (iii) the *Autorité* at its own initiative if it considers that the trustee is not performing its tasks adequately.

Tasks of the trustee

432. The trustee acts on behalf of the *Autorité* in order to guarantee fulfilment of the remedies by the notifying party. It accomplishes the tasks specified in the trustee contract in accordance with the work programme and any revisions, as approved by the *Autorité*. It shall ensure that it maintains its independence in respect of the notifying party and comply with the provisions of the trustee contract pertaining to conflicts of interest.

433. The notifying party shall provide the trustee in charge of monitoring the remedies with administrative and management cooperation and assistance by giving it any information required for it to perform its tasks.

434. The trustee can propose any measure to the notifying party that it considers necessary to ensure fulfilment of the remedies. It can, in particular, propose to the *Autorité* any necessary measures in the event that the notifying party fails to comply with the proposals of the trustee within the specified deadlines.

435. As a general rule, the trustee produces regular remedy monitoring reports for the *Autorité* and notifies it of any difficulties encountered in the course of its duties. However, the assessments made by the trustee concerning the monitoring of the remedies are not binding on the *Autorité*[55].

436. The notifying party is solely liable for implementing the remedies. It is the responsibility of the notifying party to contact the Mergers Unit in the event of any anticipated or actual difficulty.

b) Specific monitoring of structural remedies

437. As stated in paragraph 379, the notifying party is requested to commit to maintaining, until completion of the divestiture, the economic viability, market value and competitive capacity of the assets subject to the divestiture, by abstaining from taking any measure that will have a negative impact on their economic value and management or be detrimental to their scope of activity.

[55] In this respect, see Decision 424702 of the French Administrative Supreme Court (*Conseil d'Etat*) of 7 November 2019, Société Fnac Darty, § 13.

438. Initially, a trustee can be tasked with overseeing this ("monitoring trustee") and, in particular, with minimising, as far as possible, the risk of loss of competitiveness of the assets due to a change to day-to-day operations, industrial or sales strategy, investment policy or availability of key resources, for example key staff. It also ensures that the divested assets are managed independently and separately from the non-divested activities. To this end, it may have to represent the interests of the divesting party on the management boards of the businesses to be divested of. When the remedies make provision for an initial period during which the parties are allowed to find a buyer themselves ("first divestiture period)"), the trustee in charge of oversight also checks on the status of the divestiture process and the search for potential buyers, ensuring, for example, that the latter receive sufficient information. The trustee produces regular monitoring reports for the *Autorité* about the preservation of the viability of the assets subject to divestiture and the status of divestitures to be completed. It also produces a report on the viability and capacity of the buyer that has been proposed to the *Autorité* for approval to stimulate competition.

439. Secondly, a trustee can be mandated to oversee an asset divestiture by finding a suitable buyer ("divestiture trustee"). At the latest one month before the end of the first divestiture period, the notifying party must submit to the *Autorité* for its approval a list of at least three persons that could be appointed as the divestiture trustee. The process for approving the trustee, who can be the trustee in charge of oversight, is the same as the approval process for the latter. The divestiture trustee produces a report on the viability and capacity of the buyer that has been proposed to the *Autorité* for its approval to stimulate competition. The notifying party must invest the trustee with all the powers required to contractualize the divestiture(s) to which they have committed and which were not completed during the first divestiture period.

440. In any case, the trustee proposed by the parties must be approved by the *Autorité* based on the criteria described in paragraph 427 above.

441. To facilitate a swift divestiture, this trustee or these trustees must be appointed as quickly as possible. When there are specific risks to the preservation of the viability and assignability of the assets to be sold off, it may be desirable to reduce the duration of the phase from adoption of the decision through to approval of the trustee by the *Autorité*. The parties may therefore be requested not to complete the transaction until a reasonable deadline allowing for a trustee to be appointed has expired.

> **Example** : in Decision M.5984 of 26 January 2011, the Commission considered that the fact that Intel only completed the closing of the takeover of McAfee 20 working days after clearance of the transaction was a reasonable period within which to find and approve a trustee.

c) Specific monitoring of behavioural remedies

442. A trustee can be mandated to oversee implementation of these commitments, as well as the procedures established by the parties to ensure fulfilment of their commitments. The trustee can also inform the services of the *Autorité* about any complaints made by third parties. The *Autorité* is not bound by the assessments made by the trustee.

3. REVIEW OF REMEDIES

443. Review requests can relate both to commitments undertaken before the *Autorité* and commitments undertaken before the French Minister of Economy prior to the transfer of jurisdiction to the *Autorité* or to injunctions. A reasoned request must be sent to the President of the *Autorité*.

444. Remedies can be reviewed in two cases:

- Remedies whose duration is renewable are reviewed at the end of the first implementation period pursuant to a review clause. The *Autorité* must therefore conduct a new competitive analysis in order to determine whether the legal or factual circumstances that motivated the initial decision have changed to the extent that the justifications for the remedies are called into question. Such a review is usually provided for in the commitment letter or the injunctions and requires that the parties submit their observations.
- A review prior to the term of performance of the remedies:
  - If the parties consider that the changes to the legal and factual circumstances that motivated the initial decision call into question the relevance of the remedies (usually behavioural remedies) over a long period, they may decide to propose to the *Autorité* that they be reviewed:
  - The parties may finally consider that the objectives of the remedies could be better met through different remedies;
  - As regards structural remedies in particular, if parties that had committed to divesting themselves of a business activity within a given deadline are considering requesting an extension to this deadline, it is their responsibility to demonstrate that non-compliance with this remedy is the result of factors totally beyond their control and they are still in a position to divest themselves of this business activity to a suitable buyer within a short deadline;
  - Under exceptional circumstances, the parties may also request substitution of the assets to be divested.

445. The option of the parties requesting a review of remedies is usually provided for in the commitment letter or the injunctions. It is the responsibility of the parties to submit to the *Autorité* a reasoned request demonstrating the need for a review and, where applicable, to propose alternative remedies.

446. In its Decision of 21 March 2016, Numericable – Canal Plus Group, the French Administrative Supreme Court (*Conseil d'Etat*) recognised the *Autorité*'s power to amend or repeal remedies during their implementation considering that this prerogative is based on the provisions empowering the *Autorité* to predicate its clearance on the effective implementation of commitments or on injunctions imposed on the notifying party to implement remedies designed to ensure adequate competition:

"Pursuant to these provisions [of Article L. 430-7], it is for the Autorité de la concurrence to oversee the correct implementation of commitments undertaken by parties before it in order to remedy the anticompetitive effects of a merger, of injunctions linked to the transaction clearance decision for the same purpose, and of instructions, imposed on the parties, to make sufficient contribution to economic progress to compensate for the harm done to competition, throughout the execution period of these commitments, injunctions or instructions, so that it derives from these provisions the possibility of modifying them to reduce or even eliminate their impact according to the evolution of the context of the relevant markets and the utility of the continued implementation of these commitments, injunctions or instructions. "

447. Along the same lines, in its Decision of 28 September 2017, Société Altice Luxembourg and Société SFR Group, the French Administrative Supreme Court (*Conseil d'Etat*) recalled and clarified the conditions under which the parties could request an amendment to the remedies to which the merger clearance decision is subject:

"The notifying parties to the merger transaction may, if they deem it to be substantiated, inform the *Autorité de la concurrence* new legal or factual circumstances likely to warrant their being released, through a decision of the *Autorité*, from all or part of their obligations arising from the commitments, injunctions or obligations attached to a merger clearance due either to a changed situation in the relevant markets and the resulting changed consequences in respect of the relevance of these commitments, injunctions or requirements, or due to the fact that such circumstances render performance of these commitments, injunctions or requirements impossible or particularly difficult. "

448. As with the initial remedies, the remedies as amended following a review must be necessary and proportionate to the anticompetitive effects identified. In this respect, the *Autorité* may either decide to remove a remedy, if it notes that it is no longer needed to prevent the anticompetitive effects identified during the initial examination of the transaction, or relax the conditions of the remedy or modify it if it notes that it is no longer proportionate to the objectives pursued. In its Decision of 21 March 2016, Numericable – Canal Plus Group, the French Administrative Supreme Court (*Conseil d'Etat*) acknowledged the *Autorité*'s "power to amend [the remedies] to reduce or abolish their scope" during implementation of the merger decision.

449. With a view to its competitive analysis within the framework of the review at the end of or prior to the term of implementation of the remedies, the *Autorité* has the option of interviewing stakeholders about any market developments they have witnessed or about the relevance of the remedies envisaged. The competitive analysis is based on market developments observed since the initial decision and also contains a forward analysis of these developments.

450. The *Autorité* can also seek the opinion of the trustee in charge of monitoring the commitments in order, for example, to hear its observations regarding the conditions of implementation of the commitments during the previous period. The non-confidential version of this opinion is communicated to the parties.

451. When, subsequent to completion of its competitive analysis, the *Autorité* considers that the remedies must be renewed in whole or in part because effects linked to the transaction still exist, the Mergers Unit notifies the parties of its analysis. The *Autorité* gives them the opportunity to express their point of view and, where applicable, to substantiate it by submitting additional information.

452. The remedy review decisions arising from an initial phase 1 decision are taken by the President or a Vice-President of the *Autorité*. As regards remedy review decisions arising from a phase 2 decision, paragraph 4 of Article L. 461-3 provides that "The president, or a vice-president appointed by him, may adopt alone the (...) decisions specified in Article L. 430-5, [t]he remedy review decisions mentioned in III and IV of Article L. 430-7 or [t]he decisions required to implement these remedies" (our emphasis).

453. The constitutionality of the provisions of the last paragraph of Article L. 461-3, as per the wording in Article 215-8 law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities was confirmed by the French Constitutional Court in Decision 2018-702 QPC of 20 April 2018. The French Constitutional Court ruled that the aforementioned provisions were not affected by lack of full action within jurisdiction and were not incompatible with freedom of contract or right of ownership or with any other right or freedom enshrined in the Constitution. It considered that these provisions were justified by the need to ensure effective and quick implementation of the decisions of the *Autorité*, in particular when "the case does not present any particular difficulties or when deadlines so require".

454. In this same decision, the French Constitutional Court also noted that "[t]he President may also delegate to a collegiate body of the *Autorité de la concurrence* the responsibility for taking such a decision".

455. The decisions taken subsequent to the review of the remedies are published on the website of the *Autorité*, with the exception of minor modifications or modifications that do not substantively modify the remedies, such as decisions relating to a request to extend a divestiture deadline. Prior to publication, the undertakings are given the opportunity to indicate which information they consider to be subject to business secrecy in accordance with the conditions established in Article R. 430-7.

456. In addition to these review decisions, during the monitoring of remedies, the notifying party may, under exceptional circumstances, request that the *Autorité* provide clarification of the scope of the remedies adopted. In this scenario, the substance of the remedy is not modified, as the *Autorité* only clarifies its application and scope. In its Decision of 21 March 2016, Numericable – Canal Plus Group, the French Administrative Supreme Court (*Conseil d'Etat*) considered that the adoption of such a position by the *Autorité* may, under certain scenarios, give rise to an action for abuse of power.

4. NON-FULFILMENT OF REMEDIES

457. If the monitoring of the remedies brings to light a serious suspicion of non-fulfilment of the commitments, injunctions or obligations, the General Rapporteur may recommend that the *Autorité* instigate proceedings for non-fulfilment of the remedies imposed on the notifying party. Such a procedure may be instigated both in respect of transactions cleared by the *Autorité* and transactions cleared pursuant to the system in place prior to entry into force of the new provisions of Articles L. 430-1 et seq. on 2 March 2009.

a) Procedure

458. Pursuant to the last paragraphs of IV of Article L. 430-8, the applicable procedure is "the procedure established in the second 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 *representative of the minister of the economy* must submit their observations in response to communication of the report within 15 working days. The *Autorité de la concurrence* shall issue a decision within 75 working days".

459. To investigate a case of non-compliance with the obligations of the notifying party, one or more case handlers are appointed by the General Rapporteur or the Deputy General Rapporteur.

A report is drafted in accordance with paragraph 2 of Article L. 463-2 and is notified to the parties, the *representative of the minister of the economy* and the relevant ministers. It is accompanied by all of the evidence on which the case handlers based their report. The notifying party and the representative of the minister of the economy have 15 working days to present a submission in response. An inter partes hearing is then organised before the Board of the *Autorité* in accordance with the conditions stipulated in Article L. 463-7 and the internal rules of procedure of the *Autorité*.

460. At the end of this procedure, if it considers that the parties have not implemented within the set deadlines an injunction, an obligation or a commitment laid down in its decision or in the decision of the minister that ruled on the transaction, the *Autorité* shall take one of the decisions established in IV of Article L. 430-8.

461. Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities introduced the possibility for the *Autorité* to impose injunctions in lieu of the obligation that has not been fulfilled by the parties. The *Autorité* can therefore impose remedies designed to put an end to the competition concerns identified in the clearance decision rather than order compliance with commitments that have thus far not been fulfilled by the notifying party.

462. The *Autorité* can also hand a fine to legal entities amounting to no more than 5% of their turnover, excluding taxes, generated in France in the last financial year ended, plus, where applicable, the turnover generated in France by the acquired party over the same period. The amount of the fines that can be imposed may not exceed 5% of their average daily turnover by late day as of the date set by the *Autorité*.

463. The constitutionality of the version of these legislative provisions prior to their amendment by Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities was confirmed by the French Constitutional Court in Decision 2012-280 QPC of 12 October 2012. It noted in particular that these injunctions were intended to guarantee effective compliance with the remedies and ensure that market competition functions properly in the sectors affected by the merger transaction.

b) Implementation of the remedy non-fulfilment procedure

464. Since 2 March 2009, the *Autorité* has handed out fines to companies on five occasions for non-fulfilment of the commitments undertaken before it or the minister.

> **Example 1** : in Decision 12-D-15 of 9 July 2012, the *Autorité* noted non-fulfilment of one of the commitments undertaken by Bigard before the French Minster of Economy.

Although this company had committed to sign a licensing agreement on the use of the Valtéro brand for beef products sold in supermarkets, it attempted to shift awareness of this brand to another brand, which was likely to discourage companies that may have been interested in the brand licence. A fine of one million euros was handed out to this company.

Example 2 : in Decision 11-D-12 of 20 September 2011, the *Autorité* noted the non-fulfilment by Canal Plus Group of the commitments it had undertaken within the framework of the merger of its satellite pay TV package with that of TPS. Consequently, in addition to handing out a fine worth 30 million euros, it withdrew the decision of 30 August 2006 in which the minister had cleared the merger transaction. Insofar as TPS's satellite package no longer existed and its subscribers had been transferred to the packages offered by Canal Plus Group, it was no longer possible to revert to the status quo prior to the merger. The 2006 transaction was re-notified on 24 October 2011 and cleared subject to injunctions via Decision 12-DCC-100 of 23 July 2012.

465. Penalty decision 11-D-12 was confirmed to a great extent by the French Administrative Supreme Court (*Conseil d'Etat*) in its Decision of 21 December 2012. It specified the scope of the principle of the strict interpretation of the commitments, noting that "the *Autorité* has the right to check whether, even in the event of formal compliance with the criteria expressly provided for under a commitment that market changes have not stripped of its purpose, the parties that have undertaken the commitment have adopted measures or behaviours that eliminate the impact of the commitment and produce the anticompetitive effects it was intended to prevent".

466. In the same decision, the French Administrative Supreme Court (*Conseil d'Etat*) confirmed that the withdrawal decision had to be proportionate to severity of the infringements observed, particularly the scale of the commitments that have not been met, whether in full or in part, in relation to the whole set of remedies adopted and the anticompetitive effects they were intended to prevent, the scale of the breaches and the need to maintain sufficient competition on the markets concerned". In this case, it noted that Canal Plus Group had failed to fulfil commitments that were key to the remedies stipulated in the clearance decision, which had had significant effects on the competitive balance of the relevant markets. It therefore confirmed the legality of the withdrawal of the 2006 clearance.

Example 1 : in Decision 16-D-07 of 19 April 2016, which was confirmed by the French Administrative Supreme Court (*Conseil d'Etat*), the *Autorité* noted the non-fulfilment by Altice Luxembourg and SFR Group of one of the commitments to which the decision clearing the acquisition of SFR by Altice Group was subject. The *Autorité* handed out a fine worth 15 million euros to these companies.

Example 2 : in Decision 17-D-04 of 8 March 2017, the *Autorité* noted the non-fulfilment by these same companies of another commitment undertaken before the *Autorité* within the framework of the same clearance decision. The *Autorité* handed out to these companies a fine worth 40 million euros, accompanied by several injunction intended to ensure that they refrained from continuing the behaviour observed or adopting a behaviour with an equivalent purpose or effects.

Example 3 : in Decision 18-D-16 of 27 July 2018, the *Autorité* noted the non-fulfilment of several commitments undertaken by Fnac Group to divest itself of stores within the framework of its acquisition of Darty. Three stores had not been sold to a buyer approved by the *Autorité* by the end of the divestiture deadline established in the commitments. In addition to a penalty of 20 million euros, the *Autorité* imposed structural injunctions in lieu of the unfulfilled divestiture commitments, entailing the divestiture of two other stores instead of the three stores earmarked in order to restore a satisfactory competitive structure to the markets in the catchment areas affected by the failure to sell off the stores initially earmarked.

c) Assessing the sanctions

467. In order to assess the measures, from among those stipulated in IV of Article L. 430-8 that can result from the failure to implement the remedies laid down in a clearance decision, the *Autorité* takes account of all of the circumstances of the case. For example, it examines the nature of the breaches observed by assessing their severity and their harm to competition, which the clearance decision was supposed to prevent. The *Autorité* can also take account of the nature of the remedies undertaken, their importance within the general context of the clearance decision or the time elapsed since the merger and the duration of the remedies still remaining on the date on which it issues its decision.

468. Moreover, when it imposes a penalty pursuant to the provisions of IV of Article L. 430-8, the *Autorité* takes into account, if they have been established, any specific difficulties that the parties claim to have encountered in fulfilling their obligations. In its Decision of 28 September 2017, Altice Luxembourg and SFR Group, the French Administrative Supreme Court (*Conseil d'Etat*) ruled that "within the framework of a non-compliance sanction procedure, the parties sanctioned can, in their arguments against the justification for the sanction imposed, invoke specific difficulties that they claim to have encountered in fulfilling their commitments".

469. Lastly, the injunctions and sanctions imposed by the *Autorité* must be proportionate to the breaches observed. More specifically, the injunctions imposed must be proportionate to the severity of the breaches observed and to the requirements to maintain or restore a sufficient level of competition in the relevant markets. In this respect, in its aforementioned Decision of 28 September 2017, the French Administrative Supreme Court (*Conseil d'Etat*) ruled that "[i]n light of their purpose, which, aside for the punitive dimension, is to preserve economic order, the sanctions established in 1° and 2° of IV of Article L. 430-8 of the French Commercial Code (*Code de commerce*), which are separate from the fines established in the fourth paragraph of IV, must be proportionate to the severity of the breaches observed and to the requirements to maintain or restore a sufficient level of competition in the relevant markets. In this regard, in order to assess the proportionality of the injunctions subject to daily fines, it is necessary to take into account the scale of the commitments that have not been met, whether in full or in part, in relation to the whole set of remedies adopted and the anticompetitive effects they were intended to prevent, the scale of the breaches and the need to maintain sufficient competition in the markets concerned". As regards the fine, it must also be proportionate to the circumstances of the case. The specific nature of the breach relating to the non-fulfilment of remedies imposed within the framework of a merger clearance must be taken into account. It is therefore important for the fine imposed for non-fulfilment of remedies to be set at a sufficient level to deter the companies concerned from not fulfilling their commitments or knowingly proposing commitments that are difficult to implement.

d) No right of access for third parties to the facts of the case

470. Pursuant to Article L. 311-5 of the French Code on Relations between the Public and the Administration, the documents produced or in the possession of the *Autorité* as part of its investigative and decision-making powers may not be disclosed.

471. Thus, if, subsequent to a merger transaction that is subject to remedies, the new entity fails to properly implement those remedies, any third party that believes it has been harmed by the non-fulfilment of these commitments or injunctions may not require the *Autorité* to communicate the report sent by the Investigation Services to the notifying party, the Board of the *Autorité* and the minister. Consequently, third parties do not benefit from any right of access to the case file. Any interested third party can, however, be heard by the case handlers within the framework of their investigation and its observations, which are added to the case file and subject to business secrecy rules, can be taken into account during the investigation.

G. APPEALS

472. The French Administrative Supreme Court (*Conseil d'État*) is the competent court to rule on decisions of the *Autorité* due to the legal status of the latter (independent administrative authority) and pursuant to 4° of Article R. 311-1 of the code of administrative justice. By way of derogation from this rule, Article L. 464-8 of the French Commercial Code (*Code de commerce*) lists the decisions of the *Autorité* that fall within the jurisdiction of the Paris Court of Appeal, which excludes decisions taken pursuant to Articles L. 430-5, L. 430-7 and L. 430-8. The French Administrative Supreme Court *(Conseil d'Etat*) is also competent to hear any appeal relating to a decision of the minister taken within the framework of his power of evocation. The French Administrative Supreme Court (*Conseil d'Etat*) is therefore competent to rule on decisions of the *Autorité* relating to mergers.

473. All decisions relating to the clearance or blocking of mergers, approval of their completion without pre-notification[56] or prior to the decision of the *Autorité*, omissions or inaccuracies in the notification or non-fulfilment of the commitments, as well as certain related decisions, particularly in respect of publication or monitoring of injunctions[57], as well as the decisions taken within the framework of the implementation of merger decisions, such as a refusal to approve an asset buyer or a refusal to extend the deadline for fulfilling a commitment[58], may be appealed.

474. In two decisions of 9 April 2014[59], however, the French Administrative Supreme Court (*Conseil d'Etat*) ruled that a request to annul only the assessments made by the *Autorité* in the grounds for its clearance decision was not admissible insofar as the grounds cannot be separated from the framework of the decision, which they substantiate.

475. An appeal may be lodged by the parties or by any third party who have an interest in bringing proceedings. The rules on admissibility and the appeals process in respect of merger decisions are subject to ordinary administrative litigation law before the French Administrative Supreme Court (*Conseil d'Etat*).

[56] Decision 373065 of the French Administrative Supreme Court (*Conseil d'État*) of 5 November 2014 COPAGEF.

[57] Order 390640 of the French Administrative Supreme Court (*Conseil d'État*) of 24 June 2015 NC Numericable.

[58] Decisions 414654, 414689, 414657 and 414693 of the French Administrative Supreme Court (*Conseil d'État*) of 26 July 2018 Fnac Darty et de M. A...et al.

[59] Decisions 367285 and 364192 of the French Administrative Supreme Court (*Conseil d'État*) of 9 April 2014 Association des centres distributeurs Édouard Leclerc.

476. The French Administrative Supreme Court (*Conseil d'État*) has ruled on the standing of third parties by category of applicants. For example, it recognised the standing of competitors of undertakings that benefit from a merger clearance[60] and of undertakings that are clients of the parties[61]. It also recognised the right to appeal of an association comprising competitors of the parties[62] or of a shareholder of an undertaking benefiting from a merger clearance[63]. However, the French Administrative Supreme Court (*Conseil d'État*) declared inadmissible the appeal lodged by the lessor of a store that was to be sold off pursuant to a commitment, as it deemed that this third party was not operating in any of the markets affected by the merger[64].

1. APPEAL DEADLINES

477. The deadline for lodging an appeal against a merger control decision of the *Autorité* is two months.

478. The start date of the appeal deadline varies depending on the status of the applicant, person concerned or third party.

479. A merger control decision issued by the *Autorité* is an individual act; it is therefore enforceable on the person to whom it is notified. Consequently, for the notifying party, the appeal deadline commences as of the date on which the decision is notified by the *Autorité* to the interested party.

480. For third parties, the statutory stating point of the deadline is the date of publication of the decision, as specified in Article R. 464-28. The decision of the *Autorité* is deemed to have been published when it has been published on its website pursuant to Article D. 430-8. Publication of the summary of the decision prior to its publication online does not constitute the starting point of the appeal deadline for third parties.

2. REQUESTS FOR INTERIM RELIEF

481. At the same time as lodging an appeal on the merits, the applicant is also entitled to seek interim relief to stay the disputed decision. Two types of interim relief have already been established before the French Administrative Supreme Court (*Conseil d'État*) in the field of merger controls: interim relief to suspend a decision and interim relief for a necessary measure.

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[60] Decisions of the French Administrative Supreme Court (*Conseil d'Etat*) 404382 of 25 May 2018 OCEA and 362347 of 21 December 2012 Canal Plus Group.

[61] Decision 279180 of the French Administrative Supreme Court (*Conseil d'Etat*) of 13 February 2006 Fiducial Informatique and Fiducial Expertise.

[62] Decision 394117 of the French Administrative Supreme Court (*Conseil d'Etat*) of 21 October 2016 Association des entreprises de biologie médicales.

[63] Decision 294896 of the French Administrative Supreme Court (*Conseil d'Etat*) of 31 January 2007 France Antilles.

[64] Decision 403732 of the French Administrative Supreme Court (*Conseil d'Etat*) of 25 May 2018 Beaugrenelle Patrimoine.

a) Request for interim relief to suspend a decision

482. Requests for interim relief to suspend a decision are provided for in Article L. 521-1 of the code of administrative justice. For this interim relief, an action in the main proceedings is required. A request for annulment must be filed along with an application for interim relief. Three conditions must be met simultaneously by the request for interim relief

– The disputed decision of the *Autorité* must still **have legal effect** on the day of the request in order for it to be suspended.

For example, in an Order of 1 June 2006, the judge responsible for dealing with urgent matters declared inadmissible the request for interim relief to suspend the decision, as the clearance decision had been executed in full on the date of the request.

Another example can be found in an Order of 27 November 2013, in which the judge responsible for dealing with urgent matters, in the matter pertaining to the acquisition of sole control of the "structural materials" assets of Imerys TC by Bouyer Leroux, ruled that, as the acquisition of sole control had been completed, the submissions arguing for suspension of execution of the decision had become devoid of purpose.

The judge responsible for dealing with urgent matters can also order a dismissal if the merger was completed subsequent to the filing of the request[65]. However, the judge must rule on a request relating to remedies if the latter still have legal effect at the time of the ruling[66].

– **An urgent condition**. The judge responsible for dealing with urgent matters rules consistently that "The urgency justifies the suspension of execution of an administrative decision when it causes sufficiently severe and immediate harm to the public interest, the situation of the applicant or the interests the applicant wishes to protect. It is the responsibility of the judge responsible for dealing with urgent matters to correctly assess, based on the justifications provided by the applicant, whether the effects of the disputed decision can be characterised as an urgency that warrants suspension of execution of the decision without waiting for the request on the merits to be heard. The urgency must be assessed objectively taking into account all of the circumstances of the case. "[67] It applied these principles in the following cases:

[65] Order 403730 of the French Administrative Supreme Court (*Conseil d'Etat*) of 17 October 2016 SAS Soufflet Agriculture and SAS Sobra.

[66] Orders 390454 and 390772 of the French Administrative Supreme Court (*Conseil d'Etat*) of 9 July 2015 Compagnie des Gaz de Pétrole Primagaz and Vitogaz France.

[67] Order409771 of the French Administrative Supreme Court (*Conseil d'Etat*) of 27 April 2017 Altice Luxembourg and SFR Group.

In an Order of 19 May 2005, Fiducial Informatique and Fiducial Expertise, the judge responsible for dealing with urgent matters justified the urgency "in light of the purpose of the disputed decision and its effects on the market" and "in respect of the public interest in this case, which is to maintain effective competition in the market […] and the interest of the requesting companies, which are present in the same market in their capacity as competitors or potential clients […]".

However, in an Order of 22 April 2010, Métropole Télévision, the judge responsible for dealing with urgent matters considered, in respect of the acquisition by TF1 of the channels TMC and NT1, that the urgency condition had not been met given the fairly low share of television channel audiences and advertising revenues accounted for by the channels TMC and NT1 and given the progressive nature of the impact of the merger in the relevant markets.

Similarly, in an Order of 9 July 2015, Compagnie des Gaz de Pétrole Primagaz, the judge responsible for dealing with urgent matters considered that the urgency condition had not been met insofar as the commitments did not appear, due to their nature and unsuitability, likely to cause serious and immediate harm to competition on the gas and liquefied petroleum distribution markets. Moreover, the judge responsible for dealing with urgent matters considered that the applicants had not proven that the commitments would be unsuitable or insufficient to the extent that they would cause serious and immediate harm to their own economic situation.

In an Order of 27 November 2013, Wienerberger, the judge responsible for dealing with urgent matters ruled, in respect of the acquisition of sole control of the "structural material" assets of Imerys TC by Bouyer Leroux, that the disputed merger did not seem in itself likely to cause such harm to the competitive situation on the market that the commitments, due to their insufficiency or unsuitability, were likely to cause serious and immediate harm to competition on the relevant market or to the situation of the applicant to such an extent that this would justify application of the powers established in Article L. 521-1 of the code of administrative justice. In this case, the market, which only accounted for 1.3% of the turnover of the applicant in France, which was in fact the world leader in the sector, was characterised, even before the merger, by a situation where there was only one regional production site.

In an Order of 27 April 2017, Altice Luxembourg and Group SFR, the judge responsible for dealing with urgent matters also considered that this condition is not met if the French Administrative Supreme Court (*Conseil d'Etat*) is in a position to issue a decision on the merits of the case within a fairly brief deadline.

– **The existence of a plea likely, at that stage of the investigation, to create a serious doubt as to the legality of the decision.**

In an Order of 19 May 2005, the judge responsible for dealing with urgent matters considered that the reasoning of the minister was insufficient "in respect of the probability, sufficient rapidity and durability and sufficiency of the entry of new competitors likely to offset the anticompetitive effects of the relevant merger", which gave rise to a serious doubt as to the legality of the decision.

However, in an Order of 17 October 2016, the judge responsible for dealing with urgent matters considered that the condition relating to the existence of a serious doubt as to the legality of the decision was not established insofar as the commitments cannot be criticised for not increasing the level of competition that existed prior to the merger. In the same case, the judge responsible for dealing with urgent matters also noted that the fact that the silos proposed for divestiture had not been linked to a railway line and the state of disrepair of three of the silos did not compromise their viability and that the possibility for the farmers to continue to sell their grain outside the cooperative had no impact on the assessment of the sufficient nature of the commitments

b) Request for interim relief for a necessary measure

483. Requests for interim relief for a necessary measure are provided for in Article L. 521-3 of the code of administrative justice, which stipulates that: "In the event of an urgency and upon request, which will be declared admissible including in the absence of a preliminary administrative decision, the judge responsible for dealing with urgent matters can order any other necessary measures that do not impede the execution of any administrative decision." For example, the judge responsible for dealing with urgent matters considered that this procedure could be used to order an undertaking to notify a transaction that had been completed without being notified: "This procedure is likely to be applied when, after a merger has been completed without being notified, the French Minister of Economy is obligated, pursuant to the aforementioned provisions of Article L. 430-8 of the French Commercial Code (*Code de commerce*), to order notification of the transaction[68]. However, he considered that, in this case, such an injunction was not justified.

3. APPEALS ON THE MERITS

484. Appeals against merger control decisions are actions for abuse of power that could give rise to the annulment of those decisions. Appeals against decisions penalising breaches of obligations imposed by merger law, such as non-fulfilment of commitments, are actions for full jurisdiction and could give rise to the annulment or the review of the relevant decisions.

[68] Order 312534 of the French Administrative Supreme Court (*Conseil d'Etat*) of 18 February 2008 Fédération Nationale des Transporteurs Routiers.

485. In respect of these appeals, the French Administrative Supreme Court (*Conseil d'Etat*) examines the external legality (jurisdiction, compliance with certain formal or procedural safeguards) and the internal legality (checking for infringements of the law or legal or factual errors, accompanied by an examination of the legal characterisation of the facts) of the disputed decisions.

486. For example, the French Administrative Supreme Court (*Conseil d'Etat*) has been requested to examine:

- the lawfulness of the procedure [69];
- the controllability of the merger transaction[70];
- the definition of the relevant markets[71];
- the assessment of the effects of the transaction[72];
- the consideration given to contributions to economic progress likely to offset the harm to competition identified[73];
- the consideration given to the failing company defence[74];
- the sufficiency of the commitments approved by the *Autorité*[75];
- the intention to circumvent competition rules in the case of a failure to notify[76].

487. The French Administrative Supreme Court (*Conseil d'Etat*) did, however, consider that third parties could not challenge the lawfulness of the choice of the *Autorité* to adopt a clearance decision subject to commitments without conducting an in-depth examination[77].

[69] Decisions of the French Administrative Supreme Court (*Conseil d'Etat*) 249267 of 6 February 2004 Philips France, 278652 of 27 June 2007 Métropole Télévision, 401059 of 31 March 2017 Altice Luxembourg and Numericable-SFR and 404382 of 25 May 2018 OCEA.

[70] Decisions of the French Administrative Supreme Court (*Conseil d'Etat*) 201853 of 9 April 1999 Coca-Cola and 294896 of 31 January 2007 France Antilles.

[71] Decisions of the French Administrative Supreme Court (Conseil d'Etat) 278796 of 13 February 2006 Delonghi, 283479 of 30 June 2006 Fiducial, 278652 of 27 June 2007 Métropole Télévision, 394117 of 21 October 2016 AEBM and 404382 of 25 May 2018 OCEA.

[72] Id.

[73] Decision 201853 of the French Administrative Supreme Court (*Conseil d'Etat*) of 9 April 1999 Coca-Cola.

[74] Decision 249267 of the French Administrative Supreme Court (*Conseil d'Etat*) of 6 February 2004 Philips France.

[75] Decisions of the French Administrative Supreme Court (*Conseil d'Etat*) 201853 of 9 April 1999 Coca-Cola, 278652 of 27 June 2007 Métropole Télévision, 338197 of 30 December 2010 Métropole Télévision, 395284, 395247 and 395278 of 14 June 2017 CCIRPP and 403732 of 25 May 2018 SAS Soufflet Agriculture and SAS Sobra.

[76] Decision 375658 of the French Administrative Supreme Court (*Conseil d'Etat*) of 15 April 2016 Société COPAGEF.

[77] Decisions of the French Administrative Supreme Court (*Conseil d'Etat*) 390454 and 390772 of 9 July 2015 Compagnie des Gaz de Pétrole Primagaz and Vitogaz France and 403730 of 17 October 2016 Soufflet Agriculture.

488. The French Administrative Supreme Court (*Conseil d'Etat*) exercises full control over the decisions. It thus declared a disputed decision lawful after re-examining the market shares of the parties and the obstacles to the market power of the new entity and after checking the substantive merger analysis and the efficiency gains of the transaction[78]. This economic approach to the examination of the legality of a merger decision led the French Administrative Supreme Court (*Conseil d'Etat*) to assess this legality not only in respect of the existing factual and legal situation on the date of the decision, but also in respect of the observed or potential effects of the authorised merger, an examination that could include new facts, such as the arrival of a new operator in the market.

489. More recently, in its Decision of 6 July 2016, Primagaz and Vitogaz – Totalgaz, the French Administrative Supreme Court (*Conseil d'Etat*) ruled, following a full review, that the *Autorité* had not committed an error of judgement in considering that the acquisition of Totalgaz by UGI Bordeaux Holding had no anticompetitive effect on the markets for medium and large bulk distribution of LPG other than autogas, the distribution of bottled LPG other than autogas and the distribution of autogas. However, the competitive analysis of the market for small bulk distribution of LPG other than autogas was ruled to be insufficient. The French Administrative Supreme Court (*Conseil d'Etat*) noted that, given that the new entity would become the only stakeholder with secondary storage infrastructure covering the whole of the country, the *Autorité* had made an error of judgment by not examining the ability of the new entity to withdraw from the networks of capacity swap contracts that were concluded by operators before the merger.

490. In its Decision of 25 May 2018, OCEA - DCNS and Piriou, the French Administrative Supreme Court (*Conseil d'Etat*) rejected the request for annulment of the decision to clear the creation of a full-function joint venture between DCNS and Piriou. The French Administrative Supreme Court (*Conseil d'Etat*) analysed the relevance of the delineation of the relevant market performed by the *Autorité* both in terms of the products and its geographical dimension. It also reviewed the method used by the *Autorité* to calculate the market share of the joint venture as well as its assessment of the vertical effects of the transaction.

491. Compliance with third party rights is also reviewed by the French Administrative Supreme Court (*Conseil d'Etat*). In its Decision of 9 April 1999, Interbrew, the French Administrative Supreme Court (*Conseil d'Etat*) annulled the ministerial regulation clearing the takeover of Fischer by Heineken on the grounds that the rights of Interbrew, which was not a party to the transaction, had not been observed. In this case, the commitments undertaken by Heineken provided for the divestiture of a significant number of warehouses to buyers that were legally and financially independent of a number of major brewers, including Interbrew. This decision thus deprived Interbrew of the opportunity to purchase the warehouses being sold by Heineken.

[78] Decision 279180 of the French Administrative Supreme Court (*Conseil d'Etat*) of 13 February 2006 Fiducial Informatique and Fiducial Expertise.

The French Administrative Supreme Court (*Conseil d'Etat*) annulled the decision in accordance with the general principle of the rights of the defence, as Interbrew had not be given the opportunity to present its observations.

4. ANNULMENT OR REVIEW OF A DECISION BY THE FRENCH ADMINISTRATIVE SUPREME COURT (*CONSEIL D'ETAT*)

492. When an annulment request is referred to it, the French Administrative Supreme Court (*Conseil d'Etat*) can, after conducting its review, decide to reject the request or, conversely, order the annulment, in whole or in part, of the disputed decision.

493. Article R. 430-9 stipulates that "in the event of annulment, in whole or in part, of a decision issued by the *Autorité de la concurrence* or by the French Minister of Economy pursuant to Articles L. 430-5, L. 430-7, L. 430-7-1, L. 430-8 or L. 430-9 and if there are grounds to review the case, those undertakings that submitted a notification shall re-notify within two months of the date of notification of the decision of the French Administrative Supreme Court (*Conseil d'Etat*)".

494. The parties must therefore re-notify the transaction when the decision of the *Autorité* has been annulled. In its Decision of 6 February 2004, in which it annulled the decision of the French Minister of Economy clearing the takeover of Moulinex by Seb, the French Administrative Supreme Court (*Conseil d'Etat*) specified the consequences of this annulment and indicated to the minister that the referral to him by the Commission still held and that he must take his decision within the deadline established under ordinary law based on the facts existing as at the date of his new decision taking into account the substantive and procedural rules in the 1986 order, which are still irrevocably applicable.

495. The French Administrative Supreme Court (*Conseil d'Etat*) can also order the partial annulment of a decision of the *Autorité*. In its Decision of 6 July 2016, it annulled the decision of the *Autorité* on the acquisition of sole control of Totalgaz by UGI Bordeaux Holding, but only insofar as the *Autorité* had not examined all of the anticompetitive effects of the merger and the commitments were not sufficient to remedy the competition concerns identified. Thus, the annulment ordered by the French Administrative Supreme Court (*Conseil d'Etat*) did not call into question the clearance of the merger.

496. In principle, the annulment of an administrative decision implies that it ceases to apply with retroactive effect as soon as the ruling has been handed down by the judge.

497. However, the French Administrative Supreme Court (*Conseil d'Etat*) may attach time conditions to the effects of the annulment if it appears that the retroactive effect of the annulment is likely to have clearly excessive consequences due to the effects that the disputed decision has had and the situations that may have arisen while it was in force and the general interest that may arise from the temporary maintenance of its effects. It is

therefore the duty of the administrative judge to take into consideration the consequences of the retroactive effect of the annulment for the various public or private interests at play and the disadvantages, in respect of the principle of legality and the right of litigants to an effective appeal, that setting a time limit on the effects of the annulment would create.

498. Thus, in its Decision of 23 December 2013 on the appeal lodged by Métropole télévision and TF1 against Decision 12-DCC-101, the French Administrative Supreme Court (*Conseil d'Etat*) considered that the annulment of the disputed decision would necessarily have forced the *Autorité* to re-examine the disputed merger and stripped the commitments undertaken by the parties of their binding effect. It was thus decided that, in light of the excessive effects of an immediate annulment of the disputed decision for the economic public order and in respect of the general interest derived from maintaining sufficient competition, there were grounds to postpone annulment of the decision of the *Autorité* to a later date to be set by the French Administrative Supreme Court (*Conseil d'Etat*).

499. When an appeal to review a penalty decision is referred to it, the French Administrative Supreme Court (*Conseil d'Etat*) reviews the grounds for the breaches held against the relevant companies by the *Autorité* as well as the proportionality of the penalties for these breaches.

500. In its Decision of 21 December 2012, Canal Plus Group, the French Administrative Supreme Court (*Conseil d'Etat*) considered that two breaches had been wrongly held against Canal Plus Group and that the amount of the fine should be reduced from 30 to 27 million euros. Similarly, in its Decision of 15 April 2016, COPAGEF, the French Administrative Supreme Court (*Conseil d'Etat*) examined the breaches held against COPAGEF and reviewed the penalty handed out on the grounds that the *Autorité* had wrongly determined that the company had failed to cooperate in the investigation.

H. APPLICATION OF ARTICLE L. 430-9

501. Article L. 430-9 provides that: "The Competition Authority may, in the event of the abuse of a dominant position, or a state of economic dependence, enjoin, by a reasoned decision, the undertaking or group of undertakings involved to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out, even if these acts have been subject to the procedure specified by this title".

502. This article applies to all abuse made possible by a merger, regardless of whether or not it was subject to a clearance procedure before the *Autorité de la concurrence* or, previously, the minister.

Example: in Decision 02-D-44 of 11 July 2002, which is the only case thus far in which this provision has been applied, the *Conseil de la concurrence*, after starting proceedings ex-officio within the framework of its jurisdiction to control anticompetitive practices relating to the situation on the water and sanitation markets, established that Compagnie générale des eaux (CGE) and Société Lyonnaise des eaux (SLDE) held a collective dominant position over these markets[79] and that they had abused this position[80]. The *Conseil* therefore requested that the French Minister of Economy, pursuant to the provisions of the version of Article L. 430-9 prior to the French Law of 4 August 2008 on the Modernization of the Economy, order the relevant companies to amend, supplement or cancel the contracts that had led to them pooling their resources within joint subsidiaries.

[79] CGE and SLDE had approximately an 85% share of these markets and these two groups had created seven joint subsidiaries over the years at the request of the relevant local and regional public authorities. During 2009, the process of withdrawal from all of these joint subsidiaries was implemented.

[80] In response to several tenders launched by local or regional authorities as of June 1997, the parent companies had decided not to submit bids and therefore positioned themselves as competitors of their joint subsidiaries, thereby limiting the intensity of the competition.

III. Competitive assessment of a merger

503. The test applied by the *Autorité* to assess the effects of a merger on competition is the one defined in Article L. 430-6, which the *Autorité* uses to examine whether the merger "is likely to have an adverse effect on competition, in particular by creating or reinforcing a dominant position or by creating or reinforcing buying power that places suppliers in a situation of economic dependence".

504. The *Autorité* must characterise this harm [adverse effect] and the risks of a significant reduction in competition that it causes based on a forward analysis that takes account of all relevant data and is based on a plausible economic scenario[81]. Only the situation prior to the merger can be observed and the probable effects of the merger can only be assumed. This analysis is based on the characteristics of the relevant market and the functioning of competition on it at the time of the control, but also takes account of its possible developments.

505. When it determines the plausible economic scenario that it is using to assess the effects of a merger, the *Autorité* includes in its analysis the expected developments to the structure of the market when these developments are of a sufficiently certain nature. Thus, when the information available points credibly to the entry, development or exiting of a market operator, the *Autorité* takes this into account in its competitive analysis. Its assessment of the credible counterfactual scenario takes account of the financial capabilities of the relevant undertaking or its presence on neighbouring markets.

Example 1 : in Decision18-DCC-18, the *Autorité* analysed the reasoning of the parties, according to which the new entity would, following the merger, compete with operators such as Google, Amazon and Facebook. It noted that there was no evidence of a clear and swift entry of these operators on to the French online property classified ads market. It noted that no internal document submitted by the notifying party analysed the potential entry of Facebook to this market in France, attesting to the fact that this operator did not constitute a threat to the other operators that were active in the market.

Example 2 : in Decision 20-DCC-38, the *Autorité* analysed the reasoning of the notifying party, according to which the merger only had a marginal effect in the market for the supply of diagnostics and hospital treatment since, without the merger, the buyer would have closed its main clinic in Nîmes due to its difficult economic situation, thereby significantly limiting the overlapping activities in the area.

[81] Decision 362347, 363542 et 363703 of the French Administrative Supreme Court (*Conseil d'Etat*) of 21 December 2012 Canal Plus Group et al..

The *Autorité* considered that this scenario was not sufficiently certain since the difficulties described by the notifying party were not new and the financial situation of the clinic had tended to improve in recent years.

506. A merger transaction is likely to create:

- horizontal effects when the parties are first and foremost existing or potential competitors in one or more relevant markets;
- vertical effects when the parties are active in markets located at different stages on the value chain of a product or service, for example when a manufacturer merges with one of its distributors;
- conglomerate effects when the parties are not present in the same markets or in vertically integrated markets, but the merger leads, for example, to the extension or strengthening of the presence of the new entity in separate markets or market segments, but whose relation to each other can enable it to increase its market power.

507. When it involves groups performing multiple activities, the same merger can have horizontal, vertical and conglomerate effects.

508. A merger can harm competition significantly on the affected markets in two ways:

- through non-coordinated effects, i.e., effects resulting from the behaviour of the market participants, acting independently from each other;
- through coordinated effects when it is likely to modify effective competition in the market in such a way that the undertakings which, prior to the merger, were not coordinating their competitive behaviour are now in a position to do so or, if they were already coordinating their behaviour, can continue to do so more easily. We talk about the creation or strengthening of a collective dominant position. In the specific case of the creation of a joint venture, the *Autorité* analyses, in particular, the risks of coordination of the competitive behaviour of its parent companies.

509. Economic efficiency gains are usually expected as a result of a merger. When the *Autorité* notes that the merger is likely to harm competition in a market, it evaluates to what extent the expected efficiency gains could benefit consumers and whether they are sufficient to offset the harm to competition identified.

510. In exceptional cases, a transaction that harms competition and whose economic efficiency gains are not sufficient to offset this harm may nonetheless be cleared if the company that has been bought out is a failing company; if there is no better potential credible buyer from the viewpoint of the competitive analysis; and if the harm to competition would not be less serious if the undertaking were to cease to exist. This has to be substantiated by tangible evidence.

511. To conduct its examination of the merits of a merger transaction, the *Autorité* adopts a systematic approach, which starts with the delineation of the relevant markets (A). Where applicable, it analyses the functioning of the relevant market(s) in order to assess its essential characteristics (B). Once these characteristics have been identified, it can identify the effects of the mergers based on whether the transaction has a horizontal (C), vertical (D) or conglomerate dimension (E). In duly justified cases, the *Autorité* also analyses the risks of the creation or strengthening of a purchasing power that places suppliers in a situation of economic dependency (F). The *Autorité* also assesses the coordinated effects likely to arise as a result of the transaction (G). It takes account of the proven economic efficiency gains for consumers resulting from the merger (H) and, where applicable, the failing company defence (I). Lastly, it may have to take a decision on ancillary restraints to a transaction (J).

A. DEFINITION OF RELEVANT MARKETS

1. OBJECTIVE

512. The definition of the relevant markets is an essential stage in merger control insofar as it serves to identify the scope of the competition between undertakings and then assess their market power.

513. If demand for a sufficient share of the products and services of the new entity cannot be shifted to alternative products or services supplied by competitors, the merger is likely to significantly harm competition. In order to conduct a substantive analysis of a merger, it is therefore necessary to delineate the relevant markets, which cover all of the products or services supplied by the notifying party and those of its competitors and which are considered by clients to be sufficiently substitutable to be able to exert significant competitive pressure on the relevant markets.

514. The *Conseil de la concurrence* established the following definition of a relevant market in its 2001 annual report : "A relevant market can be defined as the meeting place of supply and demand for a specific product or service. In theory, in a relevant market, the units supplied are perfectly substitutable for consumers, who can thus choose between suppliers when there is more than one, which implies that each supplier is subject to price competition from the others. Conversely, a supplier in a relevant market is not constrained directly by the price strategies of the suppliers in different markets because those suppliers sell products or services that do not meet the same demand and which, in the eyes of consumers, are therefore not substitutable products. Perfect substitutability between products or services is rarely seen; the *Conseil* regards as substitutable and as being on the same market any products or services for which it could reasonably be said that demanders view them as alternatives to choose between in order to meet the same demand".

515. In respect of such a set of products and services, a company that is alone in supplying them or supplies a significant share of them would be in a position to exercise market power, which would consist of, for example, increasing its prices above the competitive level regardless of the reaction of its clients and competitors, or amending the conditions of sales of the products or services being offered without consideration for its clients and competitors. The reasoning is the one used in the hypothetical monopolist test[82]. In this test, the question is "whether the clients of the parties would shift to easily accessible substitute products or to suppliers located elsewhere in the event of a slight, but permanent increase (between 5 and 10%) in the prices of the products under consideration in the relevant geographical areas. If the substitution is sufficient, due to the resulting drop in sales, to remove any incentive to increase prices, substitute products and additional regions are added to the relevant market. The same approach is adopted until all of the products chosen from the geographical area mean that it becomes profitable to make slight, but permanent increases in the relative prices." [83] In other terms, you need to evaluate to what extent a small, but significant and non-transitory increase in the prices of a product offered by a single supplier (monopolist) would be profitable for it in light of the reactions of its clients to this price increase. If a sufficient portion of the clients opts for a substitute or shifts to other geographical areas, then the price increase will not be profitable[84].

[82] The test is also referred to as "SSNIP" ("Small but Significant Non–transitory Increase in Price").

[83] Commission Notice of 9 December 1997 on the definition of relevant market for the purposes of Community competition law, JOCE C372 .

[84] It is, however, necessary to take account of the effect on the profitability of the monopolist arising from the lower costs resulting from the reduced activity due to a part of its demand shifting to competitors' products.

516. The hypothetical monopolist test is a quantitative test that can require a large volume of data. Often these data are not available or cannot be collected and processed within the mandatory merger control deadlines. Nonetheless, this test provides the conceptual analytical framework used to structure the reasoning for delineation of the relevant markets and interpret the various qualitative and quantitative indicators available. In particular, the reasoning used shows that the delineation of the relevant markets is a question of degree. In order to belong to the same relevant market, two products must be considered as sufficiently substitutable by a sufficient number of buyers.

517. In addition, in order to assess the impact of a merger on competition, the *Autorité* can use analytical tools that do not require a precise definition of the relevant markets. Such an approach can be particularly justified when the products affected by the merger are not homogeneous, which makes it difficult to establish a priori the boundary between the products that belong to the same market and other products. However, the identification of goods or services that could be substitutes for those offered by the undertakings involved in the merger is always a necessary stage in the reasoning of the *Autorité*.

518. When it is not essential to delineate the relevant markets in order for the *Autorité* to issue a decision, in particular when it appears that the merger is not likely to harm competition, regardless of the segmentation examined, the *Autorité* can, in its decision, leave open all or part of the issue of the precise delineation of the relevant markets.

2. ANALYTICAL CRITERIA

519. A forward analysis is conducted in order to delineate the relevant markets within the framework of merger control: it takes account of current developments or expected developments within a reasonable time frame, which depends on the specific characteristics of the sector. It therefore differs from the anticompetitive practice analysis, which describes the practices in a market and which is therefore retrospective.

520. The substitutability of various products or services from the point of view of demand is the decisive criterion when delineating a relevant market. The *Autorité* can, however, take into account the substitutability of supply in order to delineate the relevant markets, insofar as the characteristics of the supply can explain the behaviour of demand. Taking into account the substitutability of supply in order to expand to two segments, A and B, a market which, when defined solely from the point of view of demand, would be limited to segment A only, is justified insofar as it can impede the exercising of a market power by a monopoly limited to segment A. The fact that most of the suppliers in segment A are also present in segment B may, in some cases, suggest that this substitutability of supply is sufficient to be able to group them together in the same relevant market. Moreover, the marketing strategies used by undertakings, such as product differentiation or differentiated distribution, can have a direct impact on substitutability from the point of

view of the clients and create a distinction between the relevant markets.

> **Example 1** : in Decision 10-DCC-21 of 15 March 2010, the *Autorité* considered that the fact that most canned mushroom producers do not produce any other type of vegetable demonstrated the specific nature of this type of production.
>
> **Example 2** : in Decision 12-DCC-42 of 26 March 2012, the *Autorité* considered that since farmers used the country silos indiscriminately to store all types of grains (cereals, oleaginous crops, protein crops), there were grounds to conduct a competitive analysis of a single grain elevator market encompassing these different products.

521. The possibility for the suppliers present in segment A only to quickly and easily adapt their offering to the products and services in segment B, due to the proximity of segments A and B, can also be taken into account and lead to the conclusion that supply-side substitutability justifies expanding the market to include segments A and B. This proximity can be taken into account either at the market delineation stage or at the stage of analysis of the potential competition exerted on suppliers in segment A by suppliers in segment B.

> **Example:** in Decision 09-DCC-67 of 23 November 2009, the *Autorité* noted that breaded poultry meat product manufacturers that supply the out-of-home catering sector could easily shift their supply to own-brand label products intended for supermarkets and hypermarkets.

522. The *Autorité* takes into account, in its analysis, previous merger control decisions by European and national competition authorities relating to the relevant markets or, when it deems it appropriate, delineations of relevant markets established in decisions on anticompetitive practices and in the opinions of sectoral regulatory bodies. However, developments on markets can render a previous delineation obsolete, for example when new products emerge or when the markets have become international, or as a result of major technological developments. That is why the *Autorité* reviews whether the past decisions and analyses are still relevant and may sometimes have to delineate the relevant markets differently. In many cases, past decisions have left open the issue of the exact delineation of the markets since, even based on the narrowest delineation, the merger did not raise any competition concerns. The proposed delineation is therefore only an initial approximation, which must be clarified if necessary based on the foreseeable concerns in a particular case.

523. Performing the hypothetical monopolist test requires knowledge of simple price elasticity of demand and the cost margins of the hypothetical monopolist considered at each stage

of the analysis and, possibly, the price elasticities crossed with other products or services if there are grounds to expand the relevant market to include these. When the data required to conduct this test rigorously are not available, the *Autorité* assesses the substitutability of the products and services by analysing all of the quantitative and qualitative indicators available. Lastly, in certain cases, it is also possible to make use of quantitative methods to clarify the delineation of the relevant markets.

3. TAKING INTO ACCOUNT QUALITATIVE AND QUANTATIVE INDICATORS

524. To collect these indicators, the *Autorité* draws on:

- studies, data and internal analyses communicated by the notifying party;
- those obtained from other undertakings within the framework of a market test;
- all public information or market studies and analyses available;
- market studies and analyses conducted as part of the investigation.

a) Delineation of the markets for products or services

525. Given the diversity of the products and services, it is not possible to draw up an exhaustive list of indicators that the *Autorité* may take into account when delineating these markets. However, the most widely used characteristics used to conduct this analysis are presented below.

Physical characteristics of a product or service

526. These are essential factors in clients' choices and, thus, are analysed to understand their behaviour.

527. However, products or services that are physically or technically different, but have the same function or intended use or cater for the same need, may be considered by clients to be substitutable.

> **Example** : in Decision 10-DCC-98 of 20 August 2010, the *Autorité* considered that there was substitutability between the different types of aggregates, as they could be used indiscriminately for certain industrial applications. This substitutability was, however, imperfect, as the regulations imposed the use of one category of aggregates for certain asphalt concretes for roads.

528. Conversely, products or services with physical or technical similarities, but which do not have the same use, do not have to belong to the same market.

Example: in Decision 10-DCC-110 of 1September 2010, the *Autorité* considered that cheese used to make *raclette* could not be replaced with another pressed uncooked cheeses insofar as cheese used to make *raclette* was mainly eaten warm as a main course in winter whereas other pressed uncooked cheeses were primarily cheeseboard cheeses served at the end of a meal in all seasons.

Client needs or preferences

529. When the products are marketed to clients with different needs or preferences, the competition authorities may have to delineate separate markets by client type. Sometimes it is certain characteristics of the product itself that differ depending on the type of clients for which it is intended, but the specific characteristics may also only relate to how the product is marketed, delivered, packaged and may warrant the application of different prices.

Example 1: as regards food production, a distinction is usually made depending on whether the products are intended for supermarkets and hypermarkets, out-of-home catering or agri-food industries. The *Autorité* may also take account of the subjective preferences of the clients, including when the characteristics of the products are fairly similar.

Example 2 : in a letter of 11 February 2004, the French Minister of Economy took account of the differentiated and heterogeneous nature of magazines for young people and the oligopolistic structure of supply. The minister listed the magazines published by competitors and which constituted substitutes that were similar to or dissimilar from those of the parties. This method of analysis helped to group together magazines for young people by target age group and topic focus of the magazine. The categories thus identified do not equate to relevant product markets, but instead to methods of grouping together magazines based on their level of substitutability (assessed according to price, format, editorial content, positioning, time on the market and paid circulation, which are used to measure the reputation of the publication, etc.) in order to determine which magazines demand would shift towards in the event that the new entity were to make a unilateral price increase for one category of magazines.

Price differences

530. A substantial and durable price difference between different products can be an indication of imperfect substitutability of these products and, therefore, of not belonging to the same market.

531. The price levels are, however, only an indicator, which is to substantiated based on the other characteristics of the market. This is because significant price differences do not necessarily suffice to demonstrate a lack of substitutability, as a price increase to one of the products can lead to a shift to another product in another price range. Thus, products can have different prices and, nonetheless, belong to the same market, particularly when they are vertically differentiated.

> **Example :** in Opinion 06-A-20 of 20 October 2006, the *Conseil de la concurrence* noted that "Scottish salmon has a better image and is regarded as being of better quality than Norwegian salmon among consumers, who are prepared to pay a higher price for this perceived higher quality". It did, however, conclude, after analysing and weighting all of the criteria likely to create a market distinction, that "the fact that a group of consumers may not consider that all of the products that cater for the same needs are substitutable does not exclude the possibility of these products belonging to the same relevant market. Given the stability and interdependency of the relative prices, the lack of a true objective difference and the possibility for a sufficient share of buyers to shift all or part of their demand from one origin to another, the *Conseil* considers that the different origins of farmed Atlantic salmon belong to the same relevant market. "

532. Similarly, undertakings that have information about the purchasing power of their clients can charge different prices to the different categories of clients.

Distribution channels

533. The distribution strategies of companies can have a direct impact on the substitutability of products from the point of view of their clients and can therefore create market distinctions. The progressive transition to paperless transactions to the benefit of distance selling means that the analysis of such a segmentation criterion is particularly relevant. The *Autorité* thus analyses on a case-by-case basis the relevance of segmenting distance selling and physical selling in stores. The *Autorité*'s assessment of the competitive pressure exerted by online sales on physical stores is described in Appendix D of these guidelines.

Commercial positioning

534. The products, particularly foodstuffs, sold by the mass retail distribution sector can be marketed under a private label, a retailer's own-brand label, a hard discounter label or an economy products label. The substitutability of the products sold under the above labels differs depending on the products concerned and the *Autorité* conducts a case-by-case analysis in order to determine if they belong to different product markets or not.

535. In the mass retail distribution sector, the supply chain usually comprises two levels: an upstream level bringing together suppliers and distributors and a downstream level

bringing together distributors and end consumers. In order to determine to what extent the upstream supply market must be segmented according to the commercial positioning of the relevant products, the *Autorité* takes account of the supply process itself and the characteristics of the supply. Thus, the purchasing of own-brand labels is subject to specific tenders based on specifications managed by the distributors, which tends to distinguish them from private labels. However, on certain markets, manufacturers of private labels also manufacture own-brand labels while, on others, the supply of own-brand label products and the supply of private labels are separate. The fact that the same suppliers manufacture both private labels and own-brand labels can be an indicator of the substitutability of supply and must be taken into account. The *Autorité* also takes account of the fact that the competitive pressure that can be exerted by suppliers of private label products and own-label products on each other is strongly influenced by the behaviour of consumers on the downstream markets and, therefore, by the substitutability of the various products from the consumers' point of view. Negotiations between the distributors and their suppliers of private label products and own-label products take place within a different competitive context depending on the degree of differentiation of the products in terms of taste, quality or packaging and depending on the reputation of the private labels. The rate of penetration of the own-brand labels for a given product range, the level of the investments in the advertising of private label products and the composition of the products are useful indicators for evaluating the distinctive nature of private label products.

Example : in Decision 18-DCC-95 of 14 June 2018, the *Autorité* considered that the substitutability of private labels and own-brand labels with each other was limited on the supply side due to the expenditure allocated to private labels and the differences in terms of variable costs, which made the transition from the manufacturing of own-brand labels to private labels complex. On the demand side, the significant price differences between private labels and own-brand labels and the low shift rate observed meant that it was not possible to conclude that private labels and own-brand labels are substitutable. Segmentation of private labels and own-brand labels could therefore not be excluded in the market for ready meals

Legal environment

536. The existence of a legal standard or a specific regulation is also likely to influence demand-side behaviour insofar as it can influence the price of products, their quality or the perception of the products among demanders.

Example 1 : in Decision 10-DCC-198 of 30 December 2010, the *Autorité* considered that the analysis of the demand for urban and interurban transport from public authorities should take account of the specificities of the tenders, the conditions for obtaining these contracts being the decisive factor in achieving effective competition between transporters.

Example 2 : in Decision 10-DCC-51 of 28 May 2010, the *Autorité* considered that the competitive analysis of the market for the supply of sugar cane should take account of the specific rules of the European "sugar" regulation and the tripartite convention between manufacturers, growers and the State.

b) Delineating geographical markets

537. As for the definition of the markets for products or services, the analytical framework applicable to the geographical delineation of the markets is that of the hypothetical monopolist test, which is designed to assess the competitive pressure exerted by suppliers located in more or less remote geographical areas. It is within this conceptual framework that the *Autorité* analyses the different qualitative or quantitative information that could be used to estimate the propensity of clients to shift to suppliers located in other geographical areas.

538. In order to delineate the geographical scope of the markets, the *Autorité* assesses the reality of the flow of trade, the distance actually covered by the suppliers or by the demanders to the point of supply and demand, the availability of the relevant goods for consumers in a geographical area, the transport costs and the price differences from one area to the next. It may use the data communicated by the notifying party and the results of market tests or surveys.

539. The markets thus defined are sometimes very small geographically speaking (a radius of a few dozen kilometres for ready-mixed concrete or asphalt concretes, for example). Conversely, the effects of European harmonisation, company mergers and the globalisation of trade are leading increasingly to the definition of European, or even global, markets.

540. Some markets can also be subject to analysis at several levels, in particular national and local level.

Example 1 : in Decision 09-DCC-16 of 22 June 2009, the *Autorité* confirmed that the competitive analysis of the retail banking markets and certain commercial banking markets, involving small and medium-sized enterprises (SMEs), was conducted both nationally and locally. Indeed, it considered that the market power of banks depended firstly on the size of the groups, as numerous banking services are characterised by economies of scale and of scope that work in favour of banks that have very broad customer bases) and, secondly, on their proximity and on the quality of their relations with their customers. Moreover, contrary to what was observed by the European Commission on other national markets, the *Autorité* noted that these markets, in France, exhibit a certain amount of geographic heterogeneity as regards both the locations of the various groups and also the price conditions applied within the same group.

Example 2 : in Decision 16-DCC-111, the *Autorité* noted that the operators that were active in the retail market for household appliances developed nationwide sales strategies, but this strategy was then tailored at local level to take account of the specific characteristics of each catchment area. It thus conducted a market analysis of the retail sale of household appliances at both local and national level.

541. In order to delineate the markets geographically, various characteristics listed below may be taken into account by the *Autorité*.

Transport costs

542. Physical constraints can be linked to the cost of transport added to the value of products, as is the case with heavy products. Thus, in Judgment 91- 14.295 of 29 June 1993, the *Cour de cassation* (French Supreme Court) confirmed the analysis of the *Conseil* and the Court of Appeal in noting "that the tiles and bricks manufactured in the region of Alsace" cannot be replaced by the others "due to" the restrictive impact of the cost of transport "on heavy, low-value construction materials".

Distance or time travelled by consumers or buyers

543. This can be an important factor in the delineation of geographical markets, particularly when these markets are limited to a local area. In which case, the analysis can be based on the "catchment area" of the stores, particular as regards the retail distribution or delivery of heavy materials. A theoretical geographical area is delineated, which is calculated on the basis of a travel time determined for a radius around the relevant store (referred to as an "isochrone" area), from which it is assumed most of the client base is drawn, even though it cannot be excluded that suppliers located outside this catchment area that exert a sufficiently significant competitive constraint may be included in the geographical market.

Example : as regards food retail distribution, the competitive conditions between hypermarkets are analysed successively in two different areas:

– a market where consumer demand meets the supply by supermarkets and equivalent forms of business located less than 15 minutes by car from the target store. In addition to supermarkets, these latter forms of business may comprise any hypermarkets located close to consumers and discount stores;

– a second market where consumer demand meets supply by hypermarkets located less than 30 minutes by car from the target store.

544. Nonetheless, in order to take account of the threshold effects that these isochrones can create, the *Autorité* usually supplements this analysis by taking into account, where applicable, the stores in the immediate vicinity of the boundary of the area, for example those located less than 2 minutes from this boundary and which therefore constitute the "border" of the area.

545. The evaluation of the travel distance or time can be weighted according to the characteristics of the road network, the frequency of the travel, the attractiveness of a sales outlet, based on the size of the latter, the extent of the different product ranges proposed and the quality of the infrastructure associated with it (other services close to the place of sale, parking). The size of the catchment areas inside Paris city is therefore limited to a radius of 300 to 500 metres due to the travel constraints and the characteristics of the stores. The specific topographical features of the areas studied can also be taken into account in the analysis, for example when these areas are located in the French overseas territories and communities.

546. However, this catchment area can also be assessed based on the actual behaviour of the consumers in a given area, which is determined using the information collected by the sales outlets relating to the location of their clients, in particular via loyalty programmes. The real catchment area of a sales outlet can thus be assimilated with the area that groups together the consumers that account for a certain percentage of the turnover of this sales outlet or, failing this, a certain percentage of the client base of this sales outlet. The past decisions of the *Autorité* generally hold that the catchment area of a store can be limited to the area where the clients that account for 80% of the store's sales actually live or, failing this, the area where 80% of its clients live. The percentage of consumers not taken into account for the analysis equates to a very occasional and non-meaningful client base, some of whom sometimes live a long way from the sales outlet: they may be one-off clients that are "passing through". This "real footprint" method provides an accurate snapshot of the clients that regularly shop at the store and, by extension, of a catchment area.

547. However, this method cannot delineate the extended area comprising stores that are not in the chosen catchment area, but which may, in the event of price increases or a deterioration in the quality of the services provided by the store in question, constitute alternative offers which consumers may opt for. In this respect, the calculation of the market shares of the local catchment areas can be sensitive to threshold effects. The *Autorité* checks whether it is necessary to include competitors located outside the identified catchment area, but which exert competitive pressure on the relevant store.

> **Example 1** : in Opinion 12-A-01 of 11 January 2012, the *Conseil de la concurrence* considered that the catchment areas of the food distribution sales outlets located in the outer districts of Paris should include hypermarkets located in the suburbs that exerted competitive pressure on these sales outlets.
>
> **Example 2** : in Decision 16-DCC-111 of 26 July 2016, the *Autorité* considered that stakeholders located on the edge of certain catchment areas did indeed exert competitive pressure on the target store even though the market shares estimated by the standard method did not reflect this. The *Autorité* therefore included these stores in the relevant catchment areas.

548. It can also use more sophisticated methods to address this problem and provide additional clarifications. Thus, in order to assess the effects of the merger, it is possible to calculate the market shares from the point of view of each of the real or hypothetical clients in the catchment area being analysed (i.e., in an area focused on this client and with an identical radius to that of the catchment area), and then aggregate these market shares based on an appropriate weighting.

> **Example :** in Decision 20-DCC-38 of 28 February 2020 on a merger in the healthcare clinics sector, the market shares were calculated taking into account the patients living in the relevant geographical area and incorporating the clinics that said patients attended, including the clinics that were not located in this geographical area (except for the clinics only visited on a marginal basis). The *Autorité* did not, however, take account of the hospital stays of patients that did not live in the relevant geographical area even if the clinic was located in this geographical area.

Categories of demanders

549. The scope of the geographical market can vary according to the categories of demanders. Demand from undertakings can therefore be directed at suppliers located in a bigger geographical area than the one determined by demand from individuals. The same can apply depending on the size of the undertakings.

Example : in the business travel sector, though the geographical market is national for SMEs, it could be larger for multinationals insofar as they seek a single supplier for the whole of their group that is capable, through its service delivery, of covering several European countries ("one stop shopping").

Legal or regulatory restrictions

550. Some markets are geographically limited by legal or regulatory restrictions.

Example : in Decision 10-DCC-198 of 30 December 2010, the *Autorité* considered that the specifications of the tender procedures, their publication in newspapers in the French language and the bid deadlines constituted obstacles to the entry of foreign competitors on urban public transport markets other than in very large cities.

551. Applicable national standards can be a criterion used to delineate markets.

Example : in Decision 09-DCC-54 of 16 October 2009, the *Autorité* considered that the delineation of the railway services market should take account of the French regulatory framework, where licences to operate were not issued for the whole network, but instead line by line. It was therefore possible for the relevant scale of the analysis to be the railway line rather than the national network.

Subjective preferences of clients

552. Subjective considerations relating to the behaviour of demand, such as regional or national preferences or attachment to brands, explain the fact that certain products from different geographic origins are not, from the demand point of view, substitutable for local products. The cross elasticity of demand between two products can therefore differ from one geographic area to another because of local habits.

Example 1: in letter C2005-12 of 27 February 2006, the French Minister of Economy considered that *foie gras* was a local product consumed uniformly across France and that, consequently, the downstream distribution market for *foie gras* was national in dimension.

Example 2 : in Decision 13-DCC-101 of 26 July 2013, the *Autorité* considered that, in the market for construction materials for load-bearing walls, there was a regional brick market in Aquitaine due to the very clear local preference for this construction material compared to the rest of France.

4. QUANTITATIVE METHODS

553. In addition to taking into account the qualitative and quantitative indicators mentioned above, the delineation of relevant markets can draw on quantitative methods that measure the degree of substitutability of the various products or services or the market power that a supplier holds in respect of a set of products in a given area.

554. The hypothetical monopolist test provides direct information about the relevance of the market under consideration. At each stage of the reasoning in respect of the market under examination, the profitability of a price increase from the point of a hypothetical monopolist is calculated based on the price elasticity of its demand (which sometimes has to be calculated based on the cross price elasticity for the goods grouped together in the candidate market) and its contribution margin. If there is no profitability to such a price increase, this can indicate that products outside the market under examination are sufficiently substitutable for those being studied, such that clients prefer to shift their consumption to these products rather accept the price increase. The relevant market must therefore be expanded and the closest substitute products must be identified and then included in the new market to be examined in the next stage of the test. This selection can be made by comparing the cross elasticities or the diversion ratios to other products or services. The diversion ratio of a product A to product B indicates the fraction of sales lost by product A to product B subsequent to a low, but permanent increase in its price. The higher this diversion ratio, the closer substitutes the products are. The calculation methodology used for these diversion ratios is presented below.

555. This test may require the collection of a large quantity of data. The price elasticities can be estimated econometrically or, alternatively, evaluated based on existing economic literature, market studies or surveys of purchasers.

556. The hypothetical monopolist test method is also only valid when the observed prices, on the basis of which the price increase simulations are performed, are sufficiently competitive prices. It is more difficult to use this test if the prices observed are not close to the competitive prices.

557. A typical example (known as the "cellophane fallacy"[85]) is a monopolist or an oligopolist that is perfectly collusive in respect of the product that is being checked to determine whether it constitutes a relevant separate market or not. A monopolist is capable of charging its monopoly price, i.e., the price that maximises its profit. At this price, any price increase is likely to reduce its profit. The test therefore leads automatically to expanding the market beyond its true dimension and therefore to underestimating the market power of the new entity and the effects of a merger.

[85] In reference to the case *United States v. E. I. DuPont de Nemours & Co., 351 US 377* in 1956 in which the United States Supreme Court ruled in favour of Du Pont and its subsidiary Cellophane, which had been sued for abuse of dominant position ("monopolisation") by the US Justice Department pursuant to the Sherman Act. The reasoning of the Supreme Court has since been regarded to a great extent as flawed.

558. The price level observed could also be higher than the expected price if there were no merger (which is the appropriate counterfactual), for example due to the future entry of competitors to a recently liberalised market; in which case, the price reduction in this market could lead to clients no longer considering less close substitutes as relevant alternatives. These must therefore not be included in the market, contrary to what would be recommended for a hypothetical monopolist test performed on the basis of the current price level.

559. Lastly, the existence of a case of "cellophane fallacy", consisting of wrongly expanding the relevant market and minimising the market power of the parties in that market, could lead to underestimating the vertical and conglomerate effects of a merger.

560. If the hypothetical monopolist test cannot be performed rigorously, then other quantitative methods can be used to determine the delineation of the relevant markets. In some cases, the degree of substitutability or the proximity of the products can be assessed directly based on the calculation of the diversion ratios.

561. The observation of price changes can also provide valuable quantitative indications of product substitutability, as different products catering for the same demand may be priced differently, but these should in theory change in a similar fashion over time. The data used in these correlation studies must cover a sufficiently long period (for example, at least two years for monthly data). They must be adjusted for seasonal variations, which can affect supply and demand in certain markets, and for changes in common cost factors.

562. Quantitative indications of the degree of substitutability of the products can also be obtained by analysing the impact of shocks that have affected the market, such as the entry of a new competitor, the launch of a new product, a fluctuation in exchange rates or a sudden increase or fall in the production capacity of a company in the market. However, a shock that leads to most or all of the demand shifting to other products could generate diversion ratios that are different from those that would be generated from a shift in the demand of the consumers that are most sensitive to prices as a result of a price increase of 5 to 10%. Thus, an analysis of the effects of the merger based on an excessive shock could lead to overestimating the portion of clients that would choose to shift their demand to competing products in the event of a price increase of 5 to 10%.

563. For all quantitative modelling, the parties are invited to describe the methodology in detail and append the data used and, more generally speaking, to follow the recommendations of the *Autorité* in this field.

B. COMPETITIVE ANALYSIS

1. IDENTIFICATION OF THE CHARACTERISTICS OF THE RELEVANT MARKETS

564. After defining the relevant markets, the *Autorité* identifies the main characteristics of the markets affected by the transaction in order to be able to assess whether the new entity will have significant market power. As recalled by the Commission in its guidelines on the assessment of horizontal and non-horizontal mergers, market power is to be understood to mean "the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition"[86].

565. The *Autorité* performs this analysis on a case-by-case basis in light of the circumstances of the case. The main characteristics usually identified are listed below. After calculating the market share of the parties to the transaction and assessing the degree of concentration of the relevant market (a), the *Autorité* identifies the characteristics of the operators present in the market (b), of the products and services available on the market (c) and of the clients or suppliers (d). The functioning of the market, resulting from some of its intrinsic characteristics, are also relevant properties when assessing the effects of a merger (e). Lastly, the *Autorité* investigates whether there are any potential competitors that could restrict the new entity (f).

a) Market shares of the parties and degree of concentration of the market

566. The market shares of the parties and their competitors and the degree of concentration of the relevant market provide an initial indication that is helpful for determining the market power of the new entity.

Market shares

567. The higher the market share of the new entity in relation to that of its competitors, the greater the probability it will confer or strengthen a market power.

568. The *Autorité* also refers to the most recent market shares available. It can take account of the market shares over the last two years, for example if they have fluctuated significantly. The market share of the new entity is calculated by adding up the market share of each of the parties. Adding up the market shares does not, however, take account of shifts to those competing for the demand that used to go to the parties. Although the intensity of this shift can be assessed qualitatively based on the type of competition between the undertakings prior to the merger, the estimated figures of the effect of this shift requires more sophisticated quantitative studies. Where necessary, this estimation can be adjusted to take account of market developments, in particular when the market is developing rapidly. The *Autorité* uses the market shares communicated by the parties in their notification, which can, where reliable sources are not available, be based on best estimations. It can, however, challenge the estimations using third party sources, in particular in the wake of a market test.

[86] Paragraph 10.

569. The value and volume of the market shares are analysed based on the functioning of the market.

> **Example :** in Decision 18-DCC-18 of 1 February 2018, after considering that the criteria relating to the number of advertisements, turnover and audience were all relevant, the *Autorité* considered that the value of the market share was the best indicator since it reflected the performance of an operator, which depends on the size and quality of its audience, and the number of advertisements published on the portal. However, it only used turnover linked to the sale of products and services relating to the posting of property classifieds, rather than advertising revenue, which does not reflect the quality of the audience of estate agencies.

570. For certain markets, the *Autorité* uses the relevant volume indicators, such as surface area in m² in the distribution sector or the number of concessions for the sale of new vehicles. In the banking and real estate sectors, the *Autorité* has also estimated the market shares of the companies based on the number of agencies they have.

571. In order to take account of the actual functioning of the market, the method for calculating the market shares can be adjusted.

> **Example 1 :** in Decision 14-DCC-160 of 30 October 2014, the *Autorité* considered that a sales outlet-focused approach did not sufficiently reflect the reality of the market. The calculation of the market shares was revised by weighting the number of shops run by the operators active in the market for the distribution of mobile phone products and services against the average number of sales by sales outlet in order to reflect the specific nature of each network of shops and, ultimately, their ability to attract, recruit and retain consumers.
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> **Example 2 :** in Decision 13-DCC-90 of 11 July 2013, the *Autorité* applied the hypothetical consumer method to the food retail distribution sector in order to estimate the position of the new entity. This method entails calculating the market shares of the companies from the point of view of consumers spread evenly across the whole of the area being analysed (in this case, the city of Paris). This method paints a different picture to the one resulting from the usual analysis of the catchment areas around each store since it assesses the range and diversity of supply enjoyed by consumers depending on their location.

572. The calculation of the market shares can sometimes require significant revisions in order to take account of the diversity of the activities of the companies present in the market.

> **Example 1** : in Decision 16-DCC-11 of 27 July 2016, the *Autorité* disregarded the usual surface area- based calculation of market share, which, according to it, led to underestimating the influence of each of the operators in the catchment areas. It used an estimation of the value of the market shares, which were adjusted to take account of online sales. Considering that pure players in the online sales sector were exerting fairly homogeneous competitive pressure across France, the *Autorité* estimated the weight of online sales operators in the local catchment areas based on the assumption that they were equal to their national market shares.
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> **Example 2 :** in Decision 18-DCC-95 of 14 June 2018, in order to accurately assess the influence of the manufacturers of products sold as private labels and own-brand labels, the *Autorité* considered that, when calculating the market shares, own-brand label products should not be treated differently to private label products and therefore calculated the market shares by allocating to each operator that manufactured both own-brand label products and private label products the sales made under its own private label and the sales made under the retailer's own brand.

573. Lastly, the market share of the new entity is not always best suited to evaluating its influence within a market.

> **Example :** in Decision 17-DCC-11 of 30 January 2017, in light of the existence of central purchasing bodies that offer its members identical purchasing conditions, in addition to taking into account the market share of the retailers involved in the merger, the *Autorité* also took into account the market share of the central purchasing bodies to which they belonged.

Degree of market concentration

574. The risks of harm to competition are usually greater on a concentrated market. To assess the degree of market concentration, the Herfindahl-Hirschman Index (HHI) can be calculated. This index is also equal to the sum of the squares of the market shares of each of the undertakings present in the market. When it is not possible, due to the lack of information, to include in the calculation all the undertakings present in the relevant market, only use the main operators whose market shares can be identified, as the impact of small market players on the value of the HHI is limited. The index level after the transaction and its differential compared to the previous situation (called delta) are taken into account.

b) Characteristics of the undertakings

575. If significant market shares are at play, the *Autorité* assesses the main characteristics of the undertakings active in the market under examination and the constraints likely to influence their competitive behaviour. These different elements are used to assess the intensity of the competitive pressure on the new entity.

Size of the undertakings and scope of their activities in the relevant market

576. The *Autorité* can analyse the volume of goods and services produced by the undertakings active in a market in order to assess the consequences of the influence of certain operators on the functioning of the market. It also assesses the diversity of the products or services offered (products or services in the same range or a different range) as well as the power of their brands.

Activities of undertakings in related markets

577. The *Autorité* checks whether undertakings are also active, simultaneously or otherwise, in other markets, either because they are vertically integrated or because they sell different goods but which belong to related markets.

Structure of costs and level of undertakings' margins

578. These indicators are likely to influence the profitability of an activity in a market and, therefore, the incentives for competitors to increase their prices. For example, the existence of fixed costs in a given economic sector generates economies of scale that are likely to constitute an incentive to economic operators active in the market to increase their production in the event of an increase in demand.

Production capacities

579. An analysis of available production capacities in a market is used to assess the competitive constraints weighing on the undertakings. This is because the existence of unused production capacities in a market is a source of additional competitive pressure that could, where applicable, discipline the new entity. The *Autorité* also assesses the possibility for the competitors of the parties to develop their production capacities.

> **Example :** in Decision 13-DCC-101 of 26 July 2013, the *Autorité* noted that the development of new production capacities by competitors already active in the market under examination was unlikely due to certain barriers to the expansion of business linked mainly to access to raw materials, the capital costs of a factory and the complexity of the relevant products.

Behaviour of the undertakings

580. In addition to the intrinsic characteristics of the undertakings, the *Autorité* analyses their current or past behaviour, including that of the parties. It checks, for example, whether there are undertakings in the market likely to discipline the new entity through their behaviour.

> **Example** : in Decision 18-DCC-18 of 1 February 2018, the *Autorité* analysed the recent entries to the online property advertisement market. It considered that the commercial success of the operators that recently entered the market had to be put in perspective since most of the new entrants do not have a sufficient audience or a sufficiently large number of advertisements to be assured of maintaining their activity over the long term. It did however consider that the Bien'ici website should be regarded as a credible new entrant. Its aggressive pricing policy, priority access to the advertisements of its shareholders and the innovative services that it offers enabled it to increase its volume of classifieds and the number of visitors. However, the *Autorité* considered that the ability of Bien'ici to exert real competitive pressure on the other operators should be put in perspective due to the difficulties encountered by the site in securing a sufficient reputation in relation to the incumbent market operators.

581. The existence of a maverick in the market being examined, which adopts aggressive competitive behaviour in respect of its competitors, is an important factor that the *Autorité* can include in its analysis of the effects of a transaction.

Ties between the undertakings

582. The existence of ties between undertakings in the market being examined, such as the existence of interlocking directorships, or structural ties, such as cross-shareholding or shareholdings in joint ventures, are likely to influence the behaviour of the economic operators in a market and must be factored into the analysis of the effects of the transaction.

583. The *Autorité* also takes account of the existence of cooperation agreements, particularly of a horizontal nature, between the undertakings.

> **Example** : in Decision 15-DCC-53 of 15 May 2015, the *Autorité* highlighted the existence of LPG storage capacity swap contracts concluded by the main operators in the sector and which had a structuring effect on the organisation of the market.[87]

[87] In a Judgment of 6 July 2016, the French Administrative Supreme Court (*Conseil d'Etat*) partially annulled Decision 15-DCC-53 of the *Autorité de la concurrence* of 15 May 2015 because it did not contain any analysis, in respect of the small bulk LPG distribution market, of the effects of the ability of the entity created by the merger to withdraw from the contract network for the swapping of LPG volumes in local markets in which either UGI or Totalgaz enjoyed a dominant position prior to the merger transaction, and because it did not include a sufficient commitment to prevent the anticompetitive effect of the merger on the LPG swap contract system in some areas.

Expansion capacities or risk of decline of the undertakings

584. When it assesses the competitive pressure exerted on the new entity, the *Autorité* takes account of the expansion capacities or, conversely, the risk of decline of the undertakings present in the market being examined.

> **Example** : in Decision 17-DCC-92 of 22 June 2017, the *Autorité* considered that Altice Group, a new entrant in the market, was likely to exert increasing competitive pressure in the future on the markets for the acquisition of broadcasting rights for American films and series for pay TV. It also factored in its recent entry on to the market for the edition of premium channels, particularly cinema channels, through its publicised creation of a pay TV channel. Lastly, the *Autorité* considered that the competitive pressure exerted by Altice Group in these markets was likely to increase due to the significant financial resources at its disposal and its desire to strengthen its convergence strategy. However, it ruled out the existence of sufficient competitive pressure exerted by Altice Group in the markets for the acquisition of broadcasting rights of French films for pay TV. The *Autorité* considered that the information relating to its activity in this market was limited to a fairly low number of projects and was therefore insufficient, on the date of the decision, to attest to the exercising of sufficient competitive pressure on Canal Plus Group in the medium term.

c) Characteristics of the products or services

585. The intrinsic characteristics of the relevant products or services are essential parameters in the competitive analysis conducted by the *Autorité*.

586. Firstly, in respect of product markets, the effects of a merger are assessed differently depending on their position in the production chain. If it is an essential input used to develop a finished product, the merger is likely to have an effect in markets other than the one in which the parties are active.

587. Secondly, the *Autorité* identifies the characteristics that are specific to the relevant products or services and which are likely to restrict trade. For example, the existence of significant transport costs or physical properties (hazardous or unstable products, non-perishable products likely to be stored) are likely to exert an influence on the functioning of a market. The *Autorité* also checks if there is any infrastructure in the market that plays a key role, for example when the infrastructure is essential or is an essential point of entry on the national territory.

Example : in Decision 15-DCC-53 of 15 May 2015, the *Autorité* considered that the new entity would have sole control of the two main marine storage facilities on the Northern coast of France and the only import storage facility in the South-west, which provided it with major loading points for its medium and large bulk LPG tankers[88].

588. Thirdly, the degree of differentiation of the goods and services available on the market is used to assess the competitive proximity between the parties and their competitors. The differentiation or homogeneity of the goods or services affected by the transaction depends on their degree of substitutability, which can be assessed via a qualitative analysis based on a body of evidence, or quantitatively by calculating the diversion ratios of the different goods or services available on the market (the method of calculating these diversion ratios is presented below).

589. The diversion ratios can be calculated in different ways:

– based on the price elasticities and cross price elasticities of the demand for the different products. These elasticities can themselves be estimated econometrically, for example using "checkout"-type data;

– directly via surveys of consumers or clients. Particular attention should be paid to formulating the questions, as the results obtained can be sensitive to this. In the event that the notifying party considers using a survey, it is invited to contact the case handler to discuss the methodology used;

– by monitoring a panel of consumers over time. However, this type of data does not usually guarantee that any changes in consumption behaviour are indeed due to price fluctuations and therefore only provide a fairly inaccurate measurement of the real diversion ratios.

[88] In a Judgment of 6 July 2016, the French Administrative Supreme Court (*Conseil d'État*) partially annulled Decision 15-DCC-53 of the *Autorité de la concurrence* of 15 May 2015 because it did not contain any analysis, in respect of the small bulk LPG distribution market, of the effects of the ability of the entity created by the merger to withdraw from the contract network for the swapping of LPG volumes in local markets in which either UGI or Totalgaz enjoyed a dominant position prior to the merger transaction, and because it did not include a sufficient commitment to prevent the anticompetitive effect of the merger on the LPG swap contract system in some areas.

Example 1 : in Decision 16-DCC-111 of 27 July 2016, the *Autorité* made use of a survey conducted by Fnac group to evaluate demand shifts to competitors under various scenarios in order to evaluate these diversion ratios.

Example 2 : in Decision 18-DCC-95 of 14 June 2018, the *Autorité* sent supermarkets & hypermarkets questionnaires to find out whether and how they would adjust their purchasing behaviour if one of the parties were to increase the price of its products.

d) Characteristics of the clients or suppliers of the parties

590. The behaviour of an undertaking is also likely to be influenced by its contract partners. The *Autorité* therefore takes an interest in the structure of supply and the functioning of the markets in which the clients or suppliers of the new entity are active.

591. The number and degree of concentration of the clients or suppliers of the new entity are important parameters for estimating its market power. The greater the concentration among the clients or suppliers, the less the new entity will be able to free itself from their demands and to act independently.

592. The ability of the clients to discipline the undertakings is greater on a wholesale market than on a retail market. On a wholesale market, the clients are professionals rather than individual consumers. They have better knowledge of the commercial terms and conditions offered by their competitors, which gives them greater negotiating power. Professional clients are also likely to account for a significant share of the market and be able to discipline the new entity. The type of clients with which the new entity is likely to develop commercial ties is therefore an essential factor in the analysis of the effects of the transaction.

593. Lastly, when it analyses the characteristics of a market, the *Autorité* takes account of the sensitivity of demand to price since the less sensitive demand is to price, the less likely the clients are to be able to discipline the competitive behaviour of the new entity. Such a situation is therefore likely to increase the competition concerns generated by a transaction.

Example : in Decision 13-DCC-101 of 26 July 2013, the *Autorité* noted that the level of the variable cost margins of the parties was an indicator of the low elasticity of demand on the market for construction materials for load-bearing walls, which was likely to generate a risk of price increases following the transaction.

e) Characteristics of the market and its functioning

594. The economic and legal characteristics of the market being examined and its functioning are likely to influence the effects of a merger. They may therefore be subject to an in-depth analysis by the *Autorité*.

595. Firstly, the stability of the market makes it easier for undertakings to coordinate their actions, which is likely to exacerbate the anticompetitive effects of a merger. Such stability encourages undertakings to align themselves with any increase in the price of the products or services supplied by the new entity. By correlation, the factors likely to reduce this stability, such as the influence of innovation on the market, are factors that are relevant to the analysis conducted by the *Autorité*.

596. Secondly, the *Autorité* assesses the degree of market transparency, which is also likely to make it easier for companies to coordinate their actions. For example, it checks if there are obstacles to access to certain market data relating to demand or price trends. *A fortiori*, the existence of common pricing rules is likely to create a focal point, which will generate a risk of an across-the-board price increase following the transaction.

597. Thirdly, the nature of the relations between suppliers and demanders is likely to influence the market power of the new entity by making the market under examination more fluid. Thus, the number of transactions in which the new entity is involved, the conditions of negotiation of these contracts (tenders or mutual agreements), the frequency of the contract renewals, the exclusive or selective nature of the networks in which the products affected by the merger are distributed or the term of the contracts are relevant factors used by the *Autorité* to assess the effects of a merger.

Example 1 : in Decision 16-DCC-111 of 27 July 2016, the *Autorité* took account of the existence of selective distribution networks, since these networks were likely to prevent certain competitors of the parties from gaining access to certain products or enable the biggest retailers to obtain the best price conditions or exclusive offers.

Example 2 : In Decisions 14-DCC-50 of 2 April 2014 and 17-DCC-93 of 22 June 2017, the *Autorité* examined the functioning of the market and the contract negotiations between the companies active in the market and identified a risk of conglomerate and vertical effects. It noted, for example, that, in respect of the rights holders, the negotiations on content distribution for pay TV and free-to-air TV involved the same protagonists and were likely to lead to the conclusion of master agreements covering these two types of rights.

598. In particular, the reaction capacity of competitors or parties can be restricted by the long-term nature of the contracts or the existence of significant costs for clients wishing to switch suppliers (due to subscriptions or contracts that are costly to terminate). The restriction of competitive intensity on the market is particularly significant when there are costs that encourage the renewal of these contracts at their term.

599. Fourthly, the regulatory framework applicable to the market being examined is analysed carefully by the *Autorité* since it has a significant influence on its functioning and the behaviour of the undertakings. It can, for example, force companies to adopt certain competitive behaviours and guide the analysis of the effects of a merger.

Example : in Decision 14-DCC-15 of 10 February 2014, the *Autorité* took account of the injunctions imposed on Canal Plus Group within the framework of Decision 12-DCC-100 of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi and Canal Plus Group in excluding certain risks of vertical or conglomerate effects in the markets affected by the merger.

600. Fifth, the *Autorité* assesses whether the relevant market is two-sided. In the event of a two-sided market, the economic equilibrium in one market cannot be assessed independently of the prevailing conditions in the other market. Though potentially separate, both markets operate interdependently, which is a specific feature that can be taken into account either at the market delineation stage or during the analysis of the effects of the transaction on competition and of the efficiency gains.

Example : in Decision 18-DCC-18, the *Autorité* noted, at the stage of definition of the relevant market, that the online property classifieds market had an upstream side, which brings together advertisers and their portals, and a downstream side, which brings together portals and advertisers. After examining the need to analyse the effects of the transaction on a single market or on two separate markets, each of which corresponds to one of the sides of this market, the *Autorité* conducted its analysis on the basis of a single market.

During its analysis of the effects of the transaction, it took account of the specific characteristics of the market, in particular the cross-side network effects. It noted that advertisers have a preference for portals with large audiences and visitors have a preference for portals that display a large number of advertisements, which can change the incentives of the parties to bring in price increases, since a price increase on one side of the market can modify the attractiveness of the other side of the market.

601. Lastly, the *Autorité* checks whether the market being examined is characterised by the existence of current or past coordination, either tacit or explicit, which is likely to occur again and increase the risk of price increases linked to the merger.

f) Sources of potential competition

602. To assess the effects of a merger in a market, the *Autorité* identifies the sources of potential competition that are likely to discipline the competitive behaviour of the new entity. When it is fairly easy to enter a market, it is unlikely that a merger will raise significant competition concerns. The existence or otherwise of barriers to entering the relevant market is therefore an important factor in the analysis. However, it is necessary to ensure that these entries are possible within reasonable deadlines and on a sufficient scale to exert real restraint.

603. The barriers to entry can take very varied forms.

604. Firstly, the entry of competitors on to the market can be made more difficult by barriers linked to regulations, intellectual property protection or access to certain data.

Example 1 : in Decision 13-DCC-90 of 11 July 2013, the *Autorité* considered that the combination of the administrative licensing system for opening a store exceeding 1,000 m² in size and the statutory and regulatory licences required to open a store contributed to hampering the establishment of stores. In the specific case of the Paris market, these barriers to entry were, according to the *Autorité*, exacerbated by the difficulties linked to obtaining a building permit and work permits for land to be built on and the requirements of the land use plan for land that has been built on.

Example 2 : in Decision 16-DCC-111 of 27 July 2016, the *Autorité* identified a set of barriers to entry to the market for the retail sale of household appliances, such as the maturity of the market, the environmental regulations, the scarcity of land and the regulatory requirements for the installation of commercial equipment. It considered that the performance of an online sales activity for this type of products was also confronted with significant barriers to entry linked to the costs of the payment methods and the logistical and marketing constraints faced by potential competitors. The competitors of the parties had also invoked the difficulties faced by new entrants in accessing the products within the framework of selective distribution networks.

605. Secondly, new entries are particularly unlikely due to the risks associated with them. The risk associated with entry to the market increases with the increase in the share of costs, which cannot be recouped in the event of failure. Advertising costs, for example, are sunk costs. The fact that a new market entrant cannot compete effectively without investing significantly in advertising to promote its brand is therefore regarded as a barrier to entry to the market.

Example : in Decision M.833 of 11 September 1997, the Commission noted that "CSDs rely heavily on brand image to drive sales, and companies like TCCC and PepsiCo have established brand loyalty through heavy investments 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. "

606. The *Autorité* also assesses the extent of the fixed costs and the conditions under which they can be recouped, i.e., the combination of market share and time required to recoup the initial investment. The greater the fixed costs incurred during production, the larger the scale of market entry needs to be in order to be profitable. The capital intensity of a profession due its fixed research and development, production or marketing costs, the impossibility of benefiting from sufficient economies of scale to be competitive, or the disadvantages arising from inexperience and a lack of expertise can lead to potential entrants concluding that the sunk costs in the event of failure are insurmountable barriers.

Example : in Opinion 03-A-15 of 25 July 2003, the *Conseil de la concurrence* considered that the investment required to penetrate the cheque processing market was fairly low in relation to the prospects of profitability. It also took account of the major technological development under way in the sector, i.e., the transition to paperless cheque clearance operations, which emerged with the creation of the Cheque Image Exchange (CEI). The *Conseil de la concurrence* considered that this development had two effects: firstly, its existence means that the geographical proximity of the processing centres and the bank branches is increasingly less necessary and national coverage is less important. Secondly, it leads to a reduction in the investments needed to establish a centre, as sorters are no longer needed. The *Conseil de la concurrence* thus concluded that "although the constraints linked to the size of a competitive operator are one of the factors explaining the merger, they nonetheless do not constitute a critical obstacle to access to the market".

607. A product market displays network effects when the overall utility of the product for the clients that use it depends not only on the personal use they make of it, but also on the number of other clients that use this product. Such a network effect is a direct network effect. If the network effects are positive (i.e., if the utility of the product increases as the number of clients using it increases), they can constitute an obstacle that is difficult to overcome for a new entrant.

608. There is an indirect network effect when the value of a good for a user increases as the number and variety of complementary products or the number of other types of users increase.

Example : in a letter of 27 April 2000, the French Minister of Economy noted that such effects play an important role in the air transport sector. Thus, "the fact that a company has an extensive network offering high frequencies and rapid connections structured around a hub can constitute a significant barrier to entry for competing companies that do not benefit from such an attractive network. "

609. In addition, certain advantages enjoyed by undertakings that are active in the market are difficult to replicate for new entrants.

Example 1 : in Decision 13-DCC-96 of 23 July 2013, the *Autorité* considered that, given the importance ascribed by clients to the reliability and accuracy of the advice provided on the market for trade in construction materials (belonging to the following product categories: carcass and masonry, roofing and waterproofing, wood and panelling, interior and exterior joinery, plastering, ceilings, insulation, tools and hardware, bathroom, heating, tiling, landscaping), a new entrant was likely to find itself with a reputational problem relating to the expertise and know-how of its sellers.

Example 2 : in Decision 16-DCC-208 of 9 December 2016, the *Autorité* considered that, despite the absence of regulatory barriers to entry, the supply constraints faced by beef producers under the "Boeuf de Charolles" registered designation of origin to the benefit of the new entity enabled it to seal off access to inputs for any new entrant. It therefore ruled out the existence of competitive pressure exerted by potential entrants who would be likely to discipline the new entity.

610. Generally speaking, the existence of switching costs can not only limit the shifting of clients to other competitors already present in the market, but *a fortiori* also to new entrants.

Example : in Decision 13-DCC-90 of 11 July 2013, the *Autorité* considered that the contractual and capital arrangements between the mass retail distribution groups and their affiliates, in particular the long contract terms or the post-contractual non-reaffiliation and non-competition clauses, are a barrier to entry or to expansion that is critical in areas where one of the parties already has significant economic power.

611. The barriers to entry can stem from the ability of undertakings to maintain very long-term supply and distribution agreements.

612. Identifying a dearth of successful entries is not sufficient to establish the existence of barriers, just as recent entries are not sufficient, in themselves, to demonstrate the absence of barriers insofar as both scenarios can be of an exceptional nature. The existence of past entries can, at the very most, be one indicator that can be compared with the other facets of the analysis.

Example : in Opinion 03-A-15 of 25 July 2003, the *Conseil de la concurrence* considered that the absence of any entries to a market was not sufficient alone to characterise the existence of a barrier to entry, as such a barrier could be the result of a range of other factors. As regards the cheque processing market, establishment of the Cheque Image Exchange (CEI) had given rise to adaptation costs and a reduction in the number of remunerated operations, leading to a fall in profitability for operators.

613. Some of these barriers to entry are easier to surmount for some potential competitors than others. Consequently, the precise identification of potential candidates for entry to the market increases the likelihood of these entries.

614. Lastly, the time frame within which an entry to a market can reasonably be expected to occur is an essential part of the analysis. This time frame depends on the characteristics of the relevant sector, as some sectors are characterised by swifter developments in the competitive situation.

Example : in Decision 18-DCC-18 of 1February 2018, the *Autorité* ruled out the competitive pressure that was likely to be exerted by Amazon and Google on the French market for online property classifieds based on the fact that no fact in the case presented demonstrated that these operators would definitely enter the market in the short term.

2. HORIZONTAL EFFECTS OF A MERGER

a) Nature of the horizontal effects

615. A risk of harm to competition within the meaning of Article L. 430-6 can be established when a merger confers market power on the new entity or strengthens a market power held by one of the parties prior to the merger, i.e., when the merger confers on the new entity the power to obstruct the preservation of effective competition on the relevant market by enabling it to act independently to an appreciable extent in respect of its competitors and clients. The new entity would thus be in a position to significantly increase its prices, reduce the diversity of the products or services available on the market or its pace of innovation.

616. An assessment of the effects of a horizontal merger is not limited to the risk of price increases. It also takes account of the non-price effects likely to occur subsequent to the merger, as a result, for example, of a reduction in the quality of the products sold or less innovation.

Example 1 : in Decision 17-DCC-95 of 23 June 2017, after noting that, in light of the specific price setting mechanisms for hospital care in France, the price competition between health clinics was limited to ancillary services, the *Autorité* analysed the non-price effects of the merger under examination. It considered that a horizontal merger in the health sector was likely to lead to lower quality supply and less diverse healthcare.

Example 2 : in Decision 16-DCC-111 of 27 July 2016, the *Autorité* assessed the risks for the quality of the service provided by the distributors of electronic products caused by the merger. Based on a survey of purchasers of electronic products distributed by the parties, the *Autorité* noted that the merger was likely to lead to lower quality services provided by the stores to consumers during their purchase, such as the greeting, advice, after-sales service and the opening times of the stores. The *Autorité* also considered that the merger was likely to lead to less supply for consumers.

617. On several occasions, competition authorities have examined merger transactions that led to the creation of monopolies. In France, some transactions examined before 2009 by the French Minister of Economy were blocked on these grounds. The other transactions were cleared subject to commitments or injunctions intended to limit their effects on the price and quality of the products supplied and on the conditions of access to the relevant markets for new entrants.

Example : in Decision 13-DCC-46 of 16 April 2013, the *Autorité* noted that the transaction led to the creation of monopolies in some markets, which gave rise to a risk of loss of quality and diversity of the press publications, which was all the more significant in that the markets were in decline and there were significant barriers to entry. The parties proposed commitments intended to preserve the editorial diversity of the various publications by preventing the harmonisation of local and regional content across the various publications owned by the new entity.

618. Though it would not have created or strengthened a dominant position for the new entity, a merger of two companies in the same market can negatively impact competition simply by removing competition between them. The new entity may be able to profitably increase its prices or reduce supply or production quality, in a way that, prior to the transaction, would have caused too great a loss in sales to other companies (including one of the parties to the transaction). Such an effect has, for example, been highlighted on several occasions in the distribution sector.

Example 1 : in Decision 11-DCC-187 of 13 December 2011, the *Autorité* noted that, when the markets affected by the merger are markets for differentiated products or services (which was the case with agricultural rum, which is characterised by a certain level of diversity of supply in terms of origin, brand, alcohol content and colour), the proximity of the respective product offerings of the parties to the transaction is one of the factors likely to influence the probability of a transaction generating significant horizontal effects. The *Autorité* notes that, in this context, the elimination of competition between the parties to the transaction can make it profitable for the entity created by the merger to bring in a substantial price increase (or a reduction in the volume or quality of its production), as this entity benefits from the captive nature of a significant share of the clients whereas, previously, a price increase by one of the parties would have led to a significant shift to the other party.

Example 2 : in Decision 12-DCC-57 of 4 May 2012 on the acquisition of sole control of ITM Alimentaire Nord by companies operating stores engaged n the retail sale of food, the *Autorité* found that the competitive pressure exerted on the ITM stores, which would have a restrictive effect on the prices and quality of the services offered, was very low due to the very high market shares (greater than 60%) of ITM and the low number of competitors (two retailers). In order to dispel the serious doubts about the effects of the transaction on competition, the parties proposed to sell off a hypermarket to a competitor, thereby allowing for a reduction in the market share of ITM and the entry of a new retailer to the relevant catchment area.

619. In return, the reaction of the other companies present in the same market and which are not parties to the transaction is likely, regardless of any coordination of competitive behaviour, to contribute to weakening the intensity of the competition. The elimination of a competitor can significantly displace the competitive equilibrium in all or part of the relevant market, as all of the undertakings present in the market can benefit from higher prices. This effect can be particularly sensitive if one of the parties is a maverick. The resulting loss of welfare for consumers can be taken into account by the competition authorities, even if the transaction does not create or strengthen a dominant position for the new entity.

Example : in Opinion 06-A-20 of 20 October 2006, the *Conseil de la concurrence* considered that a merger on the farmed Atlantic salmon market was likely to have a damaging effect on the prices and quantities of salmon produced in Scotland.

b) Analytical criteria

620. The probability of a merger causing unilateral effects depends on the characteristics of the functioning of competition in the relevant markets and, particularly, on the analysis of the market power already held by the parties prior to the transaction. All the factors likely to contribute to such a market power can therefore be taken into account when assessing the anticompetitive effects of the transaction. This holds for the following elements:

- the market share of the parties and degree of concentration of the market subsequent to the transaction;
- the level of differentiation of the parties' products;
- the competitive pressure that the current competitors can exert;
- the probability that other suppliers that are not yet present in the market will compete with the current market participants;
- the purchasing power of the clients.

621. These effects are assessed independently of the efficiency gains that the merger may generate. Within the framework of an in-depth examination, the *Autorité* examines whether efficiency gains linked to the transaction are likely to offset the harm to competition identified.

Market shares of the parties and degree of concentration of the market following the transaction

622. The addition of the market shares on the markets on which the parties are simultaneously present gives an initial indication of the effects of a horizontal merger.

623. The existence of significant market shares is an important factor in the assessment of the market power of an undertaking. High post-transaction market shares of around 50% or more can be presumed to indicate the existence of a significant market power. Such a presumption can, however, be refuted. In Opinion 02-A- 07 of 15 May 2002, the *Conseil de la concurrence* thus considered that "the market shares now held by SEB In certain markets are significant, but market share is, however, only one of the factors likely to confer a dominant position on an undertaking […]. Other factors may constitute obstacles to exercising this market power. In particular, the competitive pressure to which SEB group will be subject after completion of the transaction will not depend only on the current status of the markets, but also on the opportunities for the other operators to develop their activity and, therefore, on the ease of access to the relevant markets. "

624. If one of the parties to the transaction holds very low market shares (usually less than 2%); the transaction does not *a priori* cause harm to competition unless these market shares bolster an already very strong position or the transaction does not lead to the elimination of a maverick.

625. When the market share of the new entity is less than 25%, it is presumed that the transaction does not harm competition through unilateral effects.

626. In addition to the market share held by the new entity, the *Autorité* also analyses the degree of concentration of the markets affected by the transaction.

627. The oligopolistic nature of the market may raise competition concerns even if the new entity will not hold a dominant position in a market. In such a configuration, the market shares of each of the undertakings active in the market are high and the merger of two of them is likely to significantly reduce the competitive pressure placed on the new entity and the undertakings remaining in the market. More generally speaking, the degree of concentration of the market and the effect of the addition of market shares on this degree of concentration are important factors in the analysis conducted by the *Autorité*.

628. The *Autorité* can refer to HHI thresholds when it is assessing the effects of a horizontal merger. It considers that it is unlikely that a merger will generate horizontal effects in a market where the post-transaction HHI is less than 1,000. These markets do not usually require an in-depth analysis. It is also unlikely that a transaction will generate horizontal effects on a market when the post-transaction HHI is between 1,000 and 2,000 and the delta is below 250, or when the post-transaction HHI is above 2,000, but the delta is below 150. Conversely, horizontal effects are presumed to exist when the post-transaction HHI is between 1,000 and 2,000 and the delta is above 250, or when the post-transaction HHI is above 2,000 and the delta is above 150.

629. However, the *Autorité* provides for the possibility that a transaction may produce horizontal effects, even below these thresholds, in the following scenarios:

- one of the parties is a potential entrant or a competitor that recently entered the market, whose market share is low, but may increase rapidly;
- one or more parties are highly innovative undertakings or own data that are of particular value in certain markets, which is not reflected by their market share;
- there are significant cross-shareholdings between the companies in the market;
- one of the parties to the merger is a maverick;
- there are indications of the existence, in the market, of past or current coordination or practices that facilitate the coordination of the competitive behaviour of the undertakings;
- one of the parties holds, prior to the merger, a market share of 50% or more.

630. When it assesses the competitive position of the new entity, the *Autorité* also takes account of the legal and regulatory requirements incumbent upon this entity and which may exclude any anticompetitive risk linked to the transaction.

> **Example :** in Decision 16-DCC-167 of 31 October 2016, the *Autorité* considered that, in light of the legal and regulatory pricing framework in the market for services relating to the use of airport infrastructure, which requires consent for the economic regulation contracts concluded by the State and the airport managing bodies and approval for the airport tax rates, any risk of harm to competition arising from the transaction on this market was to be excluded.

Competitive pressure exerted by the competitors remaining in the market

631. The number, market shares and competitive advantages of the competitors of the parties are all essential factors in the analysis of the horizontal effects of a merger. In particular, the *Autorité* evaluates the ability of the current competitors to react to the new situation created by the transaction. The size of the competitors, their available production capacities or the capacities likely to develop, the difference between their market shares and that of the undertaking created by the transaction and the competitive proximity of the parties and third parties are important indicators when assessing whether the competitors can absorb a shift in demand in the event that the new entity were to increase its prices or whether the competitors can place greater quantities of products on the market if it were to reduce its production.

632. When it analyses the operators that are active in a market, the *Autorité* can, depending on the circumstances of the case, take account of undertakings that, although not established in the relevant geographical area, perform some of their activities in this area.

> **Example** : in Decision 16-DCC-208 of 9 December 2016, the *Autorité* took account of the competition exerted on the market for cattle collection by slaughterhouses located outside the defined area using the real footprint method, but which nonetheless collected cattle in this area and had sufficient capacity to increase the volume of their collections and slaughters;

633. The *Autorité* takes account not only of the ability of competitors to react, but also of their incentives to do so and, therefore, their interest in doing so. It may be in the interests of competitors that benefit from increased demand due to the new entity increasing its prices, even in the absence of coordinated behaviour, to also bring in price increases (or volume reductions) and thus replicate, at least partially, the price increases (or volume reductions) of the new entity.

> **Example** 1 : in Decision 13-DCC-101 of 26 July 2013, the *Autorité* assessed the incentives of the competitors of the parties to follow any price increase made by the new entity on the market for construction materials by examining the characteristics of the market (low price elasticity of demand) and the declarations of the competitors.
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> **Example 2** : in Decision M.6471 of 7 November 2012, the Commission found that "even though European producers will have sufficient available capacities to react to a price increase by the new entity, there is no certainty that the remaining European competitors will have an incentive to react by lowering their prices. The competitors can thus benefit from the reduced competitive pressure resulting from the transaction since a price increase by the new entity would lead to a shift in part of the demand to the competitors, for whom it could consequently be profitable to increase their prices. This hypothesis is particularly credible on a market where demand is particularly inelastic, such as the market [for cold-rolled steel]. "
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> **Example 3** : in Opinion 06-A-20 of 20 October 2006, the *Conseil de la concurrence* considered, in respect of farmed Atlantic salmon producers, that "in theory, it is in their interests to produce more than they would have in the previous market situation in order to take advantage of the supply shortfall in relation to a situation without a merger. However, it is not in the interests of the competitors to make up all of this shortfall. The combined effect of the transaction, taking into account lower production by the parties and higher production by the competitors, is therefore always negative: following a merger transaction, the total quantity supplied is lower than it would have been without the transaction and, consequently, the market price is higher than it would have been without the transaction. But the competitors still need to have the capacity to react. If they have restricted available capacities, the supply shortfall and the price tensions will be greater. "

634. The capacity of reaction of the competitors can also be hampered by the new entity, which would control, for example, resources needed for production, essential data required to improve the quality of the services it sells, access to content in the media sector, patents or intellectual property rights for competitors or significant capacities for distributing the relevant goods or services.

Example 1 : in Decision 17-DCC-210 of 13 December 2017, the *Autorité* noted that the affiliates of the new entity were subject to a significant contractual contribution and supply obligation in the markets for the distribution of agricultural supplies. It considered that this contractual obligation was likely to exacerbate the effects of the transaction on the market by dissuading clients from getting supplies from the competitors of the new entity.

Example 2 : in Decision 18-DCC-18 of 1 February 2018, the *Autorité* analysed the consequences of the new entity holding data relating to the activity of estate agencies and internet users that are likely to enable it to improve its offering by providing services that cannot be replicated by competing portals.

635. The fact that the parties are undertakings that are vertically integrated on upstream and downstream markets or are present in related markets is likely to exacerbate the horizontal effects of the combined market shares. For example, the foreclosure by the new entity of vertically integrated or related markets can lead to the strengthening of its position in markets on which the two parties to the transaction are simultaneously active prior to the transaction.

636. The capacity of reaction of the competitors can also be restricted by high supplier switching costs for clients, a specific regulatory environment that restricts their production capacities or the limited availability of inputs required to develop their activity (access to a raw material, storage spaces, essential data for performance of the activity, etc.).

Example 1 : in Decision 11-DCC-187 of 13 December 2011, the *Autorité* considered that the quota system for rum from overseas *départements* limited the capacity of the alternative operators to export more rum from the French overseas *départements* to mainland France.

Example 2 : in Decision 17-DCC-12 of 31 January 2017, the *Autorité* considered that the capacity of the clients to shift their demand to competing suppliers was restricted by significant implementation costs and lead times due primarily to the internal validation process for such a change designed to guarantee the compatibility of the cleaning products with the cosmetic formulae of the clients.

637. Lastly, the low cross price elasticity of demand, which generates limited shifts between the undertakings active in the market, also hampers the ability of competitors to discipline the new entity.

> **Example** : in Decision 13-DCC-101 of 26 July 2013, the *Autorité* noted that, despite the potential presence of residual production capacities among the competitors of the parties, low market mobility, which was characterised by low levels of price elasticity of residual demand and low shift rates to competitors, created a risk of a limited shift of demand to competitors, which meant that the incentives of the new entity to increase its prices could not be ruled out.

Potential competition

638. Even if it has a high market share, the market power of an undertaking can be effectively limited not only via the reactions of the competitors already present in the market but also because the market is contestable, i.e., that it is fairly easy for new entrants to enter the affected market (no barriers to entry). When this is the case, the deterioration of the initial market conditions linked to the merger can be regarded as an opportunity for new entrants that are likely, through their behaviour, to restore the initial competitive conditions. The competition, albeit potential, thus exerts pressure on the behaviour of the incumbent participants.

639. However, establishing the absence of a barrier to entry is not sufficient to demonstrate the existence of competitive pressure exerted by operators that are not yet active in the market. It is necessary to ensure that the clients or suppliers of these operators are likely to turn to the new entrant in the event of an increase in the sale price or a reduction in the purchase price offered by the new entity.

640. Moreover, even when a merger does not give rise to cumulative market shares, it can harm competition in one or more markets insofar as one of the parties, although not present in the same markets as the other, was likely to enter the market easily and exert competitive pressure in the relevant market(s).

641. In order for the elimination of a potential competitor to be considered by the *Autorité* as constituting harm to competition:

- the potential competitor must already have a significant bearing on the behaviour of the other undertakings or there must be a strong probability that this competitor will be a key driver of competition;
- the number of other potential competitors capable of maintaining sufficient competitive pressure after the merger must be insufficient.

Example : in Decision 17-DCC-42 of 3 April 2017, the *Autorité* considered that the transaction was likely to raise competition concerns since it led to the grouping together in a single entity of two eco-organisations that had, hitherto, been in charge respectively of the only household packaging sector (Eco-emballages) and the only paper sector (Ecofolio). After noting that each eco-organisation had the capacities needed to enter the other operator's market and that their decision to limit themselves to a single market was a strategic option that could change at any time, the *Autorité* considered that the transaction would lead to the elimination of a potential competitor in each of the two sectors. It then noted that this elimination was not likely to be offset by the entry of other operators on the market, as they would not have access to certain data needed to obtain the licence required to access the market and be able to operate effectively and immediately as an eco-organisation once the licence was obtained. Consequently, the *Autorité* considered that the elimination of a potential competitor as a result of the transaction was not likely to be offset by the entry of other operators given the existing barriers to access to the market.

Level of differentiation of the products and competitive proximity of the different operators

642. The level of differentiation of the products is an essential parameter in the analysis of the effects of a merger in two respects.

643. Firstly, it can be used to assess the level of competitive pressure exerted by third parties on the new entity. In its analysis, the *Autorité* attaches more importance to the competitive pressure exerted by close competitors than by competitors that supply products or services that are different to those of the parties.

Example : in Decision 16-DCC-111 of 27 July 2016, Fnac/Darty, the *Autorité* measured the competitive intensity in each catchment area following the transaction using a scoring method. It allocated to each competitor a score of between 0.25 and 3 based on the competitive proximity of this competitor to the parties. After identifying all of the competitors of the parties active in the area and allocating them a score, the score was weighted according to the distance between this sales outlet and the target store. Based on all of this information, a total score was calculated for each catchment area, which served to assess the intensity of the competitive pressure exerted on the new entity following the transaction. In this case, the *Autorité* considered that a score exceeding 10 was sufficient to exclude the risks of harm to competition in the area being analysed.

644. When it analyses a merger in the consumer goods sector, the *Autorité* may take account, in some cases, depending on the characteristics of each case, of the competitive pressure exerted by private label products on the retailer's own-brand labels. The intensity of the competitive pressure between these different products depends in particular on the attachment of the consumers to the brands and on their brand image.

> **Example** : in Decision 16-DCC-26 of 15 February 2016, the *Autorité* considered that the breaded poultry meat products sold under private labels exerted strong competitive pressure on the retailer's own-brand breaded products, which was factored into its analysis of the effects of the transaction.

645. The level of differentiation of the goods and services of the parties is the second essential aspect of the analysis of the effects of a merger. When the relevant market(s) are markets for differentiated products or services, the proximity of the offerings of the parties to the transaction is one of the factors that are likely to have a bearing on the probability of a transaction generating a risk of harm to competition: a merger will be all the more likely to create unilateral effects if the products of the relevant undertakings are close substitutes.

> **Example 1** : in Decision 14-DCC-173, the *Autorité* noted that, despite the low competitive proximity between Carrefour and Dia prior to the transaction, Carrefour's plan to transform Dia stores into Carrefour stores was likely to exacerbate the effects of the transaction since, once it had been completed, the new entity would be in a position to develop a multi-format strategy.
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> **Example 2** : in Decision 18-DCC-18 of 1February 2018, however, the *Autorité* considered that the horizontal effects of the transaction were mitigated by the fact that the property classifieds portals Se Loger and Logic Immo were not the closest competitors in the market and that the diversion ratios of these two operators prior to the transaction were low. Consequently, the *Autorité* considered that the planned transaction was not likely to lead to an increase in the prices practised by the new entity, as the potential gain linked to such a price increase was limited. However, given the differentiated nature of the services offered by Se Loger and Logic Immo, the *Autorité* analysed the risks of foreclosure resulting from a potential coupling of the different services.

646. On a market for differentiated products and services, the *Autorité* studies the incentives for the merged undertakings to implement price increases following the bundling of the production of differentiated goods and services within the same economic entity.

647. Following a merger, the new entity will take into account the fact that a varying portion of the lost sales of the product for which it has increased the price will shift to products that it now owns following the transaction. This portion will be larger when the products of the parties are close substitutes. Thus, a price increase that was not profitable prior to the transaction can become profitable since the losses linked to the fall in sales of the product subject to the price increase are offset by the increase in the margin on the product (like before the transaction), as well as by the increase in the sales - and therefore the profits - of the products acquired through the merger. This internalisation of the effects of a price increase on the products acquired through the transaction should therefore create an incentive for the new entity to increase its prices.

648. In such a context, in order to evaluate the likelihood of the risk of a unilateral effect in a market for differentiated products, the *Autorité* takes particular account of the following;

– The competitive proximity of the undertakings affected by the merger. In the event of a price increase, the greater the substitutability of the products of the parties, the greater the share of lost sales that the new entity will be able to recoup. To assess this competitive proximity, the *Autorité* can use internal documents belonging to the parties (for example, minutes of trade negotiations, documents relating to the development of the commercial strategy of the relevant undertakings, etc.). It can also quantify the level of competitive pressure that is exerted by a product sold by one of the parties to the merger over a product sold by another party by estimating the diversion ratio between the first and second products. The higher this diversion ratio, the greater the risk of unilateral effects (see the sections above relating to the method for calculating diversion ratios).

– The unit (contribution) margin of the parties to which a portion of the demand shifts following the price increase by one of the parties.

649. When the data are available, an initial evaluation of the risk of a unilateral effect can be obtained by conducting quantitative tests, such as “UPP” (“upward pricing pressure”), “GUPPI” (“gross upward pricing pressure index”) or “IPR” (“ illustrative price rise”) tests. These tests cannot measure precisely the size of the potential price increase resulting from the merger since they are based on simplified models that do not factor in all of the competitive interactions, particularly the reaction of competitors.

However, the advantage of these different indicators is that they can be calculated without it being necessary to define precisely the relevant market, which is particularly useful when the products are differentiated and it is not easy *a priori* to distinguish between the products that belong to the same market and the other products. The *Autorité* encourages parties that wish to use these tests to support their competitive analysis to first get in touch with the Investigation Services in order to discuss the methodological approach and the test that it might be possible to use based on the specific nature of the case.

650. **The UPP test** entails taking into account the incentives of the new entity to increase its prices thanks to the internalisation of the effects of a price increase on the products acquired through the transaction, as well as the incentives to lower the prices that could result from the efficiency gains (reduction in variable costs) generated by the merger. The test entails analysing the net effect: if it is positive, the transaction is likely to give rise to a price increase, whereas if the net effect is negative, the transaction should be fairly favourable for the consumers.

651. In the simplest version of the test (i.e., merger between two mono-product undertakings - product A and B), the net incentives to increase the price of product A depend on the positive or negative result of the expression $(p_B-(1-E)c_B)RD_{A/B} - Ec_A$, where c_B and p_B are respectively the (marginal) cost and the price of product B (prior to the transaction, c_A is the marginal cost of product A, $RD_{A/B}$ measures the diversion ratio from A to B (i.e., the proportion of the sales lost by A following the increase in the price of product A that shift to product B) and E equates to the efficiency gains "credit" selected by the *Autorité*. The idea here is that when, following an increase in its price, product A generates lower sales, a portion - $RD_{A/B}$ - of these sales shifts to product B, which in turn generates a margin for the new entity. As this margin is not internalised by undertaking A prior to the transaction, and the margin is now higher after taking into account the efficiency gains that lower the cost of product B, this additional margin creates an incentive to increase the prices of product A. This incentive is, however, counterbalanced by the fact that, due to the efficiency gains that lower the cost of product A (and which therefore increase the margin on this product), the loss of sales of product A are now more costly.

652. The UPP test does not, therefore, measure the level of the possible price increase, but merely indicates whether there is a risk of a price increase. Moreover, if the test takes account of efficiency gains, the idea is not to estimate precisely the efficiency gains that the transaction is likely to generate, but instead to allocate a "credit" (for example, a reduction in marginal costs of 5 to 10%) and check whether, despite this "credit", the merger is likely to harm consumers.

653. Unlike with the UPP test, **the GUPPI index** does not take account of any efficiency gains: it is only an indicator of price increase pressure. In the case of a merger between two mono-product undertakings, the GUPPI index for product A is written $(p_B\text{-}c_B)RD_{A/B}/p_A$. This equates, therefore, subsequent to the increase in the price of product A, to the ratio between the profit generated by the lost sales of the product that shift to product B and the lost turnover for product A. A high GUPPI index thus indicates a strong propensity for the new entity to increase its prices. This index also measures the size of the price increase subject to availability of precise data relating to the pass-on rate of the cost fluctuations by the undertakings prior to the transaction. The product of this pass-on rate and the GUPPI index provides a direct estimation of the price increase that the transaction is likely to create if there are no efficiency gains. This measurement of the pass-on rate can, for example, be obtained using the historical variable cost and price data of the parties. In the absence of such a measurement, the index can act as a filter in order to check whether the transaction is likely to generate significant effects. A threshold of 5 to 10% could therefore be set for such a filter.

654. In recent years, the *Autorité* has used the GUPPI index calculation on several occasions to estimate the risk of price increases linked to a transaction[89].

655. **The IPR test** serves to make an initial estimation of the expected price increase (when there are no efficiency gains) using the same data as for a UPP test. However, this is only possible if a specific formula is used to calculate consumer demand for a given product. It is thus possible to obtain specific formulae that give the price increase based on the diversion ratios and the margins of the parties and based on the assumption that demand is a linear function of price (for a given price increase, the fluctuation in demand does not depend on the initial price levels) or that the price elasticities of the demand functions do not depend on the price levels (iso-elastic demand). The IPR test formulae must be adjusted on a case-by-case basis to take account of the multi-product nature of the undertakings or the efficiency gains that give rise to reductions in variable costs, but they do not require any additional data. Lastly, as with the other tests, the IPR test does not take account of the reaction of the competitors and is therefore not a simulation of the overall effects of the transaction.

[89] See, for example, Decisions of the *Autorité* 13-DCC-90 of 11 July 2013 on the acquisition of sole control of Monoprix by Casino Guichard-Perrachon, 14-DCC-57 of 17 April 2014 on the acquisition of sole control by Orlait, a subsidiary of Sodiaal, of the long-life drinking milk arm of the cooperative Terra Lacta, 15-DCC-76 of 30 June 2015 on the acquisition of joint control of Allopneus by Michelin group and Hevea and 18-DCC-95 of 14 June 2018 on the acquisition of sole control of a part of the ready meals arm of Agripole Group by Financière Cofigeo.

656. The advantage of these tests is that they only require data relating to the supply of the parties. Data relating to the unit prices and (variable) costs of all of the products of the parties are therefore required, as are the diversion ratios between these different products.

657. While it is usually easy to obtain the prices, the same cannot always be said for costs. Information regarding the unit variable costs (costs that depend on the quantities produced) is therefore needed for each of the products. This is often complex for undertakings that sell multiple products because their calculation entails determining how to allocate shared costs. This is also the case for the diversion ratios, the estimation of which can be time-consuming and fairly incompatible with the tight deadlines applicable to merger controls, unless it is possible to prepare well in advance (for example, during the pre-notification phase).

658. When the results of these tests are presented by the parties to back up their competitive analysis, the *Autorité* considers it essential for the parties to also provide the confidence intervals linked to the diversion ratios so as to be able to assess the accuracy of the results. As the diversion ratios are usually estimated on the basis of a sample of the population, the corresponding confidence intervals are therefore necessary in order for the *Autorité* to have all the information at its disposal.

659. Lastly, when sufficiently detailed data are available, and deadlines permitting, it is possible, as a flanking measure, to use in-depth analytical tools, such as simulation models, based on estimating the demand function and which estimate the effects of the transaction through a more sophisticated modelling of the competitive interactions in the market.

> **Example :** in Decision 18-DCC-95 of 14 June 2018, the *Autorité* analysed the merger simulation economic study proposed by the parties, which was intended to model the supply and demand for canned ready meals and then simulate the effects of the transaction.

660. In any case, in light of the methodological weaknesses stemming primarily from the quality of the data available, as well as from the very nature of these tests, these quantitative results cannot alone be used by the *Autorité* to draw conclusions about the effects of the transaction and are not used mechanically to exclude or confirm the existence of competition concerns. When they are used, they can provide an indication of the competitive interactions that the new entity will face, but they must be compared with other analytical information, such as the purchasing power of clients and the extent of the barriers to entry.

661. Lastly, when it assesses the incentives of the new entity to increase its prices, the *Autorité* can also use data relating to the actual behaviour of the undertakings active in the relevant market prior to the transaction, which constitute a natural experience.

Example: in Decision 16-DCC-111 of 27 July 2016, the *Autorité* noted that there were price adjustment practices in place at local level, particularly at Darty stores. These practices led the household appliance stores to initiate a competitive watch of the operators located in the catchment area and, where applicable, to lower their prices below the prices recommended by their national offices in order to adjust to the local competitive situation. The *Autorité* considered that, in light of the reduction in the competitive pressure exerted on the new entity in some catchment areas, the transaction risked lowering the incentives of the operators to use specific price adjustments and, ultimately, leading to price increases in some areas.

Purchasing power of clients

662. The market power of an undertaking can be effectively limited by the purchasing power or, more generally speaking, the negotiating power of buyers, provided alternatives exist. The effects of a merger can be assessed differently depending on whether the clients of the parties are individuals or other undertakings or whether the market is a retail market or a wholesale market. When the clients are undertakings, the concentration of the buyers, their size and the diversity of their purchases are factors that are likely to give them a compensatory purchasing power. However, when the prices are negotiated with each client, the purchasing power of some clients does not limit the market power of the undertaking in respect of less powerful clients.

Example: in Opinion 09-A-01 of 6 February 2009, the *Conseil de la concurrence* noted that publishers had considerable market power for several reasons: publishing is concentrated in the hands of a small number of powerful operators; publishers can distribute the printing of the same magazine among several printers; printers had considerable surplus production capacities. The *Conseil de la concurrence* considered that this market power was likely to counterbalance the potential market power of the entity in a segment of the print market limited to the sections of magazine content subject to tight deadlines ("*cahiers chauds*").

663. In recent years, the *Autorité* has on several occasions analysed the issue of the counter-power exerted by operators in the mass retail distribution sector on their suppliers. It sets aside the systematic existence of a counter-power exerted by distributors over their suppliers and conducts a two-stage case-based analysis. It first checks whether the distributors have alternative sources of supply and, secondly, whether they can easily change suppliers.

The counter-power of demand only exists insofar as demand can shift, within a reasonable deadline, to alternative sources of supply if the supplier decides to increase its prices.

> **Example 1** : in Decision 18-DCC-95 of 14 June 2018, the *Autorité* did not conclude that the mass retail distribution sector exerted disciplining power over the new entity. It noted the absence of alternatives available to retailers in the mass retail distribution sector in the canned ready meals market, given the position acquired by the new entity and the essential nature of canned ready meals in the stores. This second factor led the *Autorité* to rule out the existence of alternatives to the products sold by the new entity outside the canned ready meals market.
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> **Example 2 :** in Decision 16-DCC-26 of 15 February 2016, the *Autorité* did, however, rule out the risks of horizontal effects linked to the transaction in the breaded poultry meat product markets due, among other things, to the counter-power exerted by buyers in the mass retail distribution sector. It noted that the clients of the new entity could change suppliers without any major difficulties, in particular because its competitors were able to increase their production quickly and without any major additional costs.
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> **Example 3 :** in Decision 19-DCC-36 of 28 February 2019, the *Autorité* considered that the mass retail distribution sector had the power to place downward pressure on the prices of entry-level alcoholic beverages by threatening to de-list them. Consumers were not loyal to specific brands and there were many alternatives available, which made the threat credible, especially as some distributors had already executed such threats in the past.

664. To a lesser extent, the *Autorité* considers that the use of own-consumption by clients is likely to restrict the behaviour of the new entity and can, if significant use of this is made, give them a certain form of counter-power.

> **Example :** in Decision 15-DCC-127 of 22 September 2015, the competitive analysis of the horizontal effects of the transaction in the market for the retail distribution of agricultural supplies in the *département* of Mayenne highlighted the fact that 50% of the cereal grain requirements of farmers in this *département* were satisfied through self-consumption, which was likely to exert competitive pressure on the seed distributors.

Analysis of the effects of a horizontal merger on two-sided markets

665. In the case of two-sided markets, the economic equilibrium in one side of the market cannot be assessed independently of the prevailing conditions in the other side of the market. Though separate, both sides operate interdependently, which is a specific feature that can be taken into account either at the market delineation stage or during the analysis of the effects of the transaction on competition and of the efficiency gains. In such a context, the strengthening of a market participant following a horizontal merger on one of the sides of the market is likely to be transmitted to the other side, thereby initiating a dynamic process that could lead to the exclusion of its competitors. The existence and extent of this effect depend on the characteristics of the functioning of the market, such as, for example, the use of multi-homing by users or the portability and interoperability of the services.

Example 1 : in Decision 18-DCC-18 of 1 February 2018, the *Autorité* noted that the online property classifieds market was characterised by cross-side network effects insofar as advertisers have a preference for the portals that have a high audience and visitors have a preference for the portals with a large number of ads. It therefore studied the competitive risks in this market taking into account the effects of a price increase on the two sides of the market. In this case, the *Autorité* first established the existence and extent of the cross-side network effects on each side of the market. It noted that, although the existence of such effects had been demonstrated through the existence of a positive correlation between the audience of the portals and the number of advertisements they publish, they were of limited extent. It noted also that a change in the number of advertisers only had a limited effect on the audience. In light of this characteristic of the market, the *Autorité* considered that the two-sided nature of the market had few consequences for the competitive analysis of the effects of the transaction since, even if a potential increase in prices led to a fall in the number of advertisements published on a portal, this fall would not necessarily have a significant effect on the audience captured by said portal.

Example 2 : in Decision 13-DCC-46 of 16 April 2013, the *Autorité* considered, however, that the link between the two sides of the market allowed for the risk of price increases to be ruled out. It noted that, in light of the significant sensitivity of readers of the regional daily press to the price of newspapers, any increase in the prices of newspapers was likely to lead to a loss of readership and, consequently, to the parallel loss of advertisers, thereby leading to a fall in advertising revenue.

Analysis of the effects of a horizontal merger on a tender market

666. In a number of sectors, particularly those involved in the production of intermediate products, the interaction of supply and demand takes place within the framework of tender procedures, where demanders require various suppliers to bid against each other.

667. In such an environment, an operator that has not been selected during the procedure, but which is still capable of making a credible bid, continues to exert competitive pressure on the winning bidder. The analysis of each bidder must therefore take account of this dynamic since today's losing operator is tomorrow's competitor. However, the market shares of the bidders cannot be used to correctly measure this aspect of the functioning of the competition: even if the market share of a losing operator subsequent to a tender procedure is still modest, as long as that operator continues to be able to submit serious bids, it will continue to be likely to exert significant competitive pressure on the contract holder when the tender is renewed.

668. Depending on the nature of the tender procedures and the products covered by them, additional indicators may be used. The competitive analysis may, for example, focus on the frequency with which the parties have been bidding against each other for the same tender, the probability that one of the parties will win the tender when the other party is also bidding and when it is not bidding, the credibility of the competitors remaining in the market after the transaction and the existence of factors likely to restrict their ability to stimulate competition. The analysis of the ranking of the bids by the awarding authority, when this ranking is available, can shed light on the degree of competitive pressure that the parties exert on each other.

> **Example** : in Decision 18-DCC-229 of 28 December 2018, the *Autorité* drew on a detailed analysis of the results of the previous tenders for railway works for which the parties submitted a bid. It studied their encounter rates and their victory rates in order to characterise the competitive structure of the market. The encounter rate serves to identify the proportion of cases where the undertakings bid for the same tenders, thereby demonstrating that they exert competitive pressure on each other. The victory rate serves to identify more generally speaking the credible competitors that win a significant number of tenders in order to assess the influence of the parties and the existence of credible competitors. In this decision, the *Autorité* also analysed the rate at which the parties were ranked first and second and the difference between the price of the second bid and the price of the third bid.

This last information serves to assess the tangible effects in these markets that are likely to result from the transaction since, in these specific cases, the transaction leads to the elimination of the competitive pressure exerted by the second ranked bidder on the first-ranked bidder, which is replaced by the third-ranked bidder.

3. VERTICAL EFFECTS OF A MERGER

a) Nature of these effects

669. The vertical effects of a merger are studied when the transaction brings together players present at different places on the value chain. This could be the acquisition of means of distribution by a producer (or vice versa) or the acquisition by an undertaking already active upstream and downstream of additional capacities located at one or both of these levels.

670. A vertical merger is usually likely to generate efficiency gains and foster competition (integration of additional activities, internalisation of double margins, reduction of transaction costs, better organisation of the production process, etc.).

671. But a vertical merger may also restrict competition by making it harder to access the markets in which the new entity will be active, or even potentially excluding competitors or penalising them by increasing their costs. In which case, we talk about foreclosure of the markets. Such a situation increases the market power of the new entity and allows it to increase its prices or reduce the quantities or quality provided.

Example : in Decision 15-DCC-76 of 30 June 2015, the *Autorité* described different forms of foreclosure of access to the market likely to be encountered in the tyre manufacturing and distribution markets: refusal of sale, price increase, as well as the granting of exclusivities, including temporary ones.

672. The strengthening of barriers to entry for potential competitors is particularly damaging when the structure of the market forces them to enter both the downstream and upstream markets.

Example : in Decision 12-DCC-101 of 23 July 2012, the *Autorité* found that "entry to the market for the acquisition of rights for French language films to be broadcast on pay TV requires the editing of a thematic cinema channel to use and monetise the acquired content. The investments for acquiring rights are, however, very high and are incurred, for any potential new entrant, even before being able to benefit from the subscriber base needed for the return on investment." [90]

[90] In its Judgment of 23 December 2013, the French Administrative Supreme Court (*Conseil d'Etat*) annulled Decision 12-DCC-101 of the *Autorité de la concurrence*.

673. In the Commission guidelines on the assessment of non-horizontal mergers, two types of foreclosures are described:

– In the first type, the undertaking refuses to sell an input to its downstream competitors or supplies it at a high price at and under unfavourable conditions or at a lower level of quality (input access foreclosure). This foreclosure can be full when the competitors are no longer being supplied, or partial when the tightening of the pricing conditions leads to an increase in the competitors' costs[91].

> **Example** : in Decision 15-DCC-54 of 13 May 2015, the *Autorité* considered that the transaction created a risk of refusal of access or discrimination in terms of access for the competitors of Rubis to its unregulated marine fuel and jet fuel storage capacities.

– In the second case, the downstream branch of the integrated undertaking refuses to purchase or distribute the products of the manufacturers that are active in the upstream market and thereby reduces their sales opportunities (customer access foreclosure)[92].

674. Other risks linked to vertical mergers have been identified by competition authorities. For example, a dominant operator in a downstream market can obtain, through the acquisition of an undertaking that supplies an important input for its competitors in the said downstream market, the possibility of possessing precise knowledge of the costs and consumption patterns of said competitors, which can provide it with a decisive competitive advantage by allowing it to adjust its pricing policy in the downstream market and thereby exclude its rivals.

> **Example** : in Decision M.3440 of 9 December 2004, the Commission considered that EDP, the main electricity producer in Portugal, was in a position to gain knowledge of the gas supply costs (and consumption) of its main competitor in the electricity market.

b) Analytical criteria

675. The *Autorité* evaluates the probability of an input foreclosure scenario and a customer access foreclosure scenario by first examining whether the entity arising from the merger would be able, subsequent to the merger, to significantly foreclose access to inputs or to customers and, secondly, whether the incentives to do so are sufficient and, thirdly, whether a foreclosure strategy would have a significant effect on the relevant markets based on their specific characteristics.

[91] Paragraphs 31 to 57.

[92] Paragraphs 58 to 72.

676. In practice, these three constraints are closely linked and are examined together. They are determined by most of the parameters also taken into account in the analysis of horizontal mergers. In Opinion 04-A-08 of 18 May 2004, the *Conseil de la concurrence* summarised the analysis as follows: "The feasibility and the benefit of foreclosure practices depend [...], firstly, on the market power of the integrated undertaking. Similarly, the presence of other vertically integrated undertakings in the upstream and downstream markets is to be taken into account when evaluating the degree of closure of these markets following the integration. Secondly, in order for these practices to lead to sealing off access for a competitor to the downstream market, entry to this market must be difficult and there must not be any sufficient distribution alternatives to the integrated undertaking. Critics that call into question the benefit of these practices for the integrated undertaking may note that, in the event that foreclosure practices exist, the non-integrated undertakings can protect themselves by concluding contracts with other independent firms or by taking control of them. However, these independent firms must exist or be created." The Commission also emphasises the importance of barriers to entry : "Wherever it is relatively easy for competing suppliers to create new buyers or find alternative buyers for the product, foreclosure is unlikely to be a real problem" (point 144 of the guidelines). It also emphasises the counterweight capacity of buyers, which, if sufficiently powerful, will not easily allow the supply of competing goods or services to be excluded.

677. Specific application of these criteria to the risk analysis, both in respect of input foreclosure and customer foreclosure, will be examined below.

New entity's market power

678. The vertical integration of an undertaking or its strengthening can harm competition when the undertaking holds, in one or more of the relevant markets, a substantial market power that can serve as the basis for a leverage effect (in the upstream market for input foreclosure and in the downstream market for customer foreclosure).

679. The *Autorité* considers that it is unlikely that a company with a market share of less than 30% in a relevant market will be able to foreclose a market upstream or downstream from it.

680. In the same vein, the *Autorité* considers that, in general, it is unlikely that a transaction will raise competition concerns if the HHI on each of the relevant markets after the merger is less than 2,000.

681. The *Autorité* can, however, conduct a more in-depth examination of this type of vertical merger in certain cases where these two criteria are met due, for example, to the specific characteristics of the market or the relevant transaction.

682. When assessing the market power of the new entity within the framework of a vertical merger, own-consumption can be taken into account. Internal production can be a very important factor within the framework of a competitive analysis of the vertical effects of a transaction in that it can act as a competitive constraint or a factor that strengthens the position of an undertaking in the market.

> **Example** : in Opinion 06-A-13 of 13 July 2006, the *Conseil de la concurrence* considered that the relationship between Canal Plus Group and its distribution partner did not equate to own-consumption, i.e., the manufacture by an undertaking of an intermediate good for the purposes of its own consumption, but did nonetheless specify the following in this respect: "[…] if the distribution of the channel Canal + were considered as own consumption, the competitive analysis would be unchanged since own consumption must be taken into account when evaluating the market power of the new entity".

683. In addition to the market share held, the market power of the new entity can be strengthened or, conversely, limited by the characteristics of the market in which it will be active.

684. **Firstly**, the characteristics of the relevant product can contribute to increasing or, conversely, mitigating the market power of the new entity. In particular, in the case of an input foreclosure, the relevant input that is foreclosed must be an important one for the undertakings located downstream.

685. This is the case, for example, when the input is a critical component of the composition of the products or services of the downstream undertakings or when the input enables competitors to perform their activity in a given geographical area. If the new entity owns a well-known brand, this is also likely to generate vertical effects in the event of input foreclosure.

> **Example 1** : in Decision 14-DCC-50 of 2 April 2014, the *Autorité* considered that "implementation by [Canal Plus Group] of a vertical foreclosure strategy could have a significant impact on the audience of the new independent channels of TNT. According to the data provided by the channels during the investigation, cinema content accounted for between 30% and 60% of the 100 best audiences of TNT's channels in 2012."[93]

[93] In its Judgment of 23 December 2013, the French Administrative Supreme Court (*Conseil d'Etat*) annulled Decision 12-DCC-101 of the *Autorité de la concurrence*.

Example 2 : in Decision 15-DCC-54 of 13 May 2015, the *Autorité* noted that "access to SARA infrastructure is needed by petroleum operators so that they can meet their strategic storage obligations and directly import finished products". The *Autorité* therefore considered that the transaction would allow the new entity, which owns this infrastructure, to refuse access to it and, subsequently, perpetuate the de facto monopolies held by its subsidiaries over imports of petroleum products.

Example 3 : in Decision 14-DCC-160 of 30 October 2014, the *Autorité* noted that Altice Group would benefit, following the transaction, from a significant advantage in terms of access to clients in the retail market or the supply of internet access in mainland France insofar as the network connection was easy to perform with only limited or no works required in homes. In addition to the logistical advantage conferred, the *Autorité* highlighted a significant discrepancy between the cable network and the "fibre to the home" network in terms of the lead times for establishing Internet access, with the former being quicker. When combined with improved commercial performance by the new entity, it considered that this technical advantage allowed it to improve its capacity to capture clients to the detriment of its competitors.

686. In parallel, in respect of a customer foreclosure, the new entity must be able to control outlets that are essential for upstream players.

Example : in Opinion 04-A-20 of 22 October 2004 on a merger in the tableware sector, the *Conseil de la concurrence* recalled that "in order to make itself a compulsory intermediary between suppliers and the end customer and be in a position to seal off access to downstream markets for rival manufacturers, the integrated undertaking must hold market power in the distribution markets".

687. **Secondly**, when it assesses the market power of the new entity, the *Autorité* also takes account of the regulatory context, which may restrict its behaviour.

Example 1 : in Decision 14-DCC-167 of 13 November 2014, the *Autorité* ruled out any risk of harm to competition in the crude oil and naphtha transport market due, in particular, to the regulatory oversight in the sector. The oil pipelines operated by the parties were regarded as "pipelines of general interest", the operation of which is governed by a decree establishing the applicable prices and the supply of third party companies. This legal text establishes a non-discrimination obligation for shareholders and third parties. Consequently, the *Autorité* considered that the new entity would not be in a position to prevent the supply of third parties or change the applicable prices in the downstream market.

Example 2 : in Decision 14-DCC-179 of 27 November 2014, the *Autorité* also took into account the regulatory framework and the commitments of the mobile network operators (MNO) to the mobile virtual network operators (MVNO) when setting aside the ability of the buyer to foreclose access for the competitors of the target to its network.

Example 3 : in Decision 16-DCC-167 of 31 October 2016, however, the *Autorité* considered that the transaction was likely to generate vertical competition concerns in the airport infrastructure maintenance markets in that the standard specifications applicable to the airport concession did not require the supply and service contracts to be subject to a competitive tender process when they were granted by the awarding authority to an affiliate. Thus, following the transaction, Vinci Group, in its capacity as the awarding authority, could have allocated the vast majority of the supplies and services required by Lyon Airport to one of its subsidiaries without a prior competitive tender. In addition, even if Vinci Group decided to use a competitive tender process, due to the lack of an independent tender committee run by the airport management body, the new entity would be acting as the awarding authority and the tenderer, which, without remedies, prevented any guarantee of its impartiality.

Example 4 : in Decision 17-DCC-76 of 13 June 2017, the *Autorité* considered that the risk of vertical effects linked to the broadcasting of major sports events on channel 23, which had been acquired by Altice Group within the framework of the transaction, was limited due, in particular, to the regulatory framework applicable to semi-generalist channels, which prevents the regular broadcasting of a large number of sports events.

688. **Thirdly**, the market power of the new entity is likely to be limited by the contracts concluded by the parties and their trading partners. These contracts may contain clauses that protect the interests of the co-contractors.

Example : in Decision 16-DCC-10 of 21 January 2016, the *Autorité* ruled out the risk of content access foreclosure due to the presence of specific rights protecting the interests of the broadcasters, particularly for the most emblematic programmes.

Reaction capacity of competitors

689. In respect of vertical mergers, the reaction capacities of competitors depend on their own vertical integration, their production capacity, their efficiency, any counter-strategies they may develop, alternatives they may propose, alternative outlets they may find, as well as on the fluidity of the market, particularly of the exclusive or long-term contracts between the different market participants.

Example : in Decision 14-DCC-160 of 30 October 2014, once the *Autorité* had assessed the ability of Altice to foreclose access to the wholesale market for high-speed generalist activated offers, it noted that, except for the new entity, no other operator would be able to provide this type of offer nationwide following the transaction. Given the limited roll-out of FttH (Fiber to the Home) networks by internet access providers, the latter would not, even in the medium term, have a footprint that is comparable to that of the cable network of the new entity.

690. The presence of other vertically integrated undertakings in the upstream and downstream markets is to be taken into account when evaluating the degree of closure of these markets following a vertical merger. Foreclosure will be unlikely if the competitors of the new entity are themselves vertically integrated and if they have internal production capacities or openings enabling them to cater for their needs.

Example : in Decision 14-DCC-50 of 2 April 2014, the *Autorité* considered that the effects of foreclosure of the rights to major sporting events were especially likely to materialise since Canal Plus Group was the only operator with a pay TV offering, enabling it to monetise the fraction of the competition catering for sports fans and a free offer for the most event-oriented part of the competition. Consequently, no other operator in the market was in a position to duplicate such a strategy.

Conversely, this same criterion was used by the *Autorité* in Decision 17-DCC-93 of 22 June 2017 to rule out vertical effects in the market for the acquisition of the broadcasting rights for major sporting events.

Noting that, in addition to owning a limited number of broadcasting rights for major sporting rights, Canal Plus Group was no longer the only operator active in both the pay and free-to-air TV markets, the *Autorité* considered that Canal Plus Group was no longer in a position to foreclose access to this type of programme and lifted the behavioural restraints that had been ordered in the aforementioned decision.

691. When the competitors located downstream depend on the parties for their supply, it is necessary to determine whether they have access to an alternative source of inputs by examining whether the competitors upstream of the new entity have the ability to increase their production or, conversely, whether they are subject to capacity constraints or to a risk of a reduction in their returns to scale. It is also necessary to take account of any capacities of competitors upstream made available by the integration of the new entity. The downstream division, which, following the transaction, gets its supplies exclusively from its upstream division, is likely to free up capacities among the other input suppliers.

692. In particular, when it assesses the reaction capacity of competitors, the *Autorité* takes into account their capacity to procure their goods from wholesalers or intermediaries by taking account of the role played by these intermediaries in all of the new entity's sales.

Example : in Decision 15-DCC-76 of 30 June 2015, the *Autorité* considered that the risk of specialists refusing to supply their goods was unlikely given the existence of wholesalers that were able to supply them with Michelin tyres. It also ruled out the risk of these wholesalers being targeted by a foreclosure strategy by Michelin since, given the small share accounted for by specialists in the sales of wholesalers, such a strategy would affect primarily sales to outlets other than specialists and would therefore not be profitable.

693. In the case of customer foreclosure, it must be determined whether the competitors located upstream can tap into alternative outlets.

694. Lastly, the risks of vertical foreclosure can be influenced by market fluidity. Thus, the contracts between the new entity and competitors can exacerbate the dependency of the latter on the new entity or, conversely, limit the market power of the new entity and protect its competitors by providing them with credible alternative supplies or outlets.

Example 1 : in Opinion 04-A-20 of 22 October 2004, the *Conseil de la concurrence* indicated that " in addition, the barriers to entering the wholesale tableware sector are weak. Contracts between suppliers and distributors are renegotiated on a yearly basis, which guarantees a certain fluidity in the market. "

Example 2 : in Decision M.4854 of 14 May 2008, the Commission noted that the existence of long-term contracts protected the main competitor from the new entity: "Garmin, 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 of Garmin against a refusal to supply will limit the profits that TomTom could secure in the downstream market if it decided to adopt a strategy that entailed refusing to supply inputs. "

Example 3 : in Decision 14-DCC-160 of 30 October 2014, the *Autorité* noted, however, that the contract between Bouygues and Numericable Groups granted the latter the ability to downgrade the pricing conditions and service quality from which Bouygues benefited prior to the transaction, thereby causing a downturn in its competitive position in the downstream market.

695. Lastly, when it assesses the risks of vertical foreclosure, the *Autorité* can take into account the capacity of the new entity to further slow down the capacities of its competitors to react to its attempts to foreclose the upstream markets.

Example : in Decision 14-DCC-160 of 30 October 2014, the *Autorité* noted that the foreclosure of access to the wholesale market for ultra high-speed generalist activated offers was exacerbated, in this case, by the negative effects of the transaction on the incentives of the new entity to invest in the development of an ultra high-speed Ftth (Fiber to the Home) network. The *Autorité* noted that, prior to the transaction, SFR was an important contributor to the co-financing of the FttH networks. However, once this transaction had been completed, it would own Numericable, which would enable it to offer ultra high-speed internet access packages nationwide. It would therefore no longer have an incentive to duplicate an ultra high-speed infrastructure over the cable network, which was likely to globally slow down the deployment of the ultra high-speed network nationwide and therefore the competitive pressure likely to be exerted by the competitors of the new entity in the ultra high-speed internet access packages segment.

Potential competition

696. As with the analysis of the horizontal effects, the role of the barriers to entry is also essential to the competitive analysis. If the barriers to entry are weak and the entry of new rival upstream providers or new downstream buyers is fairly easy, foreclosure of the relevant markers is unlikely. The *Autorité* therefore takes account of the possibility that potential competitors will challenge the market power of the new entity. In order for the pressure exerted by potential competitors to be deemed sufficient, their entry has to be likely and occur quickly and these competitors must be in a position to exert real pressure.

697. The existence of transfer costs can play an important role insofar as they dictate the ability of the competitors to change provider or distributor.

> **Example**: in Opinion 04-A-08 of 18 May 2004, the *Conseil de la concurrence* highlighted the existence of such transfer costs: "The burden of the beer contracts also limits the ability of retailers from the hospitality sector to change distributor and supplier quickly. The high proportion of hospitality undertakings bound by a 5-year beer contract with a brewer was highlighted [...] (around 70 to 80%). "

698. Generally speaking, the level of market fluidity resulting in particular from the term of these contracts in the relevant sector, the terms of renewal of these contracts (tacit renewal or not) or any early termination penalties is an important factor in the analysis.

Counter-power of buyers

699. The *Autorité* also takes account of the counter-power of the buyers in its analysis of the vertical effects of a merger. If the buyers are powerful, they will be able to counter the effects of any foreclosure strategy of the new entity by encouraging, for example, the development of new competitors. For example, if the customer base of a downstream undertaking values a range of products (different brands), this undertaking will have to retain a diversified supply from various upstream suppliers.

> **Example 1** : in Decision M.3943 of 9 November 2005, the Commission considered that distribution networks such as Point P would have to offer its customer base a very broad range of products and, consequently, Point P would not be able to limit its plaster-based product offering to BPB products.
>
> **Example 2** : in letter C2007-22 of 14 May 2007, the French Minister of Economy noted that the activity of Emofer, a subsidiary of Spie Rail, which was active in the market for the production and marketing of concrete ties, was dependent on the procurement of the main client in the market, SNCF/RFF Group, which had no interest in losing the advantages of its monopsony and being dependent on a single supplier.

700. Conversely, in some cases, the behaviour of clients is likely to freeze market development and exacerbate any vertical effects.

> **Example :** in Decision 14-DCC-160 of 30 October 2014, the *Autorité* considered that foreclosure of access to the wholesale market for the offers of Numericable was particularly plausible since the transaction could enable the new entity to pre-empt the market for access to ultra high-speed internet access, where clients are not mobile.

Probability of adoption of foreclosure scenarios

701. In addition to studying the characteristics of the market, the *Autorité* analyses the probability of the new entity adopting foreclosure strategies. To this end, it takes into account the incentives to adopt such behaviour and the factors that are likely to attenuate or eliminate such incentives. This behaviour can result, for example, from regulatory requirements incumbent upon the new entity, its governance rules, the functioning of the market in which the parties to the transaction are active or the illegal nature of this behaviour.

> **Example 1** : in Decision 16-DCC-10 of 21 January 2016, the *Autorité* considered that the new entity would not have an incentive to foreclose access to its television programme rights to reserve access for itself since it was bound by its obligation to invest in independent production. Consequently, any increase in purchases by TF1 Group from the target should be offset by a reduction in internal purchases from its subsidiary TF1 Production, i.e., through an increase in its overall investment envelope.
>
> **Example 2** : in Decision 14-DCC-167 of 13 November 2014,the *Autorité* analysed the incentives of the new entity to increase the complexity of access for downstream operators to the hydrocarbon transport and storage markets due to the governance rules applicable to the new entity. Based on the fact that only one of the two parent companies (in this case, Total) could have an incentive to foreclose access for downstream operators to the target's infrastructure, the *Autorité* specifically analysed its role in the decision-making process. It thus ruled out the risk of anticompetitive effects in the market for the transport of crude oil and naphtha, as Total could only prevent a price change in this market (rather than propose one). However, in light of its influence on the storage allocation systems, the *Autorité* considered that the transaction would generate a competition concern in the hydrocarbon storage market.

702. The aim was firstly to demonstrate that the new vertically integrated entity would have an incentive to foreclose the market. This incentive depends on the profitability of the planned foreclosure.

703. Thus, in the case of an input foreclosure, the fall in sales of inputs to competitors located downstream initially has negative effects on the profitability of the new entity. However, subsequently, the new entity may benefit from a fall in the sales of its downstream competitors due to the lack of availability of inputs and its effects on the quality of their products and their costs, and increase the price charged to consumers or develop its own share of the downstream market.

> **Example 1** : in Decision 10-DCC-98 of 20 August 2010, the *Autorité* noted that in the areas where the new entity had strong positions in the aggregates market, and insofar as the alternative sources of supply were insufficient, an increase in its prices or limiting the quantities of aggregates supplied would not result in a reduction in the margin made by the new entity upstream, but would harm competition in the downstream market for asphalt concretes and road works by reducing or increasing the price of the supply of aggregates to competitors.
>
> **Example 2** : in Decision 14-DCC-179 of 27 November 2014, the *Autorité* considered, however, that SFR would not have an incentive to foreclose access for MVNOs to its mobile telephone network due to the fixed costs linked to the maintenance of its network, the capacity of which is not fully used to cater for the demand of its own subscribers. The sale to MVNOs of access to the mobile telephone network of the operators that own their own network therefore constituted an essential source of revenue that SFR would have no incentive to forego. The *Autorité* considered that such a strategy was particularly unlikely since the majority of MVNOs catered for a specific demand, which complemented the offers of MNO operators, and was therefore less likely to shift to SFR offers.

704. When it assesses the incentives of the new entity to foreclose access to certain inputs that it sells or the anticompetitive effects of such a strategy, the *Autorité* can take account of the specific situation of certain clients.

> **Example 1** : in Decision 14-DCC-50 of 2 April 2014, the *Autorité* conducted a differentiated analysis of the incentives to implement a leverage effect between the upstream and downstream activities of the new entity. After ruling out the risk of generalised foreclosure of access to catalogue films based on the share of the turnover of StudioCanal accounted for by the major French audiovisual groups (such as TF1 and France Télévisions), it considered that such behaviour could not be excluded in respect of TNT's channels, which do not belong to a historical television group.

It considered that the dependence of these channels on catalogue films, combined with their low contribution to the turnover of StudioCanal, were likely to give Canal Plus an incentive to make access to its programmes more complex, thereby generating a risk of exclusion for this type of channels.

Example 2 : in Decision 15-DCC-54 of 13 May 2015, the *Autorité* also conducted a differentiated analysis of the incentives of Rubis to foreclose access to the petroleum product transport infrastructure. Although it ruled out this incentive in the industrial clients segment, which do not compete with Rubis in the downstream market, it nonetheless considered that such incentives existed in respect of the airport EIGs in Guadeloupe since such behaviour allowed Rubis to become the only operator likely to honour fuel supply contracts in the geographical area.

705. In the event of outlet access foreclosure or customer foreclosure, stopping securing its supplies from its upstream competitors can give rise to additional costs for the new entity or a fall in its downstream sales, which must be set against the expected upstream gains. These gains will be particularly high since the competitors in the upstream market will have to propose a less attractive supply, for example because they must cover high fixed costs for a smaller number of clients or, in extreme cases, will be forced out of the relevant market.

706. Various factors can therefore limit the incentives of the new entity. In particular, the level of profits and, therefore, the level of margins secured upstream and downstream is an important factor. It is unlikely that an undertaking will accept significant losses in a market in which it has high margins in order to develop its market share in a market in which the margins are low.

Example : in Decision n14-DCC-160 of 30 October 2014, the *Autorité* used the data relating to the upstream and downstream margins of the new entity as well as the shift rate between the products of the parties in order to estimate the gains likely to be lost in the event of implementation of a total foreclosure strategy and to assess the incentives of the new entity to develop such a strategy.

707. In addition, when demand shifts away from the downstream competitors, it is necessary to determine what share of this demand the new entity may attract. This share will depend in particular on the new entity's available capacities, the degree of substitutability between the products of the new entity and those of its competitors, etc.

Example 1 : in Decision M.3943 of 9 November 2005, insofar as it would have been difficult for Saint-Gobain to expand its distribution capacities, the Commission considered that it was unlikely that BPB, the main suppliers of plaster products in the United Kingdom, would reduce its supplies to rival distributors of Saint-Gobain.

Example 2 : in Decision 15-DCC-76 of 30 June 2015, the *Autorité* noted that, in light of the weakness of the physical network of the target, the new entity did not have a sufficient network of physical sales outlets to allow for an efficient shift of the sales lost by its competitors following implementation of a foreclosure strategy. It thus ruled out any incentive to implement such a strategy.

708. The diversity of the ranges of products or services offered in the relevant market or in related markets is also likely to have an impact on the profitability of the new entity's strategy.

709. In addition, the new vertically integrated entity is faced with the need to sell its production.

Example : in Decision M.1874 of 7 April 2000, the Commission considered that it would not be possible for Lafarge, which is a major player in the downstream concrete market in England, to reserve all of the very high quantity of production of Blue Circle for itself to the detriment of its competitors.

710. To feed into its analysis, the *Autorité* can also take into account the type of strategy and the behaviour adopted in the past by the new entity. Internal strategic documents can also provide clarification of the planned strategies. In its Judgment GE/Commission of 14 December 2005, the CFI indicated that: "[...] 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 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".

Example 1 : in Opinion 98-A-14 of 31 August 1998, the *Conseil de la concurrence* based its analysis on the minutes of a meeting of the board of directors.

Example 2 : in Decision 14-DCC-160 of 30 October 2014, the *Autorité* also drew on the parties' internal documents to demonstrate the incentives of the new entity to foreclose access for its competitors to certain infrastructure owned by it.

711. Finally, in Judgments T-80/02 of 25 October 2002[94] and T-210/01 of 14 December 2005, the CFI recalled that the competition authority must, in the course of its appraisal, take into account the possible deterrent effect represented by the fact that the practices adopted by the new entity would be clearly, or highly probably, unlawful under Community and national law: "the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of a certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in a particular conduct. ".

Example : in Decision 16-DCC-111 of 27 July 2016, the *Autorité* recalled the link between merger control and anticompetitive practice law. It indicated that "the preferential conditions granted to the parties by suppliers, which remain an exception under the current functioning of the relevant markets without the transaction changing in itself the incentives of suppliers to change their behaviour, are not likely to lead to the exclusion of competitors in the markets for the distribution of household appliances. Moreover, it should be recalled that the new entity and its suppliers will continue to be subject to competition law rules prohibiting any anticompetitive practices and abuse of domination positions that may be characterised. "

4. CONGLOMERATE EFFECTS OF A MERGER

a) Nature of these effects

712. A merger produces non-coordinated effects of a conglomerate nature when it allows the new entity to restrict or prevent access to one or more markets. An undertaking that benefits from or strengthens its already strong position in a market may be able to foreclose access to one or more related markets by exploiting a leverage effect, i.e., for example, the ability of an undertaking to increase the sales of a product or service in a market by exploiting its strong position in the market for another product or service to which the first product or service is linked.

[94] Judgment of the Court of First Instance of the European Communities T-80/02 of 25 October 2002 Tetra Laval/Commission.

713. The relation between the relevant markets can stem from the fact that the products or services belong to the same range or from the existence of brands that generate a certain level of differentiation between the products of the parties to the transaction.

714. The conglomerate effects can also be linked to data in the event of a joint purchasing agreement between undertakings present in different markets, where the data collected in relation to each of the markets can be useful for the commercial policy in the other market.

> **Example** : in Decision M. 8124, Microsoft / LinkedIn, the Commission noted the complementary nature of the specialist customer relations sales management software sold by Microsoft and the sales intelligence service supplied by LinkedIn, which makes use of databases. It therefore examined the risk of a conglomerate effect resulting from the transaction. At the end of its investigation, it did note that the high quality of the LinkedIn product was due to the accuracy and timeliness of the data used to develop the product, which come directly from the exploitation of the information in LinkedIn's user database. It did, however, consider that this product was only one offer on a very fragmented and differentiated market that proposes a large number of alternatives. This analysis, combined with other information, led the Commission to rule out any risk of foreclosure of the market for specialist sales management software linked to the position of LinkedIn in the markets for sales intelligence services, resulting in particular from the access that it enjoys to its users' data.

715. As a general rule, when a merger causes conglomerate effects, it paves the way for synergies between the different components of the merged entity. Some of these synergies can be beneficial for competition. For example, by increasing the effectiveness of overall production, the synergies can lead to cost, and then price, reductions, which is beneficial to end demand. The new entity can benefit from significant shared fixed costs or the complementary nature of several products and services. This type of transaction can also generate economies of scope, allow for greater compatibility of the complementary components or lead to an internalisation of the positive effects of a reduction in the price of a product for a complementary product ("Cournot effect").

716. Certain mergers that produce conglomerate effects can, nonetheless, restrict competition, particularly where they serve to tie, whether technically or commercially, the sale or purchase of the constituent parts of the merged entity in such a way that forecloses the market and excludes competitors.

717. The conglomerate effects are likely to materialise within the framework of offers tying or bundling goods or services produced on different markets. This type of offer can differ in nature. It could include the following:

– pure bundling offers, i.e., offers that are tied due to the imposition of an obligation to purchase or sell two or more products together; this obligation can be purely product based or take the form of the technical integration of products (technical bundling); and

– mixed bundling offers, where separate offers exist, but the undertaking proposes the sale or purchase of several products together at better conditions than those proposed if the products are sold or purchased separately.

718. The use of bundled or tied offers can give an undertaking the ability and incentive to take advantage, through a leverage effect, of the strong position it holds in a market and to exclude its competitors from that market. In addition, an examination should be made to determine whether such behaviour would have a significant negative impact on competition, for example by excluding competitors from the market or sidelining them.

b) Analytical criteria

719. The Commission's guidelines on non-horizontal mergers use the same analytical approach to the risks of foreclosure in conglomerate mergers as they do for vertical effects. Similarly, the *Autorité* examines whether the new entity would be able, following the merger, to foreclose access to one or more markets, whether it would have an incentive to do so and whether a foreclosure strategy would have a significant effect in the relevant markets. In practice, these three conditions are closely linked.

720. The factors addressed in the previous sections (market power of the new entity, reaction capacity of competitors, barriers to entry to the market and counter-power of buyers) are adapted specifically to conglomerate effects.

721. As with vertical mergers, it is unlikely that a merger will give rise to a conglomerate effect if the new entity does not enjoy a strong position in a market, which it can use to establish a leverage effect. This condition is met if the new entity has market shares of less than 30% in the relevant markets or if the post-merger HHI is lower than 2,000.

722. However, in terms of the analysis of conglomerate effects, market power can also result from the parties owning one or more assets, products or services, or one or more brands considered by many clients to be particularly important, or essential, and which only have a few acceptable substitutes due, for example, to the differentiation of the products or the capacity constraints to which the competitors are subject.

723. Moreover, a bundled scheme can only have an effect on competition in the relevant markets if a sufficient proportion of the buyers is likely to be interested in the simultaneous purchase of the relevant products.

> **Example** : in Decision 17-DCC-12 of 31 January 2017, the *Autorité* considered that the segment specialising in the distribution of hygiene and cleaning products for health professionals was related to other markets for the distribution of products for institutional professionals. Given the increasing structuring of the "purchasing" function in hospitals, which is heightened by the "hospital performance and responsible purchasing" programme, the *Autorité* noted that the hospitals tended to identify a purchasing manager for each hospital. It considered that this organisational structure was likely to strengthen the capacity of the new entity to tie the sales of its different products, thereby giving it a competitive advantage that cannot be replicated by its competitors.

724. Moreover, to assess the probability that conglomerate effects will materialise, the *Autorité* can take into account the number of clients or suppliers as well as the type and content of the contracts concluded with them.

> **Example :** in Decision 14-DCC-50 of 2 April 2014, the *Autorité* considered that Canal Plus Group was all the more likely to make use of a leverage effect between its position in the market for the acquisition of US film rights to be broadcast on pay TV and its position in the market for the acquisition of the same type of rights to be broadcast free-to-air since the distribution of this type of rights was usually organised through framework contracts that were likely to regulate broadcasting rights for pay and free-to-air TV covering all of the relevant studios and negotiated with the same contacts. The risk of foreclosure was, in this case, all the higher since the number of holders of active rights in the market was limited to six significant operators.

725. The *Autorité* then studies the credibility of the tied selling scenarios. In its *Judgment General Electric vs. Commission* of 14 December 2005, T-210/01 the CFI specified three types of proof that are likely to substantiate the probability of a tied sales scenario:

– past behaviour that may indicate that the parties have already made use of bundled sales.

Example 1 : in Decision 13-DCC-101 of 26 July 2013, the *Autorité* noted that the parties had different commercial mechanisms for the sales of each type of earthenware products and that there was therefore no link between the sales of wall bricks and the sales of partition bricks.

Example 2 : in Decision 17-DCC-53 of 27 April 2017, the *Autorité* ruled out the risk of a portfolio effect after noting that the distribution of recreational vehicles had not been based on a selective distribution model and that the new entity would not be in a position to change this situation unilaterally following the transaction.

It is, however, generally speaking probable that this past behaviour was observed in different markets to those that could be subject to such sales subsequent to the transaction, which mitigates its scope;

– documents attesting to the parties' intention to adopt such behaviour or the benefit of such behaviour for the new entity;

– an economic analysis demonstrating that such behaviour would be objectively in the business interests of the new entity.

726. This last proof is based on a study of the profitability of a tied sales strategy. In terms of gains, such a strategy can be used to protect sales in the tying market and develop sales in the tied market. The gains can stem from the increase in the market shares or the increase in prices. In terms of costs, account should be taken of the discounts designed to promote bundled sales or, where applicable, of the fall in sales due to the loss of customers who are not interested in the tied offer. Implementation of a technical product integration (technical bundling) entails development costs.

727. The effectiveness of a conglomerate foreclosure strategy can be enhanced by the low number of products involved.

Example : in Decision 14-DCC-50 of 2 April 2014, the *Autorité* considered that the ability of Canal Plus Group to establish a leverage effect between its acquisition of rights for original language version programmes to be broadcast on pay TV and on free-to-air TV was enhanced by the fact that there were few programmes that had a high potential audience and potential for success. The establishment of a bundled rights acquisition strategy likely to destabilise the market was therefore particularly effective since the new entity could focus on a limited number of programmes.

728. As with the case of vertical effects, it is generally speaking unlikely that the new entity would run the risk of losing sales in a very profitable market in order to develop its position in a less profitable market.

Example : in Decision 18-DCC-18 of 1 February 2018, the *Autorité* indicated that a tied sales strategy consisting of the granting of discounts for online classifieds in exchange for the purchase of property ads in print publications lacked credibility given the strong position of the new entity in the online property classifieds market and the low profitability of classified ads in print publications.

729. The *Autorité* also examines whether proposing a diversified range of products or services constitutes a competitive advantage and, where applicable, to what extent competitors are likely to offer such a comprehensive range of products or services or such an attractive range of brands.

Example 1 : in Decision 17-DCC-92 of 22 June 2017, the *Autorité* considered that Canal Plus Group was no longer in a position to make use of a leverage effect between its acquisitions of US content to be broadcast on linear TV and non-linear TV due to the emergence of powerful international players that were investing in broadcasting rights for non-linear TV on a global basis. Given their power at global level, these operators were in a position to counteract the attempts by Canal Plus Group to tie its acquisitions of broadcasting rights on linear and non-linear TV in France alone by tying their own acquisitions of rights for several countries.

Example 2 : in Decision 18-DCC-95 of 14 June 2018, the *Autorité* ruled out the risk of conglomerate effects between the market for canned ready meals and the markets for canned vegetables, hot sauces and pasta due to the presence, in the latter markets, of major operators that owned well-known brands and also had a conglomerate dimension.

730. The *Autorité* also analyses the strategies implemented by clients to diversify and secure their supplies.

Example : in Opinion 02-A-07 of 15 May 2002, the *Conseil de la concurrence* analysed in detail the counterweight of the mass retail distribution sector in respect of its suppliers by focusing on the high level of concentration in the mass retail distribution sector in France and the purchasing power that it conferred on retailers, which was reflected in the significant negotiating power of distributors in respect of their suppliers, and on the desire of distributors to diversify their sources of supply in the face of the increasing market shares enjoyed by a supplier.

731. Lastly, as mentioned in the previous section on vertical effects, the *Autorité* takes into account the regulatory context likely to restrict the new entity and the deterrent effect that the clearly, or highly probably, unlawful nature of a strategy adopted by the new entity could have when assessing the probability of conglomerate effects.

5. CREATION OR STRENGTHENING OF PURCHASING POWER

732. A merger can strengthen the purchasing power of the new entity to the point of placing its suppliers in a situation of economic dependency. This case of harm to competition is specifically addressed in Article L. 430-6.

733. This type of examination is conducted in particular for transactions in the mass retail distribution sectors.

> **Example** : in Decision M.1221 of 3 February 1999, the Commission analysed the dependency of suppliers on the central purchasing body of the new entity Rewe/Meinl. Some economic models show that, beyond a certain "threat threshold", which is a function of the share held by this outlet in the total sales of the supplier, the distributor can, by stopping its purchases, force its supplier more or less swiftly into a very difficult financial situation, or into bankruptcy. The level of this threshold is not fixed and depends on a large number of parameters specific to the relevant sectors, to the structure and financial situation of the undertakings and, especially, to the existence or the cost of any alternative solutions.

734. The *Autorité* analyses this type of risk when it examines mergers between distributors, in particular in the mass food retail distribution sector. It has generally considered that, based on a threat threshold that is identical to the one specified by the Commission in the aforementioned decision, in light of the position of the new entity as a purchaser and the low level of strengthening of this position as a result of the transaction, any risk of harm to competition could be excluded. Nonetheless, this risk of creation or strengthening of the economic dependency of suppliers has already been identified in other sectors.

> **Example 1** : in letter C2008-100 of 17 February 2009, the French Minister of Economy highlighted the risk of the creation of purchasing power due to a merger in the meat sector : "[…] the new entity will enjoy strong positions in the market for the purchasing of live cattle (excluding calves) in an area in the North of France, regardless of the slaughterhouse or the size of the catchment area considered. As the alternative supply of slaughtering in this area is limited and the costs and lead times for building a slaughterhouse are high and long (estimated at over two years and around 40 million euros), the risks of the creation of a purchasing power following the transaction that places cattle suppliers in a situation of economic dependency cannot be ruled out." Commitments to divest itself of slaughterhouses were sufficient to dispel the risk identified.

Example 2 : in Decision 16-DCC-208 of 9 December 2016, the *Autorité* noted that the new entity would hold a monopoly over the market for the collection for slaughter of cattle under the "Boeuf de Charolles" registered designation of origin and would therefore be in a position to foreclose access to inputs for any slaughterhouse wishing to obtain the "Boeuf de Charolles" certification. Due to the lack of competitors in the area and any potential competition likely to exert itself on the new entity, the *Autorité* considered that the transaction was likely to generate a risk of economic dependency among the producers and producer organisations that supply cattle under the "Boeuf de Charolle" registered designation of origin. In order to address this risk, the parties committed not to force their affiliates to supply or sell to the new entity a minimum volume of cattle under the "Boeuf de Charolles" registered designation of origin. This remedy, which allows for the entry of a new operator on the market, leads to a reduction in the purchasing power of the new entity.

735. Economic dependency does not constitute in itself harm to competition unless it has an effect on competition in a market and, subsequently, on consumer surplus, rather than only on one or more suppliers. The aim of a competition authority is not to protect an undertaking as such in its capacity as a competitor, client or supplier. The strengthening of purchasing power tends, as a general rule, to benefit consumers providing it does not affect the structures of the upstream and downstream markets.

736. However, insofar as it can diminish the financial capacities and innovation and research capacities of certain undertakings, and cause them to exit the market ultimately, the strengthening of dependency on one (or more) operator(s) can harm competition in a market. In particular, when its corollary or origin is an increase in market power on the downstream market, it is unlikely that the increased purchasing power enjoyed by the new entity will offset the reduced competition observed in the downstream market. It can even further reduce the intensity of competition in the downstream market.

737. These effects must be assessed on a case-by-case basis according to the characteristics of each sector. Consequently, an excessively widespread application could cause some buyers or users of subcontracting to forego *ex-ante* certain economic relations, which could give rise to problems by preventing some small undertakings from accessing either the upstream mass retail distribution markets or subcontracting by large manufacturers.

6. COORDINATED EFFECTS

a) Nature of these effects

738. A merger can modify the nature of competition in a market in such a way that the companies which, hitherto, were not coordinating their behaviour are a lot more likely to do so or, if they were already coordinating their behaviour, can continue to do so more easily. In which case, we talk of coordinated effects, the creation or strengthening of a collective dominant position or a collusive oligopoly, where the transaction will increase the incentives and the capacity of the undertakings present in the market to tacitly maintain a collusive equilibrium. Such effects can be of a horizontal, vertical or conglomerate nature. The coordination in such cases is "tacit" rather than "express", as each undertaking is deemed to continue to act independently and in its own interests.

739. Such effects are possible when, on a oligopolistic market or a highly concentrated market, as a result of a merger, in full knowledge of the common interests, each member of the oligopoly regards it as possible, economically rational and therefore preferable to adopt continuously the same common policy in the market in order, for example, to sell its services or its products at prices that are above competitive prices, without having to conclude an agreement or engage in a concerted practice within the meaning of Articles L. 420-1 or 101 of TFEU, without the current or potential competitors, or even the clients or customers, being able to react effectively.

b) Analytical criteria

740. In Judgment T-342/99 of 6 June 2002, the CFI identified three conditions required to assess the coordinated effects linked to a merger transaction :

– "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 specifically acknowledges, 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. In

this instance, the parties concur 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." (deterrent condition);

– "Third, to prove the existence of a collective dominant position to the requisite legal standard, 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-contest condition).

741. The ECJ confirmed this analysis in Judgment C-413/06P of 10 July 2008, emphasising the fact that such a coordination was only possible if the undertakings were in a position to understand the common policy and the means of implementing it and specifying the link between this "understanding condition" 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. "

742. This judgment also adds 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 relevant criteria can be developed by identifying a tacit coordination scenario (common policy on price differences or price difference trends, production capacity or market share levels or the distribution of customer types, geographical areas or tenders).

743. In its Decision of 31 July 2009, the three criteria established in European case law were picked up on by the French Administrative Supreme Court (*Conseil d'Etat*) : "Whereas the behaviour of operators in an oligopolistic situation in a market can, even in the absence of any formal anticompetitive practice, be implicitly coordinated such that the power of these operators in the market increases to the detriment, in particular, of consumers; whereas the identification of such a collective dominant position supposes that, based on the evidence and proof that can be collected, it appears that each of the members of the oligopoly is in a position to find out sufficiently precisely and immediately any changes to the behaviour of the other members, and that there are credible threats of retaliation in the event of deviation from the common policy implicitly approved by all and that the expected reactions of consumers and the existing or potential competitors of the oligopoly are not sufficient to jeopardise the expected outcome of the tacit collusion".

744. In its analysis of coordinated effects, the *Autorité* draws on this analytical approach and on all of the information likely to clarify the effects of the merger on the functioning of the relevant markets.

Need for a common understanding of the coordination model

745. The easier it is for the relevant undertakings to reach a common perception of the how coordination functions, the more reasonable it is to expect such coordinated behaviour. To this end, these undertakings must share the same vision in terms of the strategies that can be regarded as being in line with the common policy, as well as those that cannot. The probability of the emergence of a mutual understanding is therefore all the greater when the market and the market environment are stable and straightforward. Thus, in its analysis of coordinated effects, the *Autorité* takes account of the following in particular:

– **the number of operators in the market:** it is simpler to agree on coordinated behaviour when there are few potential participants;

– **the symmetry of the undertakings:** a common definition of the way in which the coordination must function is all the easier to obtain when the undertakings involved are similar. Symmetry can exist, for example, in respect of the structure of costs, market shares, production capacities or the degree of vertical integration;

> **Example :** in Decision 14-DCC-71 of 4 June 2014, the *Autorité* ruled out the risk of coordination between the operators that were active in the market for the retail sale of luxury perfumes and cosmetics, as it had observed differences in the organisation models of their distribution networks (own stores and franchises in the case of the new entity, integrated networks for the two main remaining competitors).

– **the homogeneity of the product**: a price coordination agreement is easier to establish if it covers homogeneous products. When there are significant differences between the products, coordination is made very difficult by the dispersion of the resulting price levels;

> **Example :** in Decision 18-DCC-18 of 1 February 2018, the *Autorité* noted that Se Loger and Le Bon Coin displayed significant differences in terms of positioning, which prevented them from reaching a common perception of how anticompetitive coordination would function (in particular, differences in terms of customers, content of the commercial offers, type of additional services offered and audience).

– **the stability of demand** : significant fluctuations in demand constantly modify the extent of the incentives to deviate from coordinated behaviour and force the undertakings to permanently adjust their coordination. Conversely, stable demand facilitates the emergence of a common and durable policy;

> **Example** : in Decision 17-DCC-210 of 13 December 2017, the *Autorité* ruled out the risk of coordinated effects in the markets for cereal, oil seed and protein crop collection due to the significant volatility on the market, which means that purchase offers made to farmers cannot be known in advance.

– **the scale of innovation:** as innovation is a source of instability, a market in which innovation has a low presence is prime territory for the emergence of a common vision of the conditions of coordination.

> **Example :** in Decision M.2111 of 27 October 2000, the Commission noted that the high degree of technological innovation on the flat-rolled aluminium market used in the aerospace industry contributed to making the occurrence of coordinated effects unlikely.

746. The complexity and the instability of the economic framework within which the coordination takes place can, however, be overcome by the undertakings involved thanks, in particular, to:

– **the existence of structural links:** such links pool the interests of the undertakings and thus foster the convergence of their respective visions of the system of coordination. These links also facilitate the exchange of information;

> **Example :** in Decision M.1673 of 13 June 2000, the Commission considered that the presence of cross-shareholdings could foster the adoption of coordinated behaviour.

– **the existence of common pricing rules:** these rules (which can, for example, take the form of reference prices) constitute a set of focal points that facilitate the adoption of coordinated strategies ;

– **access to market data :** the information that the undertakings can obtain and exchange, for example regarding demand or price trends, via monitoring centres or professional associations, foster the emergence of a common policy.

Example : in Decision M.1383 of 29 September 1999 Exxon/Mobil, the Commission considered that the publication of the ex-refinery fuel prices (by organisations such as Platt's), as well as at all the other stages in the distribution chain through to sale "at the pump", was a factor that fostered coordinated behaviour by undertakings.

Detection condition

747. In order for undertakings to be able to effectively coordinate their behaviour, they must be able to monitor the functioning of the market in which they are active. The transparency of that market must be sufficient for each of them to be able within a reasonable time frame:

– to observe the strategy of its competitors;

– to assess whether an unexpected behaviour effectively constitutes a breach of the common policy.

748. The transparency of the market is assessed in respect of the coordination scenario identified.

The following factors may in particular be taken into account:

– **the homogeneity of the products** : a change in the price strategy adopted by an undertaking belonging to a collusive oligopoly can be justified by the degree of differentiation of the products that it distributes in relation to the other members of the oligopoly. Thus, it is more difficult to effectively detect a deviation. However, in the case of significant differentiation, a breach of the common policy is less profitable: the diverging undertaking cannot hope to secure a very large market share unless it lower its prices considerably;

– **access to market data** : the information available to the undertakings (for example, via professional associations) relating to demand or price trends facilitates the detection of a divergent behaviour;

Example 1 : in Decision M.2498 of 21 November 2001, the Commission specified that, on the markets for wood-containing newsprint paper and magazine paper, professional associations, such as CEPIPRINT, contributed to the transparency of the aforementioned markets.

Example 2 : in Decision 17-DCC-53 of 27 April 2017, the *Autorité* ruled out the risk of coordination in the market for the manufacture and marketing of camping cars, stating that the sale prices were not public and resulted from bilateral and confidential negotiations between the manufacturers and their distributors, which prevents the monitoring of the pricing behaviour of the undertakings likely to coordinate their actions.

– **structural links** : since they facilitate information exchanges (which can relate, for example, to pricing or investment policies), the structural links that may be shared by the undertakings belonging to an oligopoly enhances the mutual controllability of each other's behaviour ;

Example : in Decision 07-D-13 of 6 April 2007, the *Conseil de la concurrence* emphasised, in its analysis of a possible collective dominant position, the existence "of structural links or factors" and wondered about the possibility that these links may be likely to "unite the undertakings bound by these links around a common policy".

– **existence of a reduced customer base**: this can constitute a vector of transmission of the information relating to one competitor to another;

– geographical **dimension** of the market**.**

Example : in Decision 14-DCC-71 of 4 June 2014, the *Autorité* considered that the local dimension of the markets made it unlikely that there would be tacit coordination between the operators. The existence of multiple markets made it complex to monitor potential coordination between the main market participants, particularly as they were not systematically present in all areas, making it more difficult to attempt coordination.

Deterrent condition

749. In order to achieve stable coordination, any divergences must be severely punished. The threats of retaliation in the event of divergent behaviour must be credible (once the divergence has been detected, there must be no doubt that the retaliation will take place) and sufficiently severe for it to be in the interests of each member of the oligopoly to comply with the common policy.

750. Regardless of the environment in which the coordination takes place, the existence of a credible punitive mechanism is always guaranteed by the return to a competitive equilibrium. Thus, the issue in respect of the deterrent condition is not whether retaliatory measures exist, but how dissuasive they are. Although, in some cases, the resumption of competitive behaviour constitutes a sufficient threat, in other cases, more severe punishments are needed to ensure the stability of the coordination. Economic theory has thus demonstrated that very stringent punitive measures, which cause the relevant undertakings to make losses, and which are applied over a specific period of time, and which are therefore more of a deterrent than the return to a competitive equilibrium, could prove to be credible.

751. A study of coordinated effects thus focuses on the different factors that allow for the appraisal of the deterrent effect of any retaliation. Other factors taken into account include:

– **production capacities of the undertakings**: a surplus production capacity (or, in some cases, significant stocks) provides the undertakings in an oligopoly with the means to impose severe punishments and, consequently, constitutes a powerful tool of deterrent. However, the presence of surplus production capacity can point to an asymmetry that could undermine the stability of the coordination. An undertaking that has surplus capacity has an incentive to diverge from the common policy, which will be more profitable for it than for the other members of the oligopoly, which, as they do not have comparable productive power, will have difficulties punishing it;

– **existence of multi-market contacts** : when the undertakings are simultaneously present in several markets, a divergence in one of them can give rise to retaliation in others. Thus, multi-market contacts are likely to increase the severity of the punishments and, along with them, the stability of the tacit coordination. However, it should be emphasised that, in the case of multiple contacts, if a member of the oligopoly can act divergently in one market, it can also do the same in all of the markets, thereby making a much greater instant profit. Multi-market contacts are, consequently, also likely to increase the incentives to diverge from the coordinated behaviour. The probability of adoption of a common policy arising from multiple contacts must therefore be subject to a case-by-case assessment;

Example : in Decisions M.2498 and M.2499 of 21 November 2001, the Commission considered that the multi-market contacts of the parties could significantly enhance the stability of coordination.

– **time frame within which the deterrent can be applied** : a punishment is more effective when it is imposed swiftly after the divergence. In this respect, a market in which transactions are few and far between and occur at intervals provides incentives that are particularly conducive to divergent behaviour, as the punishment will only take effect a long time later. Such a market is therefore not very conducive to the adoption of common strategies.

No-contest condition

752. In order for the coordination to be profitable for the participating undertakings, it must not be disrupted by the other players that are present or potentially present in the market. The emergence or strengthening of coordinated effects depends on the effectiveness with which the common policy can be undermined both by clients and competitors. The *Autorité* thus takes into account the following:

– **current competition** : the presence, after completion of the merger, of maverick operators capable of significantly modifying the position of the members of the oligopoly can severely damage the stability of the coordination ;

Example 1 : in Decision 10-DCC-198 of 30 December 2010, the *Autorité* considered that the presence of the RATP, a new entrant in the transport market outside Île-de-France, would destabilise any coordination between Keolis and the new entity.

Example 2 : in Decision 14-DCC-71 of 4 June 2014, the *Autorité* noted that the presence in the market for the retail sale of luxury perfumes and cosmetics of smaller operators than the three main players, but which were present nationwide in France, and major regional operators, was likely to disrupt any attempted tacit coordination.

– **potential competition** : potential competitors can also destabilise coordination. The ability of these competitors to enter the relevant markets is, however, dictated by the level of the barriers to entry;

Example : in Decision M.7758 of 1 September 2016, Hutchison 3G Italy / Wind / JV, the Commission analysed the risk of coordinated effects resulting from the creation of a joint venture between two mobile phone operators in the market for retail sales of mobile communications services. Within the framework of this analysis, it assessed whether potential entrants were likely to undermine the ability of the remaining operators in the market to coordinate their behaviour in the market. After noting that the Italian market for the retail sale of mobile telephone services was characterised by significant barriers to entry, the Commission ruled out any possibility that the behaviour of the operators active in the market for the retail sale of mobile telecommunication services would be restricted by the behaviour of new mobile network operators, whether virtual or not. It therefore considered that the risk of coordinated effects between these players as a result of the transaction could not be ruled out.

– **existence of a countervailing buyer power**: sufficiently large purchasers can disrupt the coordination of the members of the oligopoly by persuading one of them to diverge from the coordination. The criteria for assessing purchasing power are the same as for non-coordinated effects.

Example : in Decision M.1673 of 13 June 2000, the Commission considered that the absence of significant purchasing power could foster the emergence of coordinated behaviour.

c) Analysis of coordinated effects specific to vertical and conglomerate mergers

753. The guidelines on non-horizontal mergers emphasise that where the Commission demonstrates that such a transaction may give rise to the foreclosure of a market, it may result in a reduction in the number of competitors likely to create more favourable conditions for coordination. In addition, vertical integration may alter the conditions of market transparency and the incentives for the new entity and its competitors. It may also have an impact on the effectiveness of monitoring and retaliation mechanisms. These effects are, however, ambiguous.

754. For example, a non-integrated supplier has less incentive to lower its prices when faced with integrated competitors. This is because integrated distributors will most likely continue to source internally (at least partially), even if a non-integrated supplier offers more advantageous terms. As a result, vertical mergers reduce the opportunities for non-integrated suppliers, thereby reducing their profits from deviation and, as a result, their incentives to deviate. This declining market opportunity favours tacit collusion.

755. On the other hand, integrated undertakings typically make more profits in the punishment phases than non-integrated undertakings. This is because, even if prices in these phases are very close to the costs at one level of the vertical chain, an integrated undertaking can make positive profits at another level of the chain. Such undertakings are therefore less vulnerable to punishment than non-integrated undertakings. From this perspective, vertical integration reduces the possibility of tacit collusion.

d) Analysis of the coordinated effects specific to the creation of full-function joint ventures

756. When two independent undertakings create a joint venture, the links established between them may lead them to coordinate their behaviour, not only within the joint venture but, more broadly, in all the markets in which the parent companies and subsidiaries operate by strengthening information-sharing between them or by facilitating the understanding of common objectives.

757. Merger control makes it possible to address these risks when the joint undertaking is a full-function joint venture. Where this is not the case, the behaviour of undertakings shall be analysed in accordance with Articles L. 420-1 and 101 of the TFEU.

Example 1: in letter C2006-45 of 10 August 2006, the Minister for Economy verified, when the groups Banque Populaire and Caisse d'Épargne set up a joint subsidiary, NatIxis, in the corporate and investment banking sector, that the transaction would not lead the two banking groups to coordinate their behaviour in the retail and commercial banking markets, including at local level.

Example 2: in its Decision No. 18-DCC-235 of 28 December 2018, the *Autorité* verified that the conditions for the creation of a joint venture between Global Blue and Planet Payment aiming to operate agencies offering VAT refund services in Paris airports would not enable the parent companies to deprive their own competitors of access to VAT refund services in airports or to severely reduce the service that would be provided to them.

758. The methods of analysing the effects on competition of a merger resulting from the creation of a joint venture by two parent companies were specified by the *Conseil de la concurrence* in its Opinion No. 07-A-09 of 2 August 2007. The *Conseil* recalled that national law did not provide for any specific test for this analysis and that the applicable test was therefore the general test under Article L. 430-6, which aims to identify mergers that are "likely to have an adverse effect on competition, in particular by creating or reinforcing a dominant position or by creating or reinforcing purchasing power that places suppliers in a situation of economic dependence" and which do not make "a sufficient contribution to economic progress to offset the adverse impacts on competition".

759. The situation in which the creation of a joint venture would encourage its parent companies to coordinate their behaviour in the markets where they are simultaneously active could lead to the finding that the resulting harm to competition is incompatible with the provisions of Article L. 430-6, whatever the form of this coordination: either express, within the meaning given to it in competition law, or tacit, in the sense accepted in past decisions concerning collective dominant positions. This is because it is possible, *a priori*, that the creation of a joint venture will strengthen the structural links between its parent companies that would be joined through an interdependent relationship enabling them to anticipate their behaviour, align their strategies and reconcile their objectives, without the companies engaging in behaviour prohibited by competition law. The structural characteristics of the markets that are likely to favour an express agreement include in part the criteria for assessing the likelihood of a collective dominant position being created or strengthened. The analysis of this last risk, however, entails taking into consideration the reaction of other active competitors on the market.

760. Such harm may be considered if the parent companies remain simultaneously present on the same markets or on markets vertically linked to those in which the joint venture operates. Where parent companies are simultaneously present on a market distinct from that in which their common subsidiary is or will be active, it cannot be excluded, *a priori*,

that multi-market contact between undertakings is also likely to facilitate the coordination of their behaviour. This risk of coordination between parent companies as a result of the creation of a joint venture must be distinguished from the non-coordinated effects of such a transaction, linked to the combining of activities within the joint venture itself and to the combining of activities between this joint venture and each of its parent companies that exert a decisive influence on it.

761. When a joint venture is created, the risks of coordination between the parent companies are analysed with regard to three cumulative criteria:

– a causal link must exist between the creation of the joint venture and the appearance of risks of coordination between its parent companies or of heightened coordination;

– there must be a certain probability of coordination taking place, that is, it must be possible and of economic benefit to the parent companies;

– this coordination must have a significant effect on competition.

The causal link

762. The causal link can be established if the activity of the joint venture is of essential importance for the markets in which its parent companies are active. However, it cannot be ruled out that, in some cases, other factors may be at the root of heightened interdependence between the parent companies.

> **Example**: in letter C2006-45 of 10 August 2006, the Minister for Economy considered that the creation of the company NatIxis was likely to create the conditions for coordination between its parent companies in certain markets. The analysis underlined the fact that NatIxis products were an essential factor of production in the parent companies' activity in several of their markets. But the Minister also noted that, "concerning the overall organisation of the entity composed of NatIxis and its parent companies, it is clear from the investigation that the networks will generally act as business introducers for banking products and services for which production will be centralised at NatIxis level. As such, their remuneration will take the form of commissions. As a result, the fact that both networks share the same production platform and are offered the same methods of remuneration for the business introduced to NatIxis could bring their behaviour in the market into alignment."

Conditions of likelihood and significant effect on competition

763. The criteria of likelihood and significant effect on competition are closely linked: coordination of competitive behaviour will be all the more likely because it will be profitable and will therefore have a significant effect on markets. Assessing these criteria is based on an analysis of the competitive functioning of the markets in which the parent companies compete and in which they could coordinate their behaviour.

764. The parent companies of a joint venture will be all the more likely to coordinate their behaviour if they can easily reach a common understanding of how the coordination will function and if, through the joint venture, they are able to monitor each other easily. The effect of this will be all the more significant since parent companies hold strong positions in the markets in question and the common line of conduct cannot be challenged effectively, either by customers or competitors.

765. These criteria are consistent with those used to assess the likelihood of a collective dominant position being created or strengthened. In its decision of 27 June 2007, Métropole Télévision – TF1 and AB, the French Administrative Supreme Court confirmed this reasoning:

> "On the risks of coordination between the companies TF1 and AB
>
> Whereas it was the responsibility of the Minister to assess, within the framework of the procedure set out in Articles L. 430-1 et seq. of the French Commercial Code, whether the joint takeover of the company TMC referred to it was likely to give rise to a risk of coordination of the behaviour of the parent companies in the markets concerned, the evidence in the case indicates that, on the date on which the minister made the contested decision and taking into account, firstly, the very strong competition in the markets for the operation and marketing of special-interest channels and the purchase of broadcasting rights and, secondly, the commitments undertaken by TF1 and AB with regard to television advertising, the transaction in question was not in itself likely to create or strengthen a collective dominant position of these companies; that, if the behaviour of both companies subsequently reveals such risks, it will be the responsibility of the competition authorities to implement, where applicable, the appropriate procedures" (underlining added).

766. This assessment first of all relates to the market shares of the parent companies, since the risks of harm to competition may, in many cases, be eliminated due to the weak position of the parent companies. The risks of harm to competition cannot, however, be eliminated *a priori* in a given market on the grounds that the parent companies (or only one of them) have small or no market shares, where the parent companies have plans to enter that market.

767. If the positions of the parent companies are not sufficiently weak to rule out the risk of harm to competition through coordinated behaviour, the *Autorité* takes into consideration, in its analysis, all matters of fact and of law that may determine whether coordination by parent companies is likely and will have a significant effect on competition. In particular, the *Autorité* may take into account the symmetry of the market shares of the parent companies, the similarity of their products, the stability of demand, the pace of innovation in the sector, the existence of common pricing rules or the possibility of each parent company accessing information on the other parent company, in particular as a result of the creation or strengthening of the joint venture. Moreover, the *Autorité* assesses whether the pressure of current or potential competitors on parent companies and the buyer power of their customers are liable to prevent the coordination from being possible or having a significant effect.

Example: in Decision No. 19-DCC-157, the *Autorité* analysed the risks of coordinated effects between France Télévision, TF1 and M6 when the platform Salto was created, which provides on-demand television and audiovisual media services and operates a subscription video-on-demand service.

In this decision, the *Autorité* analysed the risk of both horizontal and vertical coordination between the parent companies in certain markets affected by the transaction. For example, in the market for operating and marketing free television channels, the *Autorité* found that, given the governance structure of Salto and the content of the distribution agreements, the transaction was particularly likely to result in coordinated behaviour by the three parent companies. This is because, given that they sit on the supervisory board, they were likely to have information on the channel distribution contracts signed by Salto with each of its parent companies, which would have been all the more harmful since these contracts contain non-discrimination clauses that are likely to lead to a certain degree of harmonisation of their content.

The *Autorité* also analysed the risk of coordination between parent companies as part of its analysis of the vertical and conglomerate effects of the transaction. In this way it found that, even though, individually, each parent company was not able to foreclose access to some content to the detriment of the competitors of their joint subsidiary, the transaction was likely to align their incentives to adopt such behaviour in their relations with broadcasting rights holders or distributors of television services. It therefore considered that it was necessary to analyse the combined weight of the parent companies in the various markets concerned in order to assess, firstly, the risks associated with coupling purchases of linear and non-linear rights and, secondly, the risks of foreclosing access to free channels published by the parent companies, as well as to their associated services.

7. CONTRIBUTIONS TO ECONOMIC PROGRESS

a) Objective

768. Article L. 430-6 specifies that, in the in-depth examination phase, the *Autorité* "shall assess whether the transaction makes a sufficient contribution to economic progress to offset the adverse impacts on competition". The *Autorité* examines, in particular, whether the economic efficiency gains from the transaction can increase the incentive for the new entity to adopt pro-competitive behaviour.

769. It is the responsibility of the parties to develop substantiated and quantified arguments demonstrating that the economic efficiency gains from the transaction are likely to offset its anticompetitive effects, and to provide evidence to support this demonstration. As an indication, the Commission indicates in its guidelines on the assessment of horizontal mergers 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".[95]

770. In addition to a precise description of the expected economic efficiency gains, the parties must endeavour to demonstrate the extent to which the criteria for assessing these gains, presented below, are met. The developments that undertakings have devoted to efficiency gains through a merger are generally very limited, even though they are the only ones to control all of the evidence required to assess them and there is good reason to believe that some mergers can generate efficiency gains likely to be of benefit to consumers. It is therefore advantageous to engage in discussions on efficiency gains with the *Autorité* far upstream and not after a risk of harm to competition has been identified and, *a fortiori*, after entering the in-depth examination phase.

[95] Paragraph 88.

b) Criteria for analysis

771. The case law and doctrine to date of the French Administrative Supreme Court and the past decisions of the *Autorité* have given rise to three criteria for assessing economic efficiency gains:
   – these gains must be quantifiable and verifiable;
   – they must be specific to the merger;
   – a share of these gains must be passed on to consumers.

772. This third criterion excludes the gains benefiting the parties to the transaction alone, as indicated by the French Administrative Supreme Court in its Decision of 9 April 1999: "While the development of the company Pernod-Ricard is likely to be favoured through the financial resources generated by the planned sales transaction, such development does not, in its current form and by itself, constitute a sufficient contribution to economic and social progress to offset the anticompetitive effects of the proposed transaction." The French Administrative Supreme Court stated in the same decision that "such compensation can no longer be regarded as consisting of tax revenue to be paid into the Public Treasury if the transaction is carried out or through investments that would be made possible in this case."

773. To assess the extent to which economic efficiency gains meeting the three criteria above offset the anticompetitive effects of a merger, the *Autorité* takes into account in particular their scale compared to that of the anticompetitive effects identified and the speed at which these gains are likely to be achieved.

774. Regarding the scale of the economic efficiency gains, the Commission states in its guidelines on the assessment of horizontal mergers 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 anti-competitive effects." Thus, on several occasions, the *Autorité* has considered that, given the structure of the post-merger market and the low price sensitivity of buyers, it was unlikely that the new entity would have any incentive to pass on all or some of the efficiency gains likely to result from the transaction to consumers.

Example: in its Decision No. 16-DCC-111 of 27 July 2016, the *Autorité* considered that there was no evidence to presume that the expected cost savings generated by the transaction would be passed on to consumers, given the stable prices charged by the retailer Fnac over the last three years, which were, on average, aligned with those of players specialising in online sales.

775. As regards the speed at which the expected gains are achieved, the Commission states in its guidelines on the assessment of horizontal mergers 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."

776. This assessment can be done as part of the construction of prospective scenarios, taking into account both the anticompetitive and pro-competitive effects of the merger.

c) Examples of contributions to economic progress

777. The *Autorité* may take into account in its analysis all contributions to economic progress meeting the above criteria, as soon as they have been demonstrated by the parties. The contributions most often presented by the parties are illustrated below.

Cost savings

778. Many mergers lead to cost savings within the new entity, whether gains by scale effects or productivity gains. It is then up to the parties to demonstrate that the expected cost savings meet the above criteria, in particular that they will be passed on, at least in part, to the community as a whole or to consumers, in the form of price reductions, improvements in the quality of the offering or greater choice for the consumer.

Example 1: in Decision No. 13-DCC-101 of 26 July 2013, the *Autorité* considered that the mere pooling of specific know-how held before the transaction by only one of the parties was not sufficient to establish the existence of a cost saving specifically related to the merger. This is because this specific know-how could be acquired by other means, for example by reorganising the structure of production costs and the logistics of the undertakings concerned.

Example 2: in letter C2005-18 of 28 October 2005, the Minister noted, on the other hand, that "it is also clear from the evidence in the case that, economically, the transaction will result in substantial cost savings. These savings will result from the pooling of information that by nature is undifferentiated, the sharing of advertising departments, distribution networks and prepress services, and the transfer of Presse Océan printing to Ouest-France's production facilities." The transfer of the gains realised to consumers resulted from the fact that, as indicated by the *Conseil de la concurrence* in its Opinion No. 05-A-18 of 11 October 2005, "the savings made seem likely to place the three press titles acquired back in a lastingly viable situation". This is because "economically, it is in the best interests of the new entity to amortise the fixed costs of its business on a maximum volume of sales. In addition, given that the readers of the regional daily press are strongly attached to their favourite publication, the group Ouest-France will benefit from continuing to publish the titles it acquired. This double incentive is therefore likely to guarantee at least that the current print run will be preserved. As a result, local advertisers and private individuals will continue to have access to several differentiated and widely distributed publications. Distribution of the publication Presse Océan, which is currently irregular due to its very fragile financial situation, will also be made viable and rationalised. Local advertisers and individuals will therefore benefit from new regularity in the distribution of this newspaper. Finally, advertisers in the Pôle Ouest publications will benefit from an improvement in the quality of the newspapers (increase in the number of colour pages), and from the extended readership (possibility of consulting classified advertisements on the Internet; rationalised distribution of the titles, putting an end to current uncertainty regarding the daily morning delivery of regional daily press publications in certain *départements*). All of these factors, by contributing to improving the quality of the new entity's publications, will increase their appeal. Consequently, in the advertising and classified advertisement markets, this appeal is capable of offsetting, for local advertisers and individuals, a potential increase in the prices of advertising space."

Example 3: in letter C2002-21 of 20 January 2003, the Minister considered that the parties had not demonstrated that the expected cost savings resulting from the merger between two operators active in the medicinal product distribution market would be passed on to the community. In the case at hand, given the predominance of fixed costs in the economy of the sector, the low incentive for parties to pass on potential gains to their customers, considering the oligopolistic nature of the market and its low competitive pressure, the low price elasticity of the final demand and regulatory constraints on final prices, the Minister considered that any potential efficiency gains would not be passed on to consumers.

779. It should be noted, as shown in Example 3 above, that efficiency gains resulting in the reduction of variable or marginal costs are more likely to lead to lower consumer prices than reductions in fixed costs, since the relationship between fixed costs and consumer prices is usually less direct, at least in the short term. Nevertheless, as shown in Example 2 above, it is possible to take into account the effect of the transaction on fixed costs, despite the fact that it is not as easy to demonstrate that these fixed cost savings will be passed on to consumers.

The development and improvement of the quality of products and services proposed to consumers

780. This is another source of contribution to economic progress that may be identified in the analysis of a merger, particularly if it produces conglomerate effects.

> **Example**: in its Decision No. 10-DCC-11 of 26 January 2010, the *Autorité* did not accept the efficiency gains put forward by the parties, related to the possibility of broadcasting programmes on channels TMC and NT1 that could not be valued on the channel TF1 because they were unlikely to achieve sufficient audience ratings for the incumbent channel. They were not considered sufficient to offset the effects of the transaction on competition, firstly because their redistribution to advertisers in the advertising markets was not compatible with the objective of restoring TF1 Group's margins, presented as one of the principal objectives of the transaction, and, secondly, because it had not been demonstrated that the transaction was the only way to increase the value of the broadcasting rights in question.

Economic benefits for the community

781. These benefits can take many forms, which the *Autorité* examines according to the specific characteristics of the markets concerned.

> **Example 1**: in letter C2007-14 of 13 November 2007, the Minister took into account the economic benefits for the community that could be generated by the merger of the parties' trade fair sites: "it seems to be well established that the activities of trade fairs, shows and conferences create positive externalities for the geographical markets where they are held, which explains why local communities that will potentially reap the benefits often agree to contribute to the investment effort to create or modernise the sites."

Example 2: in its Opinion No. 02-A-04 of 11 April 2002, the *Conseil* noted that "increased sharing of the pylons sold contributes to the development of mobile telephony markets, and in particular to the opening up of the UMTS market, by reducing the investment needs of each of the operators concerned," that "the sharing of sites and passive aerials could generate, on average, savings of 20 to 30% on the network's investment costs," and that "sharing [could] therefore be considered a general-interest objective." However, the *Conseil de la concurrence* considered that this sharing could only be accepted from the perspective of competition law if it is done in a comprehensive, transparent and non-discriminatory manner.

Improving the capacity for innovation and increasing the resources available for research and development (hereinafter "R&D")

Example: in its Opinion No. 05-A-01 of 7 January 2005, the *Conseil de la concurrence* rejected the argument presented by the parties. According to the parties, the transaction would generate financial resources for R&D; the development of homoeopathy would help to reduce the social security deficit; and the scientific progress expected from investment in R&D would benefit consumers and help promote homoeopathy in general, thereby benefiting the merged entity as well as its current and potential competitors. The *Conseil de la concurrence* considered that the increase in R&D funds was indeed "likely to increase the probability of results being achieved, and thereby the likelihood of gains being passed on to consumers", even though, by nature, the contribution of R&D investment to economic progress is always difficult to assess given the inherent contingencies of research. Moreover, lessons from economic literature show that market concentration and innovation do not always go together. As a result, the most innovative undertakings are not necessarily those operating in the most concentrated markets, or even the largest ones. Thus, the mere fact that the parties are active in sectors where investment in R&D is sometimes very substantial was not enough to prove that the merger was likely to produce significant efficiency gains that would offset the potential anticompetitive effects identified by the *Autorité*.

Improving international competitiveness

782. Improving the international competitiveness of the new entity can also constitute a contribution to economic progress if it is likely to benefit French consumers. In its decision of 6 October 2000, Pernod-Ricard – Coca-Cola Company, the French Administrative Supreme Court stated: "The applicant company mentions the development prospects that would be open to the brand 'Orangina' abroad as a result of

the planned transaction, the development possibilities for the Pernod-Ricard group arising from the proceeds of the sale of its assets related to 'Orangina' drinks, and the beneficial effects of this sale for the community; however, provided that the sale of assets related to 'Orangina' drinks is not prohibited with respect to international activities, the development of this brand abroad – which, for that matter, would only benefit the French economy to a limited extent – can be ensured without the assets on the domestic market being sold."

Economic efficiency gains specific to vertical and conglomerate mergers

783. By enabling the decisions taken between suppliers and distributors to be better articulated, vertical mergers can generate efficiency gains that are specific to them. This is because the relations between suppliers and distributors may be subject to externalities which integration makes it possible to internalise. In particular, when a supplier chooses its wholesale price, it takes into account its own margin (wholesale margin), but does not take into account that of the non-integrated retailer(s) (retail margin). By choosing a higher wholesale price, the manufacturer reduces, all other things being equal, the retailers' retail margin, thereby exerting a negative externality on them. The combination of the two margins, wholesale and retail, results in higher prices than those ensuing from an integrated organisation, due to the fact that the latter takes into account the total margin, the sum of the wholesale and retail margins, while the non-integrated supplier does not. Vertical integration thereby eliminates the inefficiency of double marginalisation, which can in some cases benefit consumers.

784. Similarly, an integrated undertaking is *a priori* more likely to invest upstream in expenses for which the profits are mostly expected downstream, for example, to design its products, adopt models, production processes or presentations that promote savings in distribution costs. Symmetrically, downstream branches have much more incentive to carry out product promotion.

> **Example**: in its Opinion No. 04-A-08 of 18 May 2004, the *Conseil de la concurrence* examined the efficiency gains that integration between a brewer and a beverage distributor is likely to generate. According to the company Kronenbourg, such integration would remove the double marginalisation problem but also help to better coordinate the efforts of the brewer and the distributor with regard to the quality and promotion of the products sold. Nevertheless, in this case, the *Conseil de la concurrence* found that the price relationship between the brewer and the warehouse presented certain specific characteristics which were not favourable to removing the double margin and that, as a result, the claimed efficiency gains could not be expected from the merger.

785. In conglomerate mergers, economies of scope are generally expected and consumers can benefit directly from their purchases being grouped together by a single party ("one-stop shopping").[96]

8. THE FAILING COMPANY EXCEPTION

786. In the specific case of an acquisition by a competitor of an undertaking that would be forced out of the market within a short period if the merger were not implemented, the *Autorité* may consider clearing the transaction even if it entails harm to competition. The decision-making practice of the *Autorité* has been based in this respect on the case law and doctrine to date of the ECJ since a judgment of 31 March 1998, which considers that in the event of a competitor taking over a company in difficulty, the transaction may be cleared without being subject to remedies when it appears that the effects of the merger would not be more unfavourable than those resulting from the elimination of the undertaking in difficulty.

787. The three cumulative criteria defined by the ECJ in this judgment were taken up by the French Administrative Supreme Court in a decision of 6 February 2004. It can therefore be considered that the effects of a merger would not be more harmful to competition than the elimination of the undertaking experiencing difficulty where:

- the difficulties experienced by the company would lead to its rapid elimination if not taken over,
- there is no less anticompetitive alternative transaction to acquire the whole undertaking or a substantial part thereof,
- the elimination of the company in difficulty would not be less harmful to consumers than the proposed acquisition.

788. The burden of proof for these three cumulative conditions lies with the parties. Moreover, whether these three conditions are met is strictly assessed.

789. In this decision, the French Administrative Supreme Court specified these application criteria: "concerning the takeover of a company in difficulty by a competitor, [the minister] must clear the transaction without subjecting it to obligations when, at the end of this analysis, it appears that the effects of the transaction on competition would not be more adverse than those resulting from the elimination of the undertaking in difficulty, that is, if it is established, firstly, that these difficulties would lead to the company being rapidly eliminated if not taken over, secondly, that there is no alternative acquisition offer for the whole of or a substantial part of the company that is less harmful to competition, and, thirdly, that the elimination of the company in difficulty would not be less harmful to consumers than the proposed acquisition."

[96] See the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C265/07), in particular paragraph 104.

790. The three criteria must be analysed according to a logical sequence and ultimately aim to establish that the deterioration in the competitive situation would have occurred even in the absence of the merger. The failing company exception only applies to the undertaking acquired and cannot be applied to the buyer. However, the *Autorité* may take into account the risk of the buyer being eliminated, provided that there is a sufficient degree of certainty, under the counterfactual scenario on which the analysis of the competitive effects of the transaction is based.

791. The failing company defence was examined in a limited number of decisions, which illustrate the way in which the three criteria set out by the French Administrative Supreme Court may be analysed.

a) The rapid elimination of the company if not taken over

792. For the *Autorité*, it is a question of verifying that the undertaking was not in a position to pursue its business activity if not taken over by a third party. It is generally accepted that this criterion is met when the target companies are in a situation of suspension of payments and have been the subject of collective proceedings before a commercial court. In the absence of collective proceedings, the *Autorité* may be required to assess whether the failure is "radical" (simple difficulties that do not jeopardise the continuity of business would not suffice), can be proven and will occur in the short term.

b) Absence of alternative acquisition offers that are less harmful to competition

793. This criterion establishes that no other offer less harmful to competition would have ensured the business continuity of the target undertaking. In order to be selected by the *Autorité*, the offer presented must:

- be credible;
- cover the whole or a substantial part of the scope taken over;
- be less harmful to competition than that of the parties.

794. First of all, it should be verified that the assignment procedure is publicised to a certain extent so that market players are able to express their interest in the acquisition. For procedures led by the commercial court, it can generally be presumed that the level of publicity is sufficient.

795. Secondly, although the *Autorité* may use the searches for buyers carried out by the parties involved in the assignment process (in particular mediators or the commercial courts) when assessing whether alternative offers exist, it is not bound by the conclusions of these procedures. The *Autorité* independently analyses the procedures on a case-by-case basis to assess whether one or more credible alternative buyers have come forward, since its assessment of the takeover process is based on competitive criteria that may be distinct

from those retained by other stakeholders involved in the assignment procedure.

796. Finally, the *Autorité* does not only take equivalent offers into consideration. It may also consider lower offers, provided that they cover the whole or a substantial part of the scope taken over.

> **Example 1**: in its Opinion No. 05-A-01 of 7 January 2005, the *Conseil de la concurrence* considered that this second criterion had not been met: "in the absence of collective proceedings, with a public call for buyers, it is up to the parties to prove, by any means, that there was no alternative for the acquisition of Dolisos laboratories". The evidence submitted by the parties proved insufficient to demonstrate that this condition had been met. In addition, a foreign company had declared its interest in entering the French market, with Dolisos being a possible acquisition target. Finally, there were many foreign competitors likely to be interested in this acquisition, even if they had not put themselves forward at the time of the investigation.
>
> **Example 2**: in its Decision No. 18-DCC-95 of 14 June 2018, the *Autorité* also considered that there was a credible alternative to that of the notifying party which was less harmful to competition. After a detailed analysis of the entire takeover process, including the period prior to the commencement of the judicial settlement procedure, the *Autorité* took into consideration all the buyers that had put themselves forward, provided that they had expressed a serious intention to acquire the target even if their offer had ultimately not been filed to the commercial court. As part of this case, the *Autorité* also verified that the alternative offers were indeed less damaging than that of the notifying party, by carrying out a *prima facie* competitive analysis of these offers in order to compare them with that made by the company Cofigeo.

c) Neutrality for consumers

797. The final criterion aims to ensure that the elimination of the target undertaking (in its configuration prior to the transaction) is not less harmful to the consumer than the transaction notified. It is therefore based on the analysis of credible counterfactual scenarios in case the merger is not carried out. For the analysis, it is necessary to identify these scenarios and their credibility, before analysing their effects on the competitive structure of the markets concerned. In particular, offers rejected for not meeting the second criterion, due to their lack of credibility or partial nature, may be considered at the the third criterion assessment stage. The *Autorité* may also be required to assess the effects of some of the target undertaking's assets exiting the market. In particular, it may be required to assess whether the buyer's position would not have been strengthened as a result of the target undertaking's market shares simply being absorbed once the target

undertaking exits the market. As the ECJ highlighted in a judgment of 31 March 1998: "the introduction of that criterion is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed."

> **Example**: in its Opinion No. 02-A-15 of 23 December 2002, the *Conseil de la concurrence* examined various prospective scenarios to determine whether the takeover of the company ORP by the company ASD was less harmful to competition and consumers than its elimination. The established scenarios took into consideration whether a collective dominant position would potentially be created, whether the company ORP would disappear or be taken over, the non-coordinated strategies that could be envisaged by the company ASD, the fact that the merger created asymmetry in the oligopoly that could destabilise it, the fact that the new entity's competitors were nonetheless capable of recreating symmetry by expanding their offerings, and the risks of foreclosure for players in the competitive fringe. From this analysis, it was shown that the elimination of the company ORP "would be as harmful to the functioning of competition as its acquisition by ASD". Consequently, it was considered that the third criterion had been met.

798. In a decision of 6 February 2004, the French Administrative Supreme Court considered, however, that the third criterion had not been met. It considered that, "in judging that a potential acquisition of the brands owned by the company Moulinex, without taking over the industrial assets, did not change the analysis, the Minister did not recognise the possibilities offered by such an acquisition to an operator wishing to enter the French small appliance market, in which, according to the Minister himself, brands constituted the main barrier to entry". In this way, a scenario that could be less harmful to competition, and more favourable to consumers than the proposed acquisition, may be considered.

9. ANCILLARY RESTRAINTS

799. Regulation 139/2004 stipulates 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 on restrictions directly related and necessary to concentrations, the Commission specifies: "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." To the extent that restrictions are directly related and necessary to the implementation of the merger, Regulation 139/2004 shall apply. By contrast, for restrictions that cannot be regarded as directly related and necessary to the implementation of the merger, Articles 101 and 102 of the TFEU remain potentially applicable.

800. This regulation only applies to mergers under European control; it does not apply to mergers subject to national law. Nevertheless, bringing together powers within the same authority relating, first of all, to the application of European and national antitrust law and, secondly, to merger control, allows the *Autorité* to conduct a review of such restrictions within the framework of clearance issued pursuant to Articles L. 430-5 or L. 430-7.

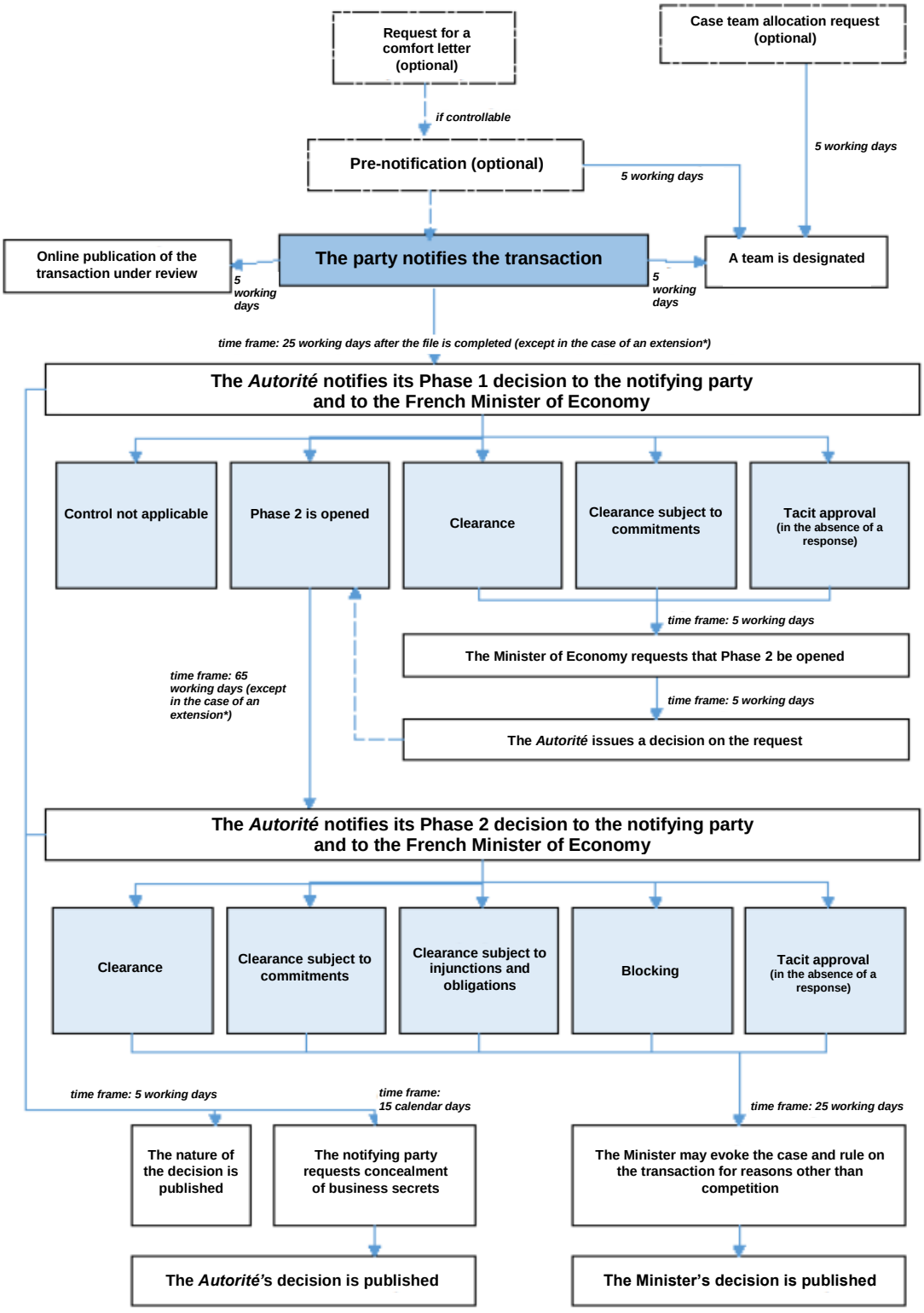
801. The parties have no obligation to bring the existence of an ancillary restraint to the attention of the *Autorité*. Nevertheless, it may be in their interest to draw the *Autorité*'s attention to the existence of a restraint for which there may be doubts as to its compatibility with competition law, owing to its form, scope or combination with other restrictions, or to the competitive context of the relevant markets.

802. Where such restraints are brought to its knowledge and it has reason to review them, the *Autorité* shall assess whether they are directly related and necessary to the implementation of the transaction, without being bound by the position of the parties. Restrictions are considered directly related and necessary where, in the absence of these restrictions, the merger could not be implemented or its viability would be called into question. To the extent that the competition restraints exceed what is directly related and necessary to the transaction, the General Rapporteur could consider implementing the provisions of paragraph III of Article L. 462-5, which give them the power to propose to the *Autorité* to start proceedings *ex officio* for the anticompetitive practices mentioned in Article L. 420-1, should the parties fail to renounce these restrictions.

Example: in its Decision No. 15-DCC-53 of 15 May 2015, the *Autorité* decided on the classification of ancillary restraints for several contracts signed between the company UGI, the buyer, and the company Total, the seller. With regard to the contract for the listing of LPG cylinders and the retail resale of LPG, containing exclusivity clauses without any indication of quantities, the *Autorité* considered that these agreements did not constitute directly related and ancillary restraints. This is because the *Autorité* considered that such a general clause, concerning unspecified quantities, was not strictly necessary to the implementation of the transaction. By contrast, the contract for the provision of butane storage capacity concerned a specific quantity. The *Autorité* therefore considered that it was related and necessary to the transaction since it enabled the seller to continue to supply power to one of its factories. Consequently, the *Autorité* declared that it was covered by the restrictions directly related and necessary to the implementation of the merger, provided that it was not renewed for more than five years.

IV. Appendices

A. THE MERGER CONTROL PROCEDURE



B. ANALYSIS OF DISTRIBUTION NETWORKS

803. The control thresholds specific to the retail sector[97] introduced by the Law of 4 August 2008 on the modernisation of the economy resulted in an increase in the number of notifications that involve questions specific to distribution networks. In particular, several major networks, whether involving the mass retail distribution of food or specialised products, have opted for an organisation structure that contractually links "network members" (concession holders, franchisees, co-operative members, etc.) to a "network head" (which may be a licensor, a franchisor or a retail cooperative, for example).

804. The application of ordinary law on mergers to the relations existing within such a distribution network requires looking at different questions, notably the nature of the control, how turnover is calculated and how market power is evaluated, among other things. The purpose of this appendix is therefore to clarify these questions.

1. DISTRIBUTION NETWORKS AND DECISIVE INFLUENCE

a) Distribution contracts, franchise contracts or trade name contracts

805. The signing of a distribution contract is only likely to exercise a decisive influence within the meaning of Article L. 430-1 of the French Commercial Code in very specific cases. The Commission's consolidated notice specifies in this respect 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)."[98] Thus, for independent stores operated under a trade name contract, the initial signing of these contracts alone does not generally constitute a merger. The same is true, *a priori*, when these stores become affiliated with another network and change trade name.[99]

[97] Paragraph II of Article L. 430-2 of the French Commercial Code.

[98] Paragraph 18 of the Commission's consolidated notice.

[99] Letter 09-DCC-23 of 23 July 2009 concerning the change of retail store name from Vêti to Kiabi: "In the present case, the affiliate agreements stipulate that the operating companies in question shall be free to define their marketing strategy and in particular to set their prices; AFFIPART nonetheless has the possibility of indicating a maximum recommended price to them. Moreover, the operating companies shall assume the financial and commercial risks associated with their activity and therefore bear, in particular, the cost of unsold goods. KIABI, through AFFIPART, will therefore not have a decisive influence on the operating companies in question."

806. The Commission has affirmed this principle in particular with regard to franchise contracts: "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."[100] In its decision M. 940 UBS/Mister Minit of 9 July 1997, the Commission considered that the "typical" provisions (requirement that the franchisee comply with the franchisor's marketing standards, protection of the franchisor's intellectual property rights, etc.) of a franchise agreement were unlikely to confer a decisive influence on the franchisor over the franchisee, to the extent that the franchisee continued to bear the commercial risks inherent to its activity (management of stock and supply, pricing, etc.).

807. Other matters of law or fact, made in conjunction with the various franchise, membership, trade name contracts or "sign" agreements, are, however, likely to confer decisive influence upon the network head over its members. The *Autorité* assesses all factors that enable the head of the network to limit the member's margin of manoeuvre, both in the management of its trade policy and in the possibilities of switching network, and determines whether they are sufficient to confer decisive influence on the "head of the network" over the "member" undertaking. In particular, it takes into account the following criteria: (i) the ability of the head of the network to impose maximum prices on its members, affecting the latter's freedom to set its prices independently, (ii) the obligation on members to procure a significant proportion of their supplies from the group, (iii) the obligation to comply with preemption provisions, substitution and preference clauses to the benefit of the group in the event of the sale of their store outside of the family, (iv) the obligation to participate in a number of promotional campaigns per year, during which members must put their products up for sale at the price indicated on the advertising material, (v) the obligation to list more than 50% of the product lines of the network head, and (vi) the varying length of the contracts.[101]

808. The ability of the network head to exercise decisive influence on its members implies that, when the same operator operates two different franchise stores under different trade names, it is able to implement a different trade policy at its two points of sale, dictated by the network head.

[100] Paragraph 19 of the Commission's consolidated notice.

[101] See, for example, Decisions No. 15-DCC-115 of 18 September 2015 regarding the acquisition of full control of the company Audika Groupe and its subsidiaries by the group William Demant, No. 13-DCC-115, No. 14-DCC-173 of 21 November 2014 regarding the acquisition of full control of Dia France SAS by the company Carrefour France SAS, and No. 14-DCC-179 of 27 November 2014 in relation to the acquisition of full control of Omer Telecom Limited by Numericable Group in which the *Autorité* applied this analysis framework for non-integrated SFR single-brand retailers, La Poste shops and Virgin Mobile shops.

The *Autorité* may therefore ultimately consider that this operator is able to maintain a competitive relationship between its different stores and takes this into account in its competitive analysis. Such a situation was observed by the *Autorité*, for example, in Decision No. 14-DCC-173 of 21 November 2014 regarding the acquisition of full control of Dia France SAS by Carrefour France SAS.

b) Equity holding and articles of association of operating companies

809. The head of the distribution network may, in particular, acquire a capital interest in the operating company at the member's point of sale. Combined with the provisions of the trade name contracts, this shareholding can confer a decisive influence upon the head of the network even if it remains very much a minority shareholding. More exceptionally, by combining a highly derogatory system of governing these operating companies with the provisions of the trade name contract, the network head may hold a decisive influence over these companies without holding any capital interest.

810. This is because, while the rights conferred upon minority shareholders are generally intended to protect their financial interests as investors and do not, *a priori*, suffice to confer decisive influence upon the head of the network over the member, in certain distribution networks, operating companies are required to adopt specific standard articles of association. In this case, the *Autorité* assesses the extent to which certain provisions of these articles are likely to confer on the minority shareholder a decisive influence over the member.

811. For example, if these articles specify the trade name under which the member is to carry out its activity and can only be modified with the consent of the minority shareholder, they enable the head of the distribution network to prevent the member from leaving the network. In that case, the *Autorité* considers that this minority shareholding, attached to the distribution contract, confers a decisive influence on the network head.[102] The same applies where stipulations in the articles set a very long period during which the member cannot leave the network or, de facto, prevent the member from leaving the network for a very long time. Such provisions may be the quid pro quo for shares equating to a simple blocking minority (34% in a limited company, 26% in a private limited liability company), or even holding a single preference share.[103]

[102] See, for example, Decision No. 09-DCC-06 of the *Autorité* of 20 May 2009, ITM/Evolis.

[103] See Decision No. 09-DCC-064 of the *Autorité* of 17 November 2009: "ITM held a single preference share in the company Mikery operating a point of sale under the trade name Intermarché, but the articles of association of the undertaking had been amended and conferred upon ITM Entreprises, for a period of [more than 10 years], the possibility of obstructing any change of trade name, opposing any transfer of shares and forcing majority shareholders to sell the business as soon as they operate a similar business under a competing trade name; as well as a right of preference in the event of the sale of the business at a price calculated according to a predetermined formula. Finally, while after [more than 10 years], ITM Entreprises no longer had the option of obstructing any change of trade name or opposing any transfer of shares, ITM Entreprises retained a right of preference over any sale of securities for an additional 5 years."

812. In another case, the *Autorité* found that the standard articles of association of the operating companies stipulate that the associates of these companies include the members of a "committee of sponsors", holders of the trade name contract, and, in most cases, confer on this committee of sponsors the power to appoint or dismiss the chief executive of the company. The standard articles of association also stipulate that an associate may be excluded by a majority vote by at least three quarters of the number of associates. The loss of the right to use the trade name constitutes sufficient grounds to dismiss the chief executive or exclude the associate. In the event of exclusion, the excluded associate is required to transfer its shares to the other associates. The chief executive of the company, even if they hold a very large majority of the capital, may be excluded under this provision. The *Autorité* considered that these standard articles of association, together with the provisions of the trade name contract, enabled the network head to exercise a decisive influence over the operating companies because the network head thereby has both the power to grant and withdraw the right to use the trade name and to determine the terms of the trade name contract, which defines the network's strategy and governs the trade policy of its members.[104]

c) Acquisition of full control and acquisition of joint control

813. Depending on the prerogatives concerning the undertaking's management, potentially conferred by the articles upon the minority shareholder and the provisions of the trade name contract, the control exercised by the network head over the member may be joint, with the two parties necessarily agreeing on the trade policy of the point(s) of sale, or full, with the network head alone able to determine this policy.

814. Where the head of the network already exercises joint control over the member, a transaction whereby the head of the network acquires full control of the member also constitutes a merger. Faced with this type of transaction during the acquisition of full control of the companies Zormat, Les Chaînes and Puech Eco by the company Carrefour Supermarchés France (Decision No. 18-DCC-65), the *Autorité* considered that the notified transaction was likely to create a problem of potential interbrand competition since it prevented the operator of the business acquired by Carrefour Supermarchés France from changing trade name and operating the store under a competing trade name, once the trade name contract expired.

[104] See Decision No. 12-DCC-125 of 27 August 2012 concerning the acquisition of joint control of 28 predominantly food retail stores by the Union des Coopérateurs d'Alsace and the Association des Centres Distributeurs E. Leclerc.

d) Temporary transactions

815. Certain acquisitions of control by the head of the network of companies operating retail stores affiliated with the network are carried out on a temporary basis, with the head of the network planning to eventually transfer all or part of the control acquired to an independent buyer. There are two possible scenarios:

– where this buyer is known, legally binding documents have been signed between the buyer and the head of the network and the resale is to take place in the short term (within one year), then both transactions, the one by which the network head acquires full control and the one by which it transfers all or part of that control to a third party, may be considered as a single transaction. In this case, the two transactions may be notified to the *Autorité* together. The first temporary transaction is, in this case, considered to have no effect on the structure of competition; only the effects of the second transaction are then subject to a competitive analysis;

– in other cases, the transaction by which the head of the network acquires full control of the point(s) of sale must be notified independently to the *Autorité*, which will assess its effects on the competitive structure of the market.

2. CALCULATING TURNOVER

816. The turnover of the head of a network (franchisor, licensor, cooperative, etc.) includes sales by its branches to end customers, sales to its independent members for the purpose of providing them with supplies, and the remuneration paid by independent members for all services provided by the head of the network. These services, paid for through royalties or other provisions, may take several forms: expertise, brands, assistance, market and assortment studies, training, seminars, etc.

817. The turnover does not, however, include sales to the public made by independent members, as the head of the network does not have the right to manage the business of its members, as per Article 5 of Council Regulation (EC) No 139/2004, explicitly referenced by Article L. 430-2 of the French Commercial Code (*Code de commerce*). This point was established in Decision M. 940 UBS/Mister Minit mentioned above.

3. ASSESSING MARKET POWER

818. The notions of decisive influence and market power do not overlap. As a result, even if the head of the network does not control the store of a member (franchisees, dealers, cooperative members, etc.), the sales of the latter may be aggregated with those of directly owned stores for the purposes of the competitive analysis[105], depending on the degree of autonomy of the business policy applied by independent members of the network.

819. The *Autorité* examines, on a case-by-case basis, whether it should be considered that – within a single catchment area – the stores controlled by the head of the network, on the one hand, and those operated under the same name but not controlled by the head of the network, on the other, are likely to exert competitive pressure on one another.

820. Such an analysis was performed, for example, by the *Autorité* in the Mr Bricolage/Passerelle case and confirmed by the French Administrative Supreme Court (*Conseil d'État*)[106], which noted that the assessment of the market power of a retail group for the purposes of analysing the competitive effects of a merger between two retail networks is distinct from the assessment of the existence of decisive influence for the purposes of identifying a merger, and requires all stores that are members of the network to be taken into account wherever their business policy is not sufficiently autonomous. The French Administrative Supreme Court ruled that the *Autorité* had not committed an error of law by proceeding with a practical analysis of the contracts specific to the two networks involved the case, and by considering – in order to assess the commercial autonomy of the different categories of member – elements such as compliance with franchisor policy regarding advertising communications; participation in promotional campaigns; exclusivity of supply from suppliers referenced by the franchisor for part of the sales; bans on modifying a retail outlet without the authorisation of the franchisor; whether the franchisor is able to set a maximum price; any obligation to produce reference listings for part of the franchisor's product lines; or the existence of first-refusal, substitution or preference clauses benefiting the franchisor in the event of divestiture of a franchised store.

[105] Decisions M. 1221 Rewe/Meinl and M. 1684 Carrefour/Promodes; Opinion of *Conseil de la Concurrence* 00-A-06 and Ministerial Regulation C2000-03, Carrefour Promodes.

[106] Decision 10-DCC-01 of 12 January 2010 on the acquisition of sole control of Passerelle by Mr Bricolage, and French Administrative Supreme Court (*Conseil d'État*) Decision 337533 of 23 December 2010.

4. CONTENT OF NOTIFICATION FILE AND SIMPLIFIED PROCEDURE

821. As indicated previously in paragraph 230 onwards, the required content of the notification file is reduced for transactions relating to retail trade where these are not initially considered likely to raise competition concerns. For such transactions, the parties may submit a shorter file.

822. However, the following elements are essential to ensure rapid, comprehensive examination of the file:

- a detailed study of the catchment areas affected by the transaction. This study must be accompanied by a map featuring the location and name of each competing store, as well as that of stores (independent stores or branches) linked to the retail network concerned by the transaction;
- a copy of the retail contracts (franchise, dealership, cooperative membership contract, etc.);
- a copy of the articles of association and internal rules of procedure of the head of the retail network (franchisor, licensor, cooperative, etc.);
- the names of members that have left the retail network and their reasons for leaving, dating back to three years prior to the notified transaction.

C. LOCAL ANALYSIS FOR MERGERS IN THE RETAIL SECTOR

823. Mergers in the retail sector represent a significant part of the *Autorité de la Concurrence*'s work. The experience that it has acquired in this area has enabled it to develop a methodology for analysing the effects of this type of transaction at local level.

824. Without prejudice to potential future modifications to decision-making practice arising from changes in the functioning of the market, this appendix aims to provide the broad outlines of this methodology to date in order to facilitate notification of this type of transaction by the operators concerned. It is also useful to note that the *Autorité* may adapt its practices in order to take into account the specific features of each case.

825. The methodology described below must be reproduced for each retail outlet affected by the transaction and adapted to the business sector of the target company.

Step 1: Delineation of the local area affected by the transaction

826. The local area analysed is centred on the target retail outlet. An "isochrone" area, whose size varies depending on the sector concerned and type of retail outlet, is marked out around this retail outlet. This area is most frequently calculated using distance (metres or kilometres) or travel time by car[107].

> **Example 1**: For the food retail sector outside Paris, the *Autorité* assesses the effects of the transaction as follows:
>
> – a first market comprising the meeting place of demand from consumers in one area and the supply of hypermarkets that these consumers can access by car in less than 30 minutes and which are, from their point of view, substitutable among themselves;
>
> – a second market comprising the meeting place of demand from consumers and the supply of supermarkets and equivalent types of business located less than 15 minutes away by car. The latter types of business may include, in addition to supermarkets, hypermarkets located close to consumers and discount stores.
>
> The *Autorité* considers that the competitive analysis only affects the second market where the target store is a supermarket, the first market only being taken into account where the target store is a hypermarket.

[107] Where the areas selected are calculated using travel time by car, this must be calculated without traffic and without the use of toll roads.

Example 2: For the food retail sector in Paris, the *Autorité* uses 300-metre areas around the target retail outlet for stores measuring less than 400 m², and 500-metre areas around the target retail outlet for stores measuring more than 400 m².

Example 3: For the food retail sector in the inner suburbs of Paris, the *Autorité* uses areas representing 10 minutes' travel by car around the target retail outlet.

Example 4: For the motor vehicle retail sector, the *Autorité* uses areas representing 45 minutes' travel by car around the target retail outlet for vehicle sales to private individuals, and areas representing 60 minutes' travel by car for new private vehicles aimed at professional customers.

Example 5: For the retail sale of homeware and general merchandise, the *Autorité* uses the following local areas:

- 20 minutes' travel by car around the target retail outlet outside Paris;
- 1–2 km around the target retail outlet within the city of Paris;
- 20, 30 and 45 minutes' travel by car around the target retail outlet in French overseas *départements* and regions.

Example 6: For the retail sale of household electrical goods, the *Autorité* uses the following local areas:

- 30 minutes' travel by car around the target retail outlet outside Paris and outside major cities;
- 20 minutes' travel by car around the target retail outlet outside Paris, in the Paris region and in major cities;
- 3 km around the target retail outlet within the city of Paris.

Example 7: For the sale of gardening, pet, DIY and interior design products, the *Autorité* uses local areas representing 20 minutes' travel by car around the retail outlet.

Step 2: Identification of operators active in the area

827. Once the "isochrone" area has been established, the notifying party has to identify all retail outlets exerting competitive pressure on the retail outlets of parties in that area, based on the past decisions made in specific sectors. At this point, the notification draws a distinction between:

– the retail outlets in the area belonging to the target;

– the retail outlets in the area belonging to the buyer;

– the retail outlets in the area belonging to competitors, with the identity of the latter precisely identified.

828. To allow the *Autorité* to check these first two steps, the notifying party must submit an exhaustive list of the competitors identified in the area analysed, accompanied by sufficient data to enable them to be located (exact addresses or, if necessary, GPS coordinates).

Step 3: Competitive analysis of the area concerned

829. The first two steps make it possible to calculate the market share of the new entity in the area identified: to do this, the notifying party adds the market share of the store in the middle of the area to that of the other retail outlets held by the target and the buyer. The notifying party also calculates the share of the other operators active in the area.

830. To date, these market shares have generally been calculated using the surface area of the retail outlets concerned, with the exception of the motor vehicle sector, for which market shares are calculated using the number of dealerships.

831. Once these market shares have been calculated, the *Autorité* may, in certain cases (notably in the retail sector where a change in store name is involved), use filters aimed at classifying areas into different categories.

832. These different filters are adapted to take into account the specific features of certain sectors or cases.

Step 4: Refined qualitative analysis for the most challenging areas

833. Where, following the analysis above, the market share of the new entity in the area concerned is greater than 50%, or where deemed necessary given the specific features of the case, the *Autorité* performs a more qualitative analysis of the competitive context in the area under consideration.

834. This fourth step allows it to take into account specific local features in the area concerned, such as the presence of major local competitors likely to exert competitive pressure that may restrict the new entity. The *Autorité* also checks the geographical distance between the various stores owned by the target and the buyer to evaluate the scale of reduction in competition associated with the transaction. Lastly, the *Autorité* may incorporate stores bordering the area into its analysis, where these – despite being located outside the "isochrone" area previously identified – are likely to exert competitive pressure on the new entity.

835. In such cases, the *Autorité* also takes into account the potential competition likely to be exerted on the new entity. It may, for example, include the entry of new operators or the expansion of existing operators in its analysis, where such events are certain. In this respect, decisions made by *département* planning committees that are still valid and cleared of any objections constitute important evidence in establishing whether competition will be increased in the area concerned, or the position of the new entity strengthened.

Special case: Actual catchment area

836. Where the notifying party has sufficient information, the *Autorité* may also analyse the effects of the merger in the retail sector based on "actual catchment area" rather than "isochrone" areas. The actual footprint is the actual catchment area of the target store, as it represents the geographical area in which the customers at the origin of 80% of store sales reside or, failing that, the area in which 80% of the store's customers reside. It provides a precise snapshot of the customers who habitually visit the store and, by construction, of a catchment area.

837. Where the actual catchment areas of the target stores are communicated by the notifying party in the notification file, the *Autorité* may use them as a substitute for isochrone areas.

838. The *Autorité* only uses such elements if it considers them a sufficiently reliable basis for its competitive analysis. In particular, the actual catchment area may be deliberately influenced by the notifying party before notification of the transaction (for example, by orienting its advertising efforts towards a given area). The *Autorité* may therefore reject data if it decides that this does not provide a realistic view of the market concerned.

D. TAKING ONLINE SALES INTO ACCOUNT

839. When it analyses the effects of a merger in the retail distribution sector, the *Autorité* considers the need to segment the market by distribution channel, notably between distance sales and those in physical retail outlets.

840. Traditionally, the *Autorité* has treated sales in physical stores and online sales as belonging to two separate markets. However, during the past few years, it has modified its practices several times, incorporating online sales and sales in physical stores into a single retail distribution market, following an analysis of the features specific to the demand for the products concerned[108]. This was notably in relation to Decisions 16-DCC-111 of 27 July 2016 on the acquisition of sole control of Darty by Fnac in relation to household electrical goods; 19-DCC-65 of 17 April 2019 on the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Stéphane Mulliez in relation to toys; and 19-DCC-132 of 16 July 2019 on the acquisition of sole control of Nature & Découvertes by the Fnac Darty group in relation to books.

841. In these decisions, the *Autorité* identified various clues that it is likely to take into account when evaluating whether online and in-store sales can be considered substitutable. Although this list is neither comprehensive nor exhaustive, the following elements are taken into account in particular:

- **Market penetration of online sales**: the *Autorité* assesses whether this is "high and persistent". For example, in Decision 19-DCC-65 mentioned above, the *Autorité* observed that online toy sales represented, in 2017, 19.2% of total toy sales and that "the share of online expenditure on toys in France is, on average, 36% per consumer surveyed". In Decision 16-DCC-111, the *Autorité* observed that "online sales of electronic products constitutes at least 20–30% of the total sales of these products".
- **Internal organisation of operators in the sector**, notably the adoption of an omnichannel strategy. In addition, in the two decisions mentioned above, the *Autorité* noted that the operators surveyed had modified their internal organisation in favour of a single marketing department, without any distinction being made between distribution channels.

[108] The *Autorité* also published, in 2020, a study on competition and e-commerce to provide an overview of the various issues arising from the development of e-commerce and give companies a clear insight into its vision.

– **Incorporation of the behaviour of online operators in the determination of marketing and pricing strategies by traditional operators**: in Decision 19-DCC-65, the *Autorité* notably observed that the notifying parties invested in online tools for adapting their marketing strategies to take into account the competition exerted by parties specialising in online sales. It also noted that one of the parties had increased its budgets for website visibility and online toy purchases.

– **Features specific to the product ranges and services offered in store in relation to those available online**: to evaluate this criterion, the *Autorité* notably takes into account the number of common products that are marketed by operators both online and in store.

– **Price uniformity between the different channels**: in particular, the use by companies of price collections showing the prices applied by online operators constitutes evidence for demonstrating the existence of price uniformity. Accordingly, in Decision 19-DCC-65 the *Autorité* observed that the differences in the prices applied by online operators and physical retail outlets were generally shrinking, standing at less than 10% on the decision date. Policies relating to product returns and the refunding of price differences if the consumer finds the same product available for less from a competitor, whether physical or online, also constitute elements that can be used to determine convergence between online and in-store sales, notably with regard to prices.

– **Development of an "omnichannel" distribution model**: the *Autorité* checks whether consumers navigate between two sales channels when they are purchasing toys, in particular by comparing online and in-store prices, or by making hybrid purchases that combine online shopping with in-store collection. As an example, in Decision 19-DCC-65, the *Autorité* raised the existence of a store digitalisation strategy by operators, based on the possibility of collecting products purchased online from stores, or on the possibility, for in-store vendors, of ordering online products that are not in stock locally.

– **Diversion rates between online retail outlets and physical stores.**

842. Where the *Autorité* considers in-store sales and online sales to belong to the same market, the market shares of operators that run stores and make online sales are calculated by taking into account both in-store and online sales. In the three cases mentioned above, the *Autorité* allocated each operator making online sales a turnover for online sales in proportion to its online market share at national level, including for parties specialising in online sales. This methodology is based on the assumption that the competitive pressure exerted by online sales is the same across all the catchment areas concerned.

E. REQUESTS FOR INTERNAL DOCUMENTS

843. When analysing the effects of a merger, the *Autorité* may decide that the elements provided as part of pre-notification or notification do not provide sufficient evidence to allow investigation of the file.

844. In such cases, the *Autorité* may ask the parties to provide internal documents to supplement the file submitted. Internal documents provide the *Autorité* with information regarding the analysis completed by the parties to the transaction, how the companies of the parties operate and make decisions, and the parties' views of the competitive environment in which they are developing.

Example: The analysis of internal documents notably enables the *Autorité* to:

- Clarify the definition of the market: in Decision 19-DCC-36 of 28 February 2019, the analysis of internal documents regarding the strategy of the notifying party helped demonstrate the existence of price segmentation in the market for the mass retail distribution of vodka.
- Determine the competitive proximity of the parties: in Decision 18-DCC-95 of 14 June 2018, the analysis of internal documents, in particular the reports of negotiations with mass-market retailers helped document the close competitive proximity between the parties to the transaction.
- Identify competitors: in Decision 18-DCC-18 of 1 February 2018, the analysis of internal documents by the *Autorité* made it possible to confirm the competitive pressure – which had been highlighted by the parties – exerted by Le Bon Coin on Se Loger.
- Understand the notifying party's motivations for the transaction: in Decision 20-DCC-38 of 28 February 2020, on the basis of the internal documents provided by the notifying party, the *Autorité* observed that the operation would lead to clinics owned by the new entity being grouped at two sites instead of three, as before the transaction. It therefore analysed the effects of this restructure on the markets concerned.

845. The internal documents that the *Autorité* may request notably include presentations, working documents, internal reports, spreadsheets and other collections of data, studies (performed internally or by an external consultant) or emails. It should be noted that this appendix does not provide an exhaustive list of the internal documents that may be requested, as the nature or scope of such documents varies depending on the transaction, business sectors and companies concerned.

846. When it issues a request for internal documents, the *Autorité* may, for example, target (i) specific internal documents (e.g. negotiation reports or documents relating to calls for tender); (ii) internal documents describing a decision-making process within the companies of the parties (e.g. internal documents on pricing decisions); or (iii) internal documents expressing the parties' views of their competitive environment (e.g. internal documents on competition monitoring by the parties).

847. The *Autorité* ensures that requests for internal documents are proportionate to the requirements of case investigation. Accordingly, where requests for internal documents concern repeated processes within companies (such as price setting mechanisms or competition monitoring), the *Autorité* restricts its request to a given period.

848. Requests for internal documents form part of the tools available to the *Autorité* as part of its merger control work. However, such requests are not systematic and are made on the initiative of the *Autorité*. It may make requests during the pre-notification and notification phase (phase 1 and phase 2). Where these requests are made during the notification phase, they may be integrated into a "stop the clock" procedure. The *Autorité* wishes to specify that the internal documents provided in this context are used exclusively for the investigation of the case.

849. As part of the response to a request for internal documents by the *Autorité*, the parties may indicate that the internal documents requested contain elements subject to confidentiality of correspondence between a lawyer and their client. If this is the case, the parties may provide the *Autorité* with a redacted version of the internal documents, indicate the type of information that has been redacted (for example, written communication with an external advisor to the company linked to the exercise of rights of defence in a competition file, internal reports on an exchange with an external advisor, among others) and produce a summary of this information in general terms.

F. MODEL COMMITMENT TO DIVESTITURE BEFORE THE *AUTORITÉ DE LA CONCURRENCE*

Commitments by [*notifying party*] in relation to [*description of the transaction: for example, acquisition of joint control, etc.*]

(Case XX-XXX)

In accordance with [Article L. 430-5, II *for phase 1 commitments*] [Article L. 430-7, II *for phase 2 commitments*], [*indicate the name of the company proposing the Commitments*] (hereinafter the "**notifying party**") hereby submits the following commitments (hereinafter the "**Commitments**") with a view to allowing the *Autorité de la Concurrence* (hereinafter the "***Autorité***") to clear [*description of the transaction: for example, acquisition of [...], creation of a joint venture between […] and […]*] through a decision based on [*Article L. 430-5, III for phase 1 commitments] [Article L. 430-7, III for phase 2 commitments*] of the French Commercial Code (*Code de commerce*) (hereinafter the "**Decision**").

The Commitments shall enter into effect on the date of notification of the Decision.

This text shall be interpreted in light of the Decision, insofar as the Commitments constitute conditions and obligations associated with the Decision, under French law in general and the French Commercial Code (*Code de Commerce*) specifically, and in reference to the *Autorité*'s merger control guidelines.

1. DEFINITIONS

850. In the context of these Commitments, the terms below shall have the following meanings, whether used in the singular or plural:

[X]: [Indicate the short name of the company divesting one or several of its businesses under the Commitments], company incorporated under [●] law, with registered office at [●], registered with [●] under number [●].

(For each entity involved in the transaction)

Buyer: Entity approved by the *Autorité* as the buyer of one or several [*tangible assets: for example, shops*[109]*; or intangible assets: for example, contracts*[110]] divested in accordance with the criteria set out in Article […] of these Commitments.

[109] These may include shops, service stations, hearing centres, silos, cider works, quarries, ADSL networks, abattoirs, etc.

[110] These may include contracts for the management of networks, capital, intellectual property rights, etc.

Divested Business: The business(es), as defined in the title [...] and appendices to the Commitments, that the parties are committing to divest.

Hold separate manager: The person appointed by [X], responsible for the day-to-day management of the divested business under the supervision of the divestiture trustee.

Divestiture Execution: Transfer to the Buyer of the legal title of the Divested Asset.

Divestiture Contract: Contract through which [*the notifying party*] divests all or part of the Divested [*tangible and/or intangible assets*] to a Buyer.

Effective Date: Date of notification of the Decision.

Closing Date: Date of transfer to [*the notifying party*] of the titles of [*the target company*].

Purchaser criteria: Cumulative criteria referred to in Article 2.4 a) of these Commitments with which each Buyer of a Divested [*tangible and/or intangible asset*] must comply.

Subsidiary: Company controlled by the parties and/or by the companies that control the parties, including the joint venture [*only if the transaction is the creation of a joint venture*], in accordance with Article L. 430-1 of the French Commercial Code and in light of the *Autorité*'s merger control guidelines.

Divested [*tangible or intangible assets*]**:** Set of assets corresponding to the [*tangible or intangible assets*] featuring on the list provided in **Appendix X** of these Commitments or, where relevant, the set of titles of the companies holding these [*tangible or intangible assets*], that the notifying party commits to divesting.

Trustee(s): The monitoring or divestiture trustee.

Divestiture Trustee: One or several legal persons, represented by one or several individuals, independent of the parties, approved by the *Autorité* and appointed by [X], who have received from [X] the exclusive mandate to carry out divestiture of the Divested Business.

Monitoring Trustee: One or several legal persons, represented by one or several individuals, independent of the parties, approved by the *Autorité* and appointed by [X], charged with checking that [X] complies with the conditions and obligations appended to the Decision.

Divestiture Period: Period of nine months from the Effective Date.

Intervention Phase of the Divestiture Trustee: Period of three months from the expiry date of the First Divestiture Period.

First Divestiture Period: Period of six months from the Effective Date.

Personnel: All personnel currently employed by the Divested Business, including Key Personnel, personnel seconded to the Divested Business and shared personnel, as defined in the appendices to the Commitments.

Key Personnel: All personnel required to maintain the viability and competitiveness of the Divested Business [*employed by the Divested tangible assets*].

2. COMMITMENTS BY [*the notifying party*]

851. In response to the competition concerns identified by the *Autorité* in [*the geographical market concerned: for example, the catchment areas concerned, etc.*] and to restore effective competition, the notifying party commits to divesting itself of the assets or titles corresponding to the Divested [*tangible or intangible assets*] featured in Appendix X as per the provisions of Article 2.1 of these Commitments.

2.1 Principle

852. [*The notifying party*] commits to signing, before the end of the Divestiture Period, one or several Divestiture Contracts with one or several Buyers covering all the Divested [*tangible or intangible assets*] featured in Appendix X and approved by the *Autorité* in accordance with the procedure described in Article 2.1.4 b) of these Commitments.

853. [*The notifying party*] shall be considered to have complied with this Commitment if (i) within the Divestiture Period, [*the notifying party*] signed one or several Divestiture Contracts covering all the Divested [*tangible or intangible assets*], (ii) if the *Autorité* approves the Buyer(s) and the terms of the Divestiture Contract(s), and (iii) if closing occurs within three months of the approval of the Buyer(s) and the terms of the Divestiture Contract(s) by the *Autorité*.

854. If Divestiture Execution is subject to a standstill condition linked to the receipt, by the Buyer, of prior authorisation as part of merger control, and if the lifting of this condition occurs after this three-month period has ended, Divestiture Execution shall take place on the last day of the month following the receipt of the authorisation in question.

2.2 Subject of Divestiture Commitment regarding the Divested [*tangible or intangible assets*]

855. Where the Divested [*tangible or intangible asset*] is held by a legal person as the sole asset of the latter, divestiture shall cover either the assets of the Divested [*tangible or intangible assets*], or all the titles of this company held, directly or indirectly, by [*the notifying party and/or the target*], allowing transfer of control over them to the Buyer.

856. If divestiture of a Divested [*tangible or intangible asset*] concerns assets, the divested assets shall include the following elements:

(a) all tangible and intangible assets allocated to the operation of the Divested [*tangible or intangible asset*] that contributes to the current functioning or which is necessary to guarantee the viability and competitiveness of the Divested [*tangible or intangible asset*];
(b) all licences, permits and authorisations granted by the competent bodies and administrations to the benefit of the Divested [*tangible or intangible asset*], insofar as they are transferable;
(c) the income and expense of all contracts, leases, commitments and ongoing customer orders as part of operation of the Divested [*tangible or intangible asset*], insofar as they are transferable;
(d) the income and expense of all contracts, rights and obligations in relation to the Personnel of the Divested [*tangible or intangible asset*].

2.3 Associated commitments

a) Preservation of the viability, commercial value and competitiveness of the Divested [*tangible or intangible assets*]

857. From the Effective Date until Divestiture Execution, [*the notifying party*] shall preserve the economic viability, commercial value and competitiveness of the Divested [*tangible or intangible assets*], in accordance with best trade practices, and undertake to try, as far as possible, to avoid any risk of loss of competitiveness of the Divested [*tangible or intangible assets*]. In particular, the [*notifying party*] commits to:

(a) avoid taking, under its own responsibility, any action that would have a significant negative effect on the value, management or competitiveness of the Divested [*tangible or intangible assets*], or which could alter the nature and scope of the Divested [*tangible or intangible assets*], or the commercial or industrial strategy or investment policy of the Divested [*tangible or intangible assets*];

(b) provide the Divested [*tangible or intangible assets*] with sufficient resources required for their operation, on the basis of and continuing on from existing business plans;
(c) undertake any action necessary to encourage all Key Personnel to remain with the Divested [*tangible or intangible assets*].

b) Non-solicitation of Key Personnel

858. [*The notifying party*] commits to avoid soliciting, and to ensure that its Subsidiaries avoid soliciting, the Key Personnel transferred with the Divested [*tangible or intangible assets*] for a period of [●] months after Divestiture Execution.

c) Due diligence

859. To allow potential buyers to perform due diligence on the Divested [*tangible or intangible assets*], subject to due precautions regarding confidentiality and according to the progress made with the divestiture process, [*the notifying party*] shall provide potential buyers with the information they need to make an offer for the Divested [*tangible or intangible assets*].

860. [*The notifying party*] shall inform the *Autorité* of the preparation of documentation for the data room, as well as the progress made with the due diligence process, and submit a copy of the information memoranda to the *Autorité* before they are passed to potential buyers.

d) Drafting of reports

861. [*The notifying party*] shall submit written reports in French to the *Autorité* and the Trustee regarding the potential buyers of the Divested [*tangible or intangible assets*], as well as information regarding the progress of negotiations with these potential buyers, at the latest 15 days after the end of each month following the Transaction Execution Date (or, where necessary, on the request of the *Autorité*).

2.4 Buyers

a) Conditions Required of the Buyer

862. Buyers shall:

(a) not be controlled as defined under merger law by [*the notifying party or its Subsidiaries*];

(b) possess the financial resources, the confirmed appropriate competence and the necessary motivation to be able to preserve and develop, in a viable way, the capacity of the Divested [*tangible or intangible assets*] to actively compete with the [*notifying party*] and its Subsidiaries in the [*specify sector concerned*] sector;

(c) not be likely, in light of the information available to the *Autorité*, to generate competition concerns; in particular they shall be reasonably likely to obtain all necessary approvals from the competent regulatory authorities for the acquisition of the Divested [*tangible or intangible assets*].

The criteria listed in points (a) to (c) above regarding the Buyer are hereinafter referred to as the "**Conditions Required of the Buyer**".

b) Approval by the *Autorité*

863. Where [*the notifying party*] has reached an agreement with a potential buyer, it must submit to the *Autorité* a documented proposal setting out its reasons, together with a copy of the final version of the draft Divestiture Contract. [*The notifying party*] must demonstrate to the *Autorité* that the potential buyer satisfies the Conditions Required of the Buyer, and that the terms of the proposed divestiture of the Divested [*tangible or intangible assets*] comply with the Commitments.

864. For the purposes of this approval, the *Autorité* checks that the proposed buyer meets the Conditions Required of the Buyer and that the proposed divestiture of the Divested [*tangible or intangible assets*] complies with the Commitments. The *Autorité* may approve the partial divestiture of the Divested [*tangible or intangible assets*], i.e. the transfer of part of the assets or personnel, on the condition that this does not affect the viability and competitiveness of the Divested [*tangible or intangible assets*] after divestiture, taking the proposed buyer into account.

865. The approval of a Buyer by the *Autorité*, as defined in this article, does not necessarily lead to approval as part of merger control. In this respect, the Divestiture Contract may be concluded subject to the standstill condition of the Buyer obtaining any prior authorisation required under merger control.

2.5 Guarantee of Commitment effectiveness

866. In order to preserve the structural effect of the Commitments, [*the notifying party*] may not, for a period of 10 years from the Effective Date, acquire any direct or indirect influence over all or part of the companies operating the Divested [*tangible or intangible assets*] or their assets, except where the *Autorité* gives prior approval in application of Article 3 of these Commitments.

3. TRUSTEE

3.1. Appointment procedure

867. [*The notifying party*] shall appoint a Monitoring Trustee to perform the duties specified in the Commitments.

868. If the [*notifying party*] has not signed a binding contract regarding the Divested [*tangible or intangible assets*] one month prior to the end of the First Divestiture Period, or if the *Autorité* rejects a buyer proposed by the [*notifying party*] by this date or at a later time, [*the notifying party*] shall appoint a Divestiture Trustee to perform the duties specified in the Divestiture Commitment. The appointment of this Divestiture Trustee shall take effect at the start of the Intervention Phase of the Divestiture Trustee.

869. The Monitoring Trustee and, where relevant, the Divestiture Trustee, shall be independent of the [*notifying party*], have the qualifications required to fulfil their mandate (for example, as an investment bank, consultant or audit company), and shall not create or become the subject of a conflict of interest. Each Trustee shall be remunerated by [*the notifying party*] in such a way that does not harm the independent, effective completion of their assignments. In particular, where remuneration of the Divestiture Trustee includes a results-based bonus linked to the final sale value of the Divested [*tangible or intangible assets*], the bonus must also be linked to the execution of the divestiture(s) during the Intervention Phase of the Divestiture Trustee.

3.1.1. Proposal by [*the notifying party*]

870. No later than four weeks after the Effective Date, [*the notifying party*] shall submit to the *Autorité*, for approval, a list of at least three people that [*the notifying party*] proposes appointing as Monitoring Trustee.

Where applicable, at the latest one month before the end of the First Divestiture Period, [*the notifying party*] shall submit to the *Autorité*, for approval, a list of one or several people that [*the notifying party*] proposes appointing as Divestiture Trustee, on the understanding that the Monitoring Trustee and the Divestiture Trustee may be one and the same person.

871. The proposal should include sufficient information to allow the *Autorité* to check that the proposed trustee meets the conditions detailed in Article 3 of these Commitments, in addition to:

(a) the full text of the draft mandate, including all the provisions necessary to allow the Trustee to perform their duties regarding the Commitments;
(b) a draft work plan describing how the Trustee intends to perform their assignment;
(c) a note regarding whether the proposed trustee would serve as both Monitoring Trustee and Divestiture Trustee, or whether two separate trustees are being proposed for the two roles.

3.1.2. Approval or rejection by the *Autorité*

872. The *Autorité* shall have discretionary power to approve or reject the proposed trustee and to approve the terms of the proposed mandate, subject to any modifications it deems necessary to meet the obligations. If a single name is approved, [*the notifying party*] shall appoint or have appointed the person or institution concerned as Trustee, in accordance with the terms of the mandate approved by the *Autorité*. If several names are approved, *the notifying party* shall be free to appoint a Trustee from among the approved names. The Trustee shall generally be appointed within one week of the approval of the *Autorité* in accordance with the terms of the mandate approved by the latter.

3.1.3. New proposal by [*the notifying party*]

873. If all the proposed trustees are rejected, [*the notifying party*] shall submit the names of at least two other people or institutions within one week of the date on which it is informed of the rejection by the *Autorité*, in accordance with the procedure described in Article 3 of these Commitments.

3.1.4. Trustee(s) appointed by the *Autorité*

874. If all the Trustees put forward under this new proposal are rejected by the *Autorité*, the latter shall itself appoint one or several Trustees with whom [*the notifying party*] shall sign a mandate in accordance with the terms approved by the *Autorité*.

3.1.5 Communication of signed mandate contract to the *Autorité*

875. Once the Trustee has been identified, [*the notifying party*] shall, within a week of approval by the *Autorité*, send the latter a copy of the mandate contract signed by [*the notifying party*] and the Trustee.

876. Once the mandate has been signed, [*the notifying party*] and the Trustee are not permitted to make any changes to the mandate without the agreement of the *Autorité*.

3.2. Trustee assignments

877. The Trustee shall take on their specific obligations to ensure that the Commitments are fulfilled.

878. The *Autorité* may, on its own initiative or on the request of the Trustee or the [*notifying party*], give the Trustee any order or instruction with a view to ensuring that the conditions and obligations arising from the Decision are met.

3.2.1. Duties and obligations of the Monitoring Trustee

879. The Monitoring Trustee shall:

(i) propose, in their first report to the *Autorité*, a detailed work plan describing how they intend to check that the obligations and conditions arising from the Decision have been met;

(ii) ensure that the economic viability, commercial value and competitiveness of the Divested [*tangible or intangible assets*] are preserved, and that [*the notifying party*] complies with the other conditions and obligations set out in paragraph 2.3;

(iii) monitor the management of the Divested [*tangible or intangible assets*] as distinct entities likely to be divested;

(iv) take on other assignments given to the Monitoring Trustee in accordance with the conditions and obligations of these Commitments;

(v) propose to the [*notifying party*] measures that the Monitoring Trustee considers necessary to ensure that the [*notifying party*] complies with the conditions and obligations arising from these Commitments, notably preservation of the viability, commercial value or competitiveness of the Divested [*tangible or intangible assets*];

(vi) examine and evaluate potential buyers, as well as the progress made regarding the Commitments and check, depending on the progress made regarding the Commitments, that the potential buyers receive sufficient information regarding the Divested [*tangible or intangible assets*] and the personnel, in particular by examining, if these elements are available, the documentation contained in the data room, the information reports and the due diligence process;

(vii) provide, within two weeks of the end of each month, a written report to the *Autorité*, sending – in parallel and by the same deadline – a non-confidential version of this report to the [*notifying party*]. This report shall cover the operation and management of the Divested [*tangible or intangible assets*] in such a way that allows the *Autorité* to examine whether these Divested [*tangible or intangible assets*] are being managed in accordance with the Commitments, the progress made in implementing the Commitments and the principal characteristics of potential buyers.

In addition to these reports, the Monitoring Trustee shall inform the *Autorité*, in writing and without delay, sending to the [*notifying party*] – in parallel and by the same deadline – a non-confidential version of the documents sent to the *Autorité* if it considers, on the basis of reasonably justified elements, that [*the notifying party*] has failed to comply with the Commitments; and

(viii) within the deadline of one week of the [*notifying party*] sending the Monitoring Trustee a documented proposal regarding a potential buyer, submit to the *Autorité* an opinion, with reasons, regarding the appropriate character of the proposed buyer, the viability of the Divested [*tangible or intangible asset*] after divestiture and whether this proposal has been issued in compliance with the conditions and obligations of these Commitments, notably specifying, where relevant depending on the buyer proposed, whether the transfer of the Divested [*tangible or intangible asset*] without one or several elements of the assets or without part of the personnel would affect the viability of the Divested [*tangible or intangible asset*] after divestiture, taking the proposed buyer into consideration.

3.2.2. Duties and obligations of the Divestiture Trustee

880. During the Intervention Phase of the Divestiture Trustee, the latter must sell, without a minimum price being set, the Divested [*tangible or intangible assets*] to a Buyer, as soon as the *Autorité* approves the potential buyer and the binding and definitive divestiture agreement in accordance with the procedure set out in Article 2.1.4. The Divestiture Trustee shall include in the Divestiture Contract all provisions and conditions that they consider appropriate for the completion of a rapid sale during the Intervention Phase of the Divestiture Trustee. In particular, the Divestiture Trustee may include in the Divestiture Contract all the usual declarations regarding the state of the business, guarantees and the compensation required to complete divestiture. The Divestiture Trustee shall protect the legitimate financial interests of [*the notifying party*], subject to the unconditional obligation of [*the notifying party*] to proceed with divestiture without a minimum price being set during the Intervention Phase of the Divestiture Trustee.

881. During the Intervention Phase of the Divestiture Trustee or, where relevant, on the request of the *Autorité*, the Divestiture Trustee shall provide the *Autorité* with a detailed monthly report in French on the progress made with divesting the Divested [*tangible or intangible assets*]. These reports shall be submitted within two weeks of the end of each month, with a copy being sent in parallel and by the same deadline to the Monitoring Trustee, and a non-confidential version being sent to the [*notifying party*].

3.3. Duties and obligations of [*the notifying party*]

882. [*The notifying party*], either directly or via its counsels, shall provide the Trustee with cooperation and assistance, and provide them with any information reasonably required by the Trustee to accomplish their tasks. The Trustee shall have full access to all the accounts, records, documents, members of management or personnel, infrastructure, sites and technical information of [*the notifying party*] or the Divested [*tangible or intangible assets*] necessary to fulfil their duties under the Commitments. [*The notifying party*] and the Divested [*tangible or intangible assets*] shall provide the Trustee, on request, with a copy of any document. [*The notifying party*] and the Divested [*tangible or intangible assets*] shall make available to the Trustee one or several offices at their premises, and shall be available for meetings in order to provide the Trustee with the information required to complete their assignment.

883. [*The notifying party*] shall provide the Monitoring Trustee with any administrative and management assistance that the latter might reasonably request in the performance of their assignments. [*The notifying party*] shall provide, and have provided through its counsels, to the Monitoring Trustee, on their request, the information submitted to potential buyers, in particular the data room documentation and any other information made available to

potential buyers as part of the due diligence procedure. [*The notifying party*] shall inform the Monitoring Trustee about the potential buyers, provide them with a list of these buyers and keep the Monitoring Trustee informed of any developments in the divestiture procedure.

884. [*The notifying party*] shall grant, or have granted by its Subsidiaries, to the Divestiture Trustee, all powers, duly authenticated, required to complete the divestiture of the Divested [*tangible or intangible assets*], Divestiture Execution, and any actions and reports that the Divestiture Trustee deems necessary or appropriate for the purpose of completing the divestiture or Divestiture Execution, including the appointment of counsels to assist them in the divestiture process. On the request of the Divestiture Trustee, [*the notifying party*] shall take all necessary legal measures to ensure that the documents required to for transfers and closing are duly authenticated.

885. [*The notifying party*] shall indemnify the Trustees as well as their employees and agents (individually referred to as an "**Indemnified Party**"), and indemnify each Indemnified Party against all liabilities arising from the execution of the duties of Trustee under the Commitments, except where this liability arises from the wilful neglect, negligence, misconduct or bad faith of the Trustee, their employees or their counsels and agents.

886. At the cost of [*the notifying party*], the Trustee may appoint counsels (notably to provide legal or financial opinions), subject to the agreement of [*the notifying party*] (which may not withhold or delay its approval without justification), whenever they consider the appointment necessary or appropriate for the accomplishment of their duties and obligations in accordance with the mandate, and on the condition that the expenses incurred by the Trustee on the occasion are reasonable. If [*the notifying party*] refuses to approve the counsels proposed by the Trustee, the *Autorité* may, after hearing [*the notifying party*], approve the appointment of the counsels in its place. The provisions of the previous paragraph shall apply *mutatis mutandis*. During the Intervention Phase of the Divestiture Trustee, the latter may call upon the same counsels as those used by [*the notifying party*] during the First Divestiture Period, if they consider that this is in the interests of a rapid sale.

3.4. Trustee replacement, discharge and reappointment

887. If a Trustee ceases to perform their duties under the Commitments or for any other legitimate reason, including due to a conflict of interest involving the Trustee:

(a) the *Autorité* may, after hearing the Trustee, require [*the notifying party*] to replace the Trustee; or

(b) [*the notifying party*] may, with the prior authorisation of the *Autorité*, replace the Trustee in question.

888. A Trustee removed in accordance with the previous paragraph may be required to continue to perform their duties until a new Trustee, to whom the removed Trustee shall transfer all relevant documents and information, takes up the position. The new Trustee shall be appointed in accordance with the procedure mentioned in Article 3.1.

889. Except in the case of removal as defined in this Article, the Trustee may only cease to act as Trustee after the *Autorité* has discharged them from their duties, after the completion of all the Commitments for which the Trustee in question is responsible. However, the *Autorité* may, at any time, ask for the Monitoring Trustee to be reappointed if it decides that the Commitments concerned have not been fully or properly implemented.

4. REVIEW CLAUSE

890. The *Autorité* may, where necessary and in response to a written request from [*the notifying party*] detailing legitimate reasons:

(a) grant an extension to the deadlines given in the Commitments; and/or

(b) lift, modify or replace one or more Commitments if the *de facto* or *de jure* circumstances taken into account in the examination of the transaction undergo significant change to the point of calling into question the competitive analysis of the markets concerned, and thus the need for the Commitments.

891. The new or exceptional circumstances that may, on the request of [*the notifying party*], be examined on a case-by-case basis by the *Autorité* to assess, after hearing [*the notifying party*], the relevance of any request to lift, modify or replace one or more of the Commitments, in light of the competitive analysis of the relevant market by the *Autorité*, can include in particular any change in the competitive structure of the [*geographic market(s) concerned*], which could lead to [*the opening of competing retail outlets*], for example.

892. If [*the notifying party*] requests an extension of the deadlines, it must submit a request to this effect to the *Autorité* at the latest one month prior to the deadline concerned, detailing its legitimate reasons. [*The notifying party*] may request an extension during the last month prior to the deadline solely if exceptional circumstances so justify.

Signed in Paris, _____20XX On behalf of [the Buyer]

G. MODEL MANDATE CONTRACT

BETWEEN:

[X] [*Indicate the name of the company selling its business*] (hereinafter "[X]"), company incorporated under [*indicate law applicable to the company*], with registered office at [*indicate full address*], represented by [*indicate name and position of person representing X for the mandate*],

hereinafter referred to as the "**Principal**",

AND

[X] [*Indicate the trade name of the company*] (hereinafter "[X]"), with registered office at [*indicate full address*], represented by [*indicate name and position of person representing X for the mandate*],

hereinafter referred to as the "**Trustee**".

The Principal and the Trustee are collectively referred to as the "**parties**".

THE FOLLOWING IS HEREBY AGREED:

As part of merger [*number and name of the case*], and in accordance with Article [*L. 430-5 (phase 1) or L. 430-7 (phase 2)*] of the French Commercial Code (*Code de commerce*), the Principal has proposed commitments (the "***Commitments***"), a copy of which is provided in Appendix [●], with a view to allowing the *Autorité de la Concurrence* (the "***Autorité***") to clear [*description of the transaction: for example, acquisition of sole control of [...], creation of a joint venture between [...] and [...], etc.*]. The *Autorité* has therefore cleared the transaction through Decision [*number and date of decision*] (the "**Decision**"), subject to implementation of the Commitments.

In accordance with the Commitments, the Principal has committed to divesting [*business that must be divested*] (the "**Divested Business**"). Pending divestment of the Divested Business, the Principal commits to maintaining its economic viability, its commercial value and its competitiveness.

The Principal commits to appointing a trustee responsible for monitoring compliance with the Commitments ("**Monitoring Trustee**") and a trustee responsible for carrying out divestiture of the Divested Business if a Divestiture Contract is not drawn up for the latter by the end of the First Divestiture Period ("**Divestiture Trustee**"). Through this mandate contract, the Principal appoints the Trustee as Monitoring Trustee and, where necessary from [*date of end of first divestiture period*], as Divestiture Trustee.

The appointment of the Trustee and the terms of this mandate have been approved by the *Autorité* by letter [*indicate the date of the approval letter*].

In the event of doubts or contradictions, the mandate shall be interpreted in accordance with (i) the Decision and Commitments; (ii) the general framework of French law, and the Commercial Code (*Code de commerce*) more specifically; and (iii) the *Autorité*'s merger control guidelines.

HAVING REGARD TO THE AFORESAID, THE PARTIES AGREE THE FOLLOWING:

1. DEFINITIONS

893. Under the Commitments and for the purposes of this mandate, the terms below are defined as follows:

Buyer: Entity or entities approved by the *Autorité* as the buyer(s) of the business in accordance with the criteria set out in the Commitments.

Divested Business: The assets, as defined in the text of the Commitments, that the Principal has committed to divesting.

Divestiture: Signing of a definitive contract to sell the Divested Business to the Buyer.

Conflict of interest: A conflict of interest arises from a situation in which the Trustee, the companies associated with the Trustee or the members of the Trustee's Team have interests that may influence how the Trustee performs their duties.

Trustee Partner Firms: The other companies belonging to the same group of individuals or companies as the Trustee.

Trustee's Team: The key people responsible for performing the tasks in the mandate identified in Article 4.

Trustee: The Monitoring or Divestiture Trustee.

Work plan: Document submitted to the *Autorité* by the Trustee before their appointment detailing how their work will be organised. This document is given in Appendix [●] of

this mandate, and a more detailed version shall be submitted to the *Autorité* by the Trustee in the month following the signing of this mandate contract.

First Divestiture Period: Period of [●] months starting from the date of the *Autorité*'s Decision, ending on [*date*].

Divestiture Execution: Effective transfer of ownership of the Divested Business to the buyer.

2. TRUSTEE APPOINTMENT

894. Through this mandate, the Principal gives the Trustee an exclusive mandate to perform the role of Monitoring Trustee and Divestiture Trustee in accordance with the Commitments. The Trustee accepts this appointment in accordance with the terms of this mandate.

895. The duties of Trustee take effect on the date this contract is signed, with the exception of those related to the role of Divestiture Trustee, which shall take effect following the end of the First Divestiture Period.

896. The Trustee's Team comprises the following people: [*indicate name and title of each person*]. The Trustee shall not change any members of the Trustee's Team without prior approval from the *Autorité* and the Principal.

3. DUTIES AND OBLIGATIONS OF THE TRUSTEE

897. The Trustee acts on behalf of the *Autorité* to ensure that the Principal complies with its Commitments, and takes on the duties of [*Monitoring and/or Divestiture Trustee*] in accordance with the Commitments. They perform the tasks described in this contract in accordance with the work plan and its revised versions approved by the *Autorité*.

898. The *Autorité* may, on its own initiative or on the request of the Trustee or Principal, issue the Trustee with any instruction aiming to ensure that the Commitments are met. In no case may the Principal give instructions to the Trustee.

899. The Trustee may propose to the Principal any measures that they consider necessary to ensure that the Commitments are met, and may propose necessary measures to the *Autorité* if the Principal does not comply with the proposals of the Trustee within the deadlines set by the Trustee.

900. The Trustee guarantees, throughout the execution of their assignments, to remain fully independent of the Principal, and to ensure that their employees do likewise, in order to prevent any conflicts of interest arising during the execution of one of their tasks.

3.1 Duties and obligations of the Monitoring Trustee

3.1.1 Monitoring the Divested Business

901. The Monitoring Trustee must, in accordance with the Commitments, supervise the day-to-day running of the Divested Business in order to ensure that its viability, commercial value and competitiveness are preserved, and to ensure that the Principal upholds its Commitments. To this end, and until Divestiture Execution, the Monitoring Trustee must notably:

a) monitor (i) the preservation of the economic viability, commercial value and competitiveness of the Divested Business in accordance with best trade practices; (ii) the minimisation, as far as possible, of any risk of loss of potential competitiveness of the Divested Business; (iii) the absence of actions under their own responsibility that would have a significant negative effect on the value, management or competitiveness of the Divested Business, or on the commercial or industrial strategy or investment policy of the Divested Business; (iv) the provision by the Principal to the Divested Business of sufficient resources required for its development, on the basis of and continuing on from existing business plans; (v) the completion by the Principal of any actions necessary, notably suitable incentive schemes (in accordance with the practices of the sector concerned), to encourage all Key Personnel to remain with the Divested Business;

b) check that the Divested Business is managed as a separate, transferable entity, separate from the business of the Principal or its Subsidiaries;

c) in consultation with the Principal, (i) determine all measures necessary to guarantee that the Principal is not able, after the Effective Date, to obtain any information covered by business secrecy, expertise, commercial information or any other confidential or protected information regarding the Divested Business, and (ii) decide whether such information may be divulged to the Principal where this is necessary to allow it to implement the divestiture or where this disclosure is required by law.

3.1.2 Monitoring of divestiture

902. The Monitoring Trustee shall assist the *Autorité* as part of their monitoring of the divestiture process and the examination of the proposed buyers. As a result, the Monitoring Trustee shall, during the First Divestiture Period:

a) examine and assess the progress made with the divestiture process and the search for potential buyers;

b) check, according to the stage of the divestiture process, (i) that the potential buyers receive sufficient information regarding the Divested Business (by checking, if these documents are available, the documentation contained in the data room, the information reports and the due diligence process); (ii) that the potential buyers have adequate access to the personnel.

903. Once the Principal has submitted a documented proposal for a buyer to the *Autorité*, the Trustee shall, within one week of receiving the documented proposal, submit to the *Autorité* an opinion, with reasons, on the appropriate character and independence of the proposed buyer, the viability of the Divested Business after divestiture and whether the sale of the Divested Business complies with the Commitments.

3.2 Duties and obligations of the Divestiture Trustee

904. After the First Divestiture Period, the Principal issues an exclusive mandate to the Trustee to allow the sale of the Divested Business to a Buyer approved by the *Autorité*. They must find a suitable buyer to be approved at a later stage by the *Autorité*.

905. The Divestiture Trustee must sell the Divested Business, without a minimum price being set, to one or several Buyers approved by the *Autorité*.

906. The Divestiture Trustee shall include in the Divestiture Contract all provisions and conditions that they consider appropriate for the completion of a rapid sale. In particular, the Divestiture Trustee may include in the sale contract the usual declarations, guarantees and compensation that may be reasonably required to execute the divestiture. At the same time, the Divestiture Trustee shall protect the legitimate financial interests of the Principal.

3.3 Reporting obligations

907. The Monitoring Trustee shall provide, within 15 days of the end of each month, a written report to the *Autorité*, sending – in parallel and by the same deadline – a non-confidential version of this report to the Principal.

908. The report shall provide an update on the Monitoring Trustee's fulfilment of their obligations in application of the mandate, and the Principal's compliance with the

Commitments. The reports must cover the following in particular:

a) a proposed detailed work plan in the first report, as well as any modifications in later reports or any difficulty encountered in drawing up a work plan;

b) the operational and financial performance of the Divested Business in the reporting period; checks on the preservation of the economic viability, commercial value and competitiveness of the Divested Business and on the compliance of the Principal with the obligations to keep the Divested Business separate;

c) the progress made with the divestiture procedure, including a list of potential buyers, their principal characteristics, the state of negotiations and any other information received by the Principal regarding the divestiture;

d) any difficulties that arise during the execution of their mandate, in particular any difficulties related to failure by the Principal to comply with its Commitments;

e) an estimated future schedule.

909. Following the end of the First Divestiture Period, the Divestiture Trustee shall provide a monthly written report to the *Autorité*, sending – in parallel and by the same deadline – a non-confidential version of this report to the Principal. The report shall provide an update on the Divestiture Trustee's fulfilment of their obligations in application of the mandate, and the Principal's compliance with the Commitments. The reports must cover the following in particular:

a) a proposed detailed work plan in the first report, as well as any modifications in later reports or any difficulty encountered in drawing up a work plan;

b) the progress made with the divestiture procedure, notably a summary of the negotiations with each potential buyer, a list of the potential buyers and a preliminary opinion of each of them;

c) any difficulties or problems concerning the divestiture of the Divested Business, including any difficulties or problems in negotiating the necessary agreements;

d) the need for assistance from an advisor for the divestiture of the Divested Business and a list of counsels selected by the Trustee for this purpose.

910. The Trustee shall provide the *Autorité*, at any time and on the request of the latter (or on the initiative of the Trustee), an oral or written report on issues related to their mandate. The Principal shall be sent, in parallel, a non-confidential version of any additional written reports, and be informed rapidly of the non-confidential content of any oral reports.

911. In addition to the reports, the Trustee shall inform the *Autorité*, in writing and without delay, sending to the Principal – in parallel and by the same deadline – a non-confidential version of the documents sent to the *Autorité*, if they consider, on the basis of reasonably justified elements, that the Principal has failed to comply with the Commitments.

912. The Trustee may, where necessary for the execution of their assignments, ask the *Autorité* for interpretation of the clearance Decision or the letter of Commitments made by the Principal, or more generally how their assignments should be executed.

4. DUTIES AND OBLIGATIONS OF THE PRINCIPAL

913. The Principal, either directly or via its counsels [*counsels to be named*], shall provide the Trustee with cooperation and assistance, and provide the Trustee with any information reasonably required by them to accomplish their tasks. Specifically in relation to the Divested Business, the Trustee shall have full access to all the accounts, records, documents, members of management or personnel, infrastructure, sites and technical information of the Principal or the Divested Business necessary to fulfil their duties under the Commitments. The Principal and the Divested Business shall provide the Trustee, on request, with a copy of any document. The Principal and the Divested Business shall make available to the Trustee one or several offices at their premises, and shall be available for meetings in order to provide the Trustee with the information required to complete their assignment.

914. The Principal shall provide the Monitoring Trustee with any administrative and management assistance that latter might reasonably request, for example administrative support in relation to the Divested Business. The Principal shall provide, or have provided through its counsels, to the Monitoring Trustee, on their request, the information submitted to potential buyers and any other information made available to potential buyers as part of the due diligence procedure. The Principal shall inform the Monitoring Trustee about the potential buyers, provide them with a list of these buyers and keep them informed of any developments in the divestiture procedure.

915. Following the end of the First Divestiture Period, the Principal shall grant the Divestiture Trustee all the powers necessary to formalise the divestiture in a contract and execute it, and perform any action or declaration that the Divestiture Trustee considers necessary or appropriate for the purposes of Divestiture Execution.

916. At the expense of the Principal, the Trustee may appoint counsels (notably to provide legal, financial or technical opinions), subject to the agreement of the Principal (which may not withhold or delay its agreement without justification), whenever they consider the appointment necessary or appropriate for the accomplishment of their duties and obligations in accordance with the mandate, and on the condition that the expenses

incurred by the Trustee on the occasion are reasonable. If the Principal refuses to approve the counsels proposed by the Trustee, the *Autorité* may, after hearing the Principal, approve the appointment of the counsels in its place. Only the Trustee is permitted to issue instructions to these counsels. Following the end of the First Divestiture Period, the Divestiture Trustee may call upon the same counsels as those used by the Principal during the First Divestiture Period, if they consider that this is in the interests of a rapid sale.

5. PROVISIONS RELATING TO THE TRUSTEE

5.1 Conflict of interest

917. Current relations between the Principal and its Subsidiaries, on one side, and the Trustee, the Trustee's Team and companies associated with the Trustee, on the other, are reported in Appendix [●] to this mandate. On this basis, the Trustee personally guarantees that they and each member of their Team are independent from the Principal and its Subsidiaries, and that no conflicts of interest threaten their objectivity and capacity to independently execute the assignments entrusted to them under the terms of the present mandate.

918. The Trustee undertakes to avoid creating any conflicts of interest during execution of the mandate. The Trustee, the members of their Team and the companies associated with the Trustee may not, during the execution of this mandate:

a) occupy or accept any job, role or corporate mandate within the Principal or its Subsidiaries, with the exception of any appointments relative to the implementation and execution of this mandate;

b) perform or accept any assignment, enter into any business relationship or hold any financial interest in the Principal or its Subsidiaries that could give rise to a conflict of interest. If the Trustee, the companies associated with the Trustee or the members of the Trustee's Team wish to undertake an assignment, enter into a business relationship or make an investment with the Principal or its Subsidiaries, the person concerned must obtain the approval of the *Autorité*.

919. If the Trustee is informed of the existence of a conflict of interest, they must immediately inform the Principal and the *Autorité*. If the Principal is informed of the existence – whether potential or confirmed – of a conflict of interest, they must immediately inform the Trustee and the *Autorité*. When a conflict of interest arises during the mandate, the Trustee commits to bringing it to an end immediately. If the conflict of interest cannot be, or is not, resolved by the Trustee as rapidly as possible, the mandate may be brought to an end according to the conditions set out in paragraph [●] below.

920. For the duration of the mandate, and for a period of one year from the end of the mandate, the Trustee, their Team and Subsidiaries commit to avoid providing the Principal or its Subsidiaries with services of any kind, notably advisory services, and more generally to avoid accepting any job, function or corporate mandate within the Principal or its Subsidiaries, without informing the *Autorité de la Concurrence* beforehand.

921. In addition, the Trustee commits to put in place measures to guarantee their independence as well as that of their Team members. Prior to implementation, these measures shall be communicated to the *Autorité*, which may make any modifications.

5.2 Remuneration

922. [The parties to the mandate contract must reach an agreement on an appropriate fee structure. The Trustee must be remunerated in a way that does not affect their independence and effectiveness in executing the mandate. Regarding the Divestiture Trustee, the *Autorité* favours fee structures that, at least to a significant extent, are contingent on the Divestiture Trustee completing the divestiture as rapidly as possible. In particular, if the total remuneration includes a performance-related bonus linked to the value of the final sale of the Divested Business, the fees must also be linked to the divestiture taking place in the Intervention Phase of the Divestiture Trustee, as set out in the Commitments. It should be noted that the fee structure, like the mandate as a whole, is subject to approval by the *Autorité*. Any additional fees that may arise during execution of the Trustee's assignment(s), such as those for consulting sector experts, shall be met by the Principal.]

5.3 Guarantee

923. The Principal indemnifies the Trustee against all liabilities arising from the execution of the duties of Trustee under the Commitments, except where this liability arises from the gross or wilful misconduct or bad faith of the Trustee or the members of their Team.

924. This guarantee shall remain applicable for five years following the expiry of the mandate.

5.4. Confidentiality

925. The Trustee recognises that they are required to observe the strictest confidentiality regarding all aspects of this mandate and its execution. To this end, without prejudice to

the other provisions of this contract, the Trustee undertakes, as soon as they take up the position, to avoid divulging for any reason and to any third party – with the exception of the *Autorité*'s services, members of their own Team and any external counsels of the Principal:

a) the content of their mandate, including its appendices and any amendments;

b) documents and information of any kind (industrial, commercial, fiscal, legal or administrative) concerning the Principal that they may encounter in the execution of their assignment;

c) the content of their communications and reports to the *Autorité* in relation to the execution of the Commitments and their assignment;

d) more generally, any information concerning the Principal that is not public.

926. The Trustee undertakes to ensure that their Team complies with this confidentiality commitment and acts as guarantor in this respect.

927. This confidentiality commitment does not prevent:

a) the Trustee communicating the aforementioned information and documents to the *Autorité*, and non-confidential versions of these documents and information to the Principal under the conditions set out in this contract;

b) the Trustee communicating the documents and information required to execute their assignment to their counsels who are bound by professional rules of ethics requiring confidentiality for the duration of this contract;

c) the communication of information required by law.

928. This requirement to maintain confidentiality shall remain applicable for five years following the expiry of the mandate.

6. TERMINATION OF THE MANDATE

929. The mandate shall come to an end under the following conditions:

6.1 Termination of the mandate in normal conditions

930. The mandate shall automatically come to an end when the *Autorité* observes that all the Commitments have been executed and discharges the Trustee from their obligations in writing.

931. The Principal recognises that the *Autorité* may, at any moment, require the Trustee to be reappointed if it becomes clear at a later stage that the Commitments have not been fully executed. By accepting this mandate, the Trustee also accepts potential reappointment in accordance with the terms and conditions of this mandate.

6.2 Premature revocation of the mandate

932. The Principal may only bring the mandate to an end before the Trustee is discharged under the conditions set out in the Commitments (section [●]). The Trustee may bring their mandate to an end solely for a justified reason, by providing written notice to the Principal, with a copy sent to the *Autorité*.

933. The *Autorité* may also, at any time, bring the mandate to an end on their own initiative if it considers that the Trustee is not performing their assignment adequately, notably in the event of failure to respect one of the provisions in this mandate contract.

934. A removed Trustee may be required to continue to perform their duties until a new Trustee, to whom the removed Trustee shall transfer all relevant documents and information, takes up the position. The new Trustee shall be appointed according to the procedure mentioned above.

7. OTHER PROVISIONS

7.1 Revising the mandate contract

935. The mandate may only be revised in writing and with prior approval from the *Autorité*. In addition, the *Autorité* may ask, after an *inter partes* discussion, the Principal and the Trustee to amend the mandate contract in order to ensure strict compliance with the Commitments.

7.2 Applicable law and dispute resolution

936. In the event of doubts or contradictions, this contract shall be interpreted in accordance with the Commitments and their appendices, *Autorité* Decision [*number and date of decision*], and more broadly French law, by which it is expressly governed.

937. Any dispute regarding its interpretation or execution falls within the exclusive jurisdiction of the Commercial Court of [XXX].

7.3. Severability

938. If any of the provisions of this contract are found to be invalid or unenforceable, this shall not affect the validity or enforceability of the other provisions.

7.4. Choice of domicile

939. All communications sent in application of this contract shall be in writing and considered valid if they are served into the hands of the party to the mandate to whom they are addressed, sent by registered post with acknowledgement of receipt or, where sent by fax or email, if their receipt has been acknowledged in writing or by email. All communications must be sent to the following people and addresses: [XXX].