

**COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST  
LAW AND INTERNATIONAL LAW REGARDING THE FRENCH COMPETITION  
AUTHORITY’S CONSULTATION ON MODERNIZING AND SIMPLIFYING THE  
FRENCH MERGER CONTROL LAW**

*The views stated in these Comments are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

September 28, 2018

The American Bar Association Sections of Antitrust Law and International Law (“Sections”) appreciate the opportunity to submit these comments on the French Competition Authority’s (“Authority”) consultation dated June 7, 2018,<sup>1</sup> concerning the introduction into French merger control law of a new *ex post* review system for mergers that do not fall within the current jurisdiction of the Authority or the European Commission (the “Consultation”). According to the Consultation, such a “residual jurisdiction” system would permit the Authority to open an investigation and require a filing for non-reportable transactions, including after the closing of a transaction, if the Authority determines that the transaction raises “substantial competition concerns” in France.

These comments reflect the Sections’ collective experience and expertise with respect to the application of antitrust and merger review laws in the United States, the European Union, France, and other jurisdictions and with important related international best practices, notably the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures<sup>1</sup> (“ICN Recommended Practices”) and the Organization of Economic Cooperation and Development’s Recommendation on Merger Review<sup>2</sup> (“OECD Recommendation”).

The Sections offer comments on three topics raised by the Consultation: (i) the time frame within which such controls may be carried out (ii) the criteria the Authority would use to assess whether the transaction raises “substantial competition concerns” in France, and (iii) “substantial competition concerns” as a potential new standard of harm.

**I. Time Limit for *Ex Post* Intervention**

The Consultation indicates that the Authority is considering imposing a time limit of between 6 months and two years on the Authority’s ability to exercise its residual jurisdiction under any new *ex post* merger control system. The Sections commend the Authority for recognizing that any such new regime should include a time limit within which the Authority can review an otherwise non-notifiable transaction. The absence of a deadline or time limit for such reviews would subject all non-notifiable transactions to considerable uncertainty as to whether the

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<sup>1</sup> Autorité de la Concurrence, Consultation Document, Reform of Merger Law and Ex-Post Control (last visited Sept. 26, 2018), available at [http://www.autoritedelaconcurrence.fr/doc/note\\_controle\\_expost\\_en\\_final.pdf](http://www.autoritedelaconcurrence.fr/doc/note_controle_expost_en_final.pdf).

<sup>2</sup> ICN Recommended Practices for Merger Notification and Review Procedures (May 2017), at IV.A, Comment 1, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf> (emphasis added).

Authority may initiate a review. As the ICN *Recommended Practices* make clear with respect to the review of mergers in general, delay may “*have an adverse impact on the merging parties’ individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty*.”<sup>3</sup> Moreover, the ability of the Authority — or indeed any competition regulator — to obtain effective remedies diminishes with the passage of time following the closing of a transaction. Once the parties’ operations have been integrated, it may become extremely difficult — and possibly inefficient — to implement structural remedies. The *Recommended Practices* recognize this, and counsel that “*the passage of time may render it more difficult for the competition agency to obtain effective post-closing remedies*.”<sup>4</sup>

In the Sections’ view, a one-year time limit for instituting a review following the closing of a transaction would be an appropriate and proportional period for undertaking reviews of non-notifiable transactions. Although the U.S. does not have a specific time limit on the ability of the antitrust agencies to investigate a merger post-closing, the U.S. is by far the exception. In practice the U.S. has rarely sought to challenge a merger more than a year after closing and if it were to seek to unwind a consummated transaction, it would have to obtain such relief in court. A one year time period would be consistent with the findings of an OECD study on this subject, in which the OECD Competition Committee reviewed the legal rules in a number of jurisdictions that retain a similar type of residual jurisdiction and noted that the legal systems in most countries limit any *ex post* challenge of mergers to up to one year following the completion of a transaction.<sup>5</sup> It would also be consistent with the effective, longstanding merger control practice in Canada, for example, where the Competition Bureau may review non-notifiable transactions to determine if they are likely to result in a substantial lessening or prevention of competition, but such reviews can be conducted only up to one year after the closing of the transaction.<sup>6</sup>

Whereas limiting the term for any *ex post* review involves some level of subjectivity, the Sections believe a one-year time period strikes the right balance between the public and private interests that are affected when a non-reportable or consummated merger is challenged. In particular, the Sections believe a one-year period will create appropriate incentives for the diligent enforcement of the French competition laws. Parties that contend they have been (or will be) injured by an anticompetitive transaction will be encouraged to promptly bring forth evidence supporting any legal arguments against the transaction, and the time limit will encourage the Authority to review and take action on any such complaints without undue delay. Similarly, to the extent that the Authority is independently monitoring news or other public sources of information to identify potentially problematic transactions, a time limit will encourage prompt attention to any issues that are identified or give rise to potential concerns.

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<sup>3</sup> ICN Recommended Practice IV.A, at Comment 1 (emphasis added). Although these recommended practices did not relate to the post-closing review of non-notified transactions, they did address the review of transactions by non-suspensory merger review regimes and the principles related to market certainty are equally applicable.

<sup>4</sup> ICN Recommended Practice IV.A, at Comment 3.

<sup>5</sup> Background Paper by the Secretariat, Working Party No. 3 on Cooperation and Enforcement, OECD Competition Committee, Local Nexus and Jurisdictional Thresholds in Merger Control (Mar. 10, 2016), at ¶ 64, available at [https://one.oecd.org/document/DAF/COMP/WP3\(2016\)4/REV1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf) (“OECD Background Paper”).

<sup>6</sup> Competition Act, R.S.C. 1985, c. C-34, as amended, section 97. Under section 97 of the Competition Act, the Canadian Competition Bureau cannot bring an application to challenge any merger more than one year after the transaction has closed.

Moreover, while protecting the public against potentially anticompetitive transactions is clearly an important policy goal and objective, the merging parties have legitimate interests in not being subjected to stale and dormant claims long after closing a transaction. In addition to the purchase price, an acquiring party may make additional investments in the businesses or assets being acquired and substantial changes to the merged firm's operations over time. If residual jurisdiction were exercised long after the closing of a transaction, such a system could potentially chill or delay beneficial investments by merging parties that would enable the combined company to operate more effectively and efficiently.

Furthermore, as the ICN Recommended Practices recognize,<sup>7</sup> the ability of a competition authority to obtain effective relief will likely be challenging after even a one-year period. The merging parties will likely have completed many of their efforts to integrate their operations and achieve various costs savings or efficiencies. These developments can present practical difficulties and challenges for any post-closing divestiture remedy that is designed to restore competition to the status quo *ex ante* (*i.e.*, the state of competition prior to the consummation of the transaction). Extending the residual jurisdiction time period beyond one year could, in many cases, simply exacerbate and potentially compound this recognized enforcement problem.

## II. Other Possible Limits or Guidance on Residual Jurisdiction

The Consultation also notes that the Authority is exploring whether any limits other than time periods should be imposed on its ability to exercise residual jurisdiction over consummated transactions. In particular, the Consultation indicates that the Authority is considering issuing additional guidance regarding the types of transactions that could give rise to “substantial competition concerns” and/or limiting its jurisdiction to merger transactions where the parties’ combined global turnover excluding tax exceeds a certain threshold (*e.g.*, the current threshold of €150 million).

To the extent that the Authority is considering additional objective criteria to ensure that only transactions with a material impact on France are subject to a new residual jurisdictional system, the Sections believe that global turnover thresholds would not be appropriate or helpful in accomplishing this objective. We also note the Authority’s own recent conclusion — with which the Sections concur — that “the establishment of a new merger control category based on the transaction value [...] is not justified for the French economy.”<sup>8</sup> To establish a clearer link and jurisdictional nexus to France, it would be more appropriate in the Section's view to include a minimum threshold based on the size of the acquired or target company, such as a minimum value of assets or sales in France (*e.g.*, somewhere in the range of €15 million to €50 million).

Such a threshold is more likely to ensure that the Authority’s jurisdiction is exercised on “substantial” transactions that have a direct and reasonably foreseeable effect on French commerce and markets. This jurisdictional principle is consistent with ICN and OECD recommendations, and has been emphasized by the Sections in comments on proposed merger

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<sup>7</sup> See *supra* n.3.

<sup>8</sup> Autorité de la concurrence, Press Release, The Autorité de la Concurrence Announces Several Measures Aimed at Streamlining and Simplifying Mergers’ Procedures for Companies (June 7, 2018), available at [http://www.autoritedelaconcurrence.fr/user/standard.php?lang=en&id\\_rub=684&id\\_article=3182](http://www.autoritedelaconcurrence.fr/user/standard.php?lang=en&id_rub=684&id_article=3182).

thresholds to other competition authorities.<sup>9</sup> A “size of target” threshold of this nature could also be combined with a “size of transaction” threshold if the Authority wanted to further limit its enforcement resources to larger transactions that are likely to have a more significant impact on the French economy or affected markets.

Besides these objectively-based criteria, the Sections believe that the Authority’s existing Merger Guidelines likely already provide parties doing business in France with sufficient visibility on the types of transactions that are likely to give rise to potential competition concerns. The Sections suggest, however, that the Authority consider adopting a provision that allows parties to transactions that meet any residual jurisdiction thresholds the opportunity to voluntarily notify their transactions so they can seek a pre-closing approval of the transaction and avoid a possible post-consummation investigation and challenge. Under any such voluntary filing system, the Sections recommend that the Authority apply standard merger control procedures and comply with existing time limits for completing its review. Other jurisdictions that retain residual jurisdiction, such as Canada, Ireland, and Japan, have a similar process to allow merging parties to seek comfort from the reviewing authority.<sup>10</sup>

### III. Test for Competitive Harm

The Authority’s Merger Control Guidelines state that, when assessing the competitive effects of a merger:

the Autorité examines if the operation "*may harm competition, notably through the creation or strengthening of a dominant position or through the creation or strengthening of purchasing power that places suppliers in a situation of economic dependency*". The fact that the concentration must significantly impede competition is not mentioned in French law, but a proportionate treatment of adverse effect on competition is required.

The Sections note that the Consultation is studying *ex post* reviews as a possible means to identify non-reportable transactions that may raise “substantial competition concerns” in France. It is not clear to the Sections whether the phrase “substantial competition concerns” is intended to suggest a standard of harm different from that of the Merger Control Guidelines, or instead intends to apply a higher standard of proof for finding a consummated transaction to be unlawful. If the Authority intends to take enforcement action against non-reportable transactions only if there is evidence that such transactions cause a degree of competitive harm more significant than under the standard applied to notifiable transactions, then the Sections recommend that the Authority provide further guidance as to the definition and application of this new “substantial

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<sup>9</sup> See International Competition Network, Recommended Practices for Merger Notification Procedures (2002), as amended 2017, at Section II.B & II.E, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf>; OECD, Council Recommendation on Merger Review (2005) at Section I.A.2.1–2, available at <http://www.oecd.org/daf/competition/mergers/40537528.pdf>.

<sup>10</sup> See, e.g., Canadian Competition Bureau, Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act, § 3.4; Ireland Competition and Consumer Protection Commission, Notice in Respect of the Review of Non-Notifiable Mergers and Acquisitions (Oct. 31, 2014), at §§ 1.6–1.8, available at <http://ccpc.ie/sites/default/files/CCPC%20Mergers%20Non%20Notifiable%20Mergers.pdf>; ICN Merger Notification and Procedures Template: Japan Fair Trade Commission (Oct. 2014), at Section 4.F, available at [http://www.jftc.go.jp/en/policy\\_enforcement/mergers/ICNmerger.files/ICN\\_Merger\\_Template\\_Japan\\_2014.pdf](http://www.jftc.go.jp/en/policy_enforcement/mergers/ICNmerger.files/ICN_Merger_Template_Japan_2014.pdf).

competition concerns” standard. If the Authority intends to apply the same standard of competitive harm to all transactions, the Sections recommend that, to avoid confusion, any further guidance relating to *ex post* review should use the same terminology as used in the Merger Control Guidelines.

The Sections appreciate the opportunity to comment on the Consultation, and would be pleased to respond to any questions regarding these comments.