

Insights

FRENCH COMPETITION AUTHORITY'S NEWEST MERGER CONTROL GUIDELINES: WHAT IS CHANGING?

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SUMMARY

On July 23, 2020, the French Competition Authority published its new guidelines on merger control after more than two years of discussions and consultations. These guidelines, which are immediately applicable, are binding on companies before the Authority and directly enforceable by the parties to a merger. They replace the guidelines published in July 2013. They incorporate (i) a number of procedural innovations (request for the appointment of a team prior to pre-notification, extension of the simplified procedure), as well as (ii) several references to the Authority's recent decision-making practice with regard to the analysis grid on the substance of a transaction (e.g. for taking account of online sales).

On July 23, 2020, the French Competition Authority (the "**Authority**") published its new guidelines on merger control (the "**Guidelines**"), after more than two years of consultations and discussions. These Guidelines, which replace, effective immediately, the previous guidelines published in July 2013, are binding on companies before the Authority and directly enforceable by the parties to a merger. They take into account the developments in recent decision-making practice and furthermore introduce a number of new features.

The main contributions of these Guidelines, on the procedural aspects (1) and on the substantive analysis of a transaction (2) are presented below.

1. Procedural improvements

The Guidelines now provide that the parties to a merger may, prior to notification, **request the appointment of a team** that will be in charge of the examination the case within the Authority. This request will have to contain a certain amount of information, and in particular, a brief description of the transaction (nature of the transaction, activity of the parties, markets concerned, affected markets, effects of the transaction). The Authority then undertakes to reply within 5 working days, and to indicate the name of the deputy head of department responsible for examining the case

(§188 and seq.). This mechanism, heavily inspired by the one existing before the European Commission, had been requested by contributors to the public consultations held in 2018 and at the end of 2019.

Furthermore, the Authority states that it will inform the parties of the **completeness** (or absence thereof) of their notification file ("completeness" letter) within 10 days of its submission (§207 and seq.). Although this time limit is indicative, this improvement allows the parties to obtain more visibility on the timetable of the procedure.

With regard to the content of the notification file, the Guidelines take up the **simplified formalities** already instituted by Decree n° 2019-339 of 18 April 2019 simplifying the file for notifying a merger to the Authority:

- The market share threshold above which a market is considered to be vertically affected – for which the information to be provided is much more detailed – is increased from 25 to 30%,
- The financial appendix to be provided with the notification file now requires only 12 financial data as opposed to 93 previously (which is to be welcomed, given the extent to which this appendix was causing confusion among companies), and
- Only one paper copy of the notification file must be provided, as opposed to four previously.

An appendix is also devoted to requests for the communication of internal company documents that the Authority may have to make in the pre-notification or notification phase. The Guidelines specify the circumstances in which such requests may be made and the types of documents that may be concerned. These clarifications, which are intended to give companies greater visibility and transparency on the requests likely to be made by the Authority, nevertheless leave the Authority with a very wide margin of discretion. The only limit it sets itself consists in a criterion of proportionality, the contours of which are not defined: "*the Authority ensures that requests for internal documents are proportionate to the requirements of the investigation of the case*" (§842 and seq.).

In a more innovative way, the Guidelines provide a number of clarifications and improvements relating to the **simplified procedure**.

Firstly, they **extend the scope of operations eligible** for this procedure. From now on, the criterion will not solely be that of market share. The following types of transaction will also be eligible for this procedure:

- Acquisitions of sole control of a company where the purchaser exercised joint control,
- The creation of a full-function joint-venture exclusively active outside the national territory, and

- The acquisition of joint control of a real estate asset sold before completion (§230 and seq.).

Secondly, the Guidelines provide that the parties will be informed of the eligibility of the transaction for the simplified procedure when the letter of completeness will be sent, i.e. within 10 days of notification.

Moreover, the Guidelines endorse the **dematerialised notification procedure**, implemented by the Authority at the end of 2019. Certain transactions can thus be pre-notified and notified using a form that must be completed online (accessible on the demarches-simplifiees.fr website). Transactions that are not likely, at first glance, to raise competition concerns are eligible for this procedure, namely (i) those notified because they exceed the specific thresholds applicable to retail stores (provided that they do not result in a change of chain), and (ii) transactions that do not entail any horizontal, vertical or conglomerate links between the parties' activities (§234 and seq.).

Finally, the Authority goes back over the various procedural infringements in merger control, referring in the Guidelines to its recent decision-making practice, in particular as regards failure to notify and gun jumping (§163 and seq.), as well as failure to comply with commitments (§456 and seq.)

2. Clarifications on the substantive analysis of an operation

The Authority takes advantage of these new Guidelines to present in a more pedagogical way than in the previous version the different stages of the competitive analysis in merger control.

The Authority gives a detailed reminder of the **methodology it uses to define the relevant markets** (§511 and seq.). The Authority then reviews the characteristics of the **concerned markets** that it can take into account in its analysis (§563 and seq.), and then the **various effects** that may be generated by a merger and the criteria for analysing each of these effects (§614 and seq.).

The Guidelines also discuss **the remedies** that may be proposed by the parties to a merger (§354 and seq.) and the conditions for **their review** (§442 and seq.). In this respect, they contain details on the relationship between behavioural and structural measures. While the Authority generally considers that the latter can address horizontal issues, it recognises that behavioural commitments may also, in certain circumstances, respond to problems of overlapping activities (§405 and seq.).

The Authority also took the opportunity in these Guidelines to indicate, as it had announced in its February 2020 contribution on competition policy and digital issues, that it may extend the **temporal dimension of its prospective analysis** to take into account the *"current or anticipated developments over a reasonable time horizon, which depends on the specific characteristics of the sector"*. This *a priori* slight change that could nevertheless respond to a major concern in the case of operations carried out in the digital sector, namely the need to take into account effects that may occur several years after the operation has been carried out (§518).

New and detailed developments in the appendix are also, in particular, dedicated to:

- **Local analysis in the retail sector.** The Authority sets out in detail the methodology it uses for this type of operation. In particular, the Authority explains under what circumstances it may use the actual footprint of the point of sale rather than an isochronous area (i.e. the area with equal travel time/distance from the point of sale) as the demographic delineation of the market and sets out the analysis it carries out for “problematic” areas (§822 and seq.) ;
- **The inclusion of online sales.** The Authority lists and details the analysis criteria it uses to assess the substitutability between online sales and sales in physical stores, and in particular the penetration rate of online sales, the internal organisation of operators in the sector, the standardisation of prices for various channels, the existing carry-over rates, etc. (§838 and seq.).

Finally, the Guidelines include, as requested by a large majority of contributors to the public consultation conducted in 2019, a model of structural commitment and a model of mandate contract that is up-to-date with recent developments in the decision-making practice.

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