

Insights

COMPETITION AND DISTRIBUTION LAW NEWSLETTER – BCLP PARIS – JULY 2021

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SUMMARY

Merger control - Infrastructure: For the first time, the French Competition Authority blocked a concentration in the infrastructure sector. The Authority ruled that the acquisition of exclusive control of the *Pipeline Méditerranée-Rhône* company by Ardian group (which manages and advises investment funds in various sectors) would cause a distortion of competition in the market for the transport of refined oil products and that no structural or behavioral injunction would be appropriate to remedy those competition concerns.

The Authority's reasoning raises a significant risk to acquisitions of non-regulated infrastructure, including acquisitions by financial investors, provided these infrastructure are qualified as essential.

On 09 July 2021, the French Competition Authority (the FCA) published its decision n°21-DCC-79 to block the exclusive control acquisition of Pipeline Méditerranée-Rhône (the SPMR) by a subsidiary of Ardian group, which manages and advises investment funds in various sectors and, more specifically, in infrastructure (Ardian).

This is the first prohibition decision in this sector and the second one since the creation of the FCA, after the prohibition of Géant Casino hypermarkets' acquisition by Soditroy and E. Leclerc last year (see our [Newsletter](#) from September 2020).

While the FCA's analysis in the first of these two decisions can be qualified as traditional (a merger between competitors with high market shares), its reasoning in the SPMR decision raises several issues. For example, the acquirer was a fund, neither party was a competitor, nor a supplier, a target customer, and there were issues with the proposed substantial commitments. Provided that the infrastructure is qualified as essential, this kind of analysis may create a significant uncertainty for many infrastructure acquisition projects, including acquisitions by financial investors.

I. The transaction's context : the acquisition of an infrastructure by a financial investor

The SPMR owns and operates the Mediterranean-Rhône Pipeline (the PMR), a 760 km long pipeline network which supplies depots in refined products in the southeast France. Historically, the SPMR was owned by shareholders who also were users and, for some of them (namely BP, Total, Pétrofrance), who gradually decided to sell their stake to Ardian.

When the transaction project was notified, the SPMR capital was divided between Ardian, and then Trapil, Esso, ENI and Thevenin-Ducrot on the other hand, which are the companies using or representing the PMR's users. None of these shareholders either solely or jointly exercised a decisive influence over the SPMR.

According to the project, Ardian intended to acquire ENI's stake, so that it would have hold more than 50% of the SPMR's capital and voting rights. For the first time since its creation, the project intended to result in the SPMR control by one of its shareholders and in particular, a financial investor, as opposed to a user of the pipeline.

II. Analysis of the transaction : following a new reasoning, the FCA decided to ban the transaction considering that no injunction was sufficient

- The PMR can be qualified as an essential infrastructure

In its analysis of the relevant markets, the FCA noted that the PMR is not subject to competitive pressure from pipeline competitors and therefore has a de facto monopoly on the market. The FCA also considered that, given the significant barriers to market entry - a pipeline willing to constitute a credible alternative to the PMR along its entire route cannot reasonably be expected . The significant barriers to market entry considerations included: (i) the high level amount requirements to invest in a pipeline creation, (ii) their specific nature, and (iii) the regulatory issues to obtain an authorization.

Therefore, according to the FCA, the PMR can be qualified as an essential infrastructure for the transport of oil products in Southern France.

- The exclusive control of this essential infrastructure by a financial investor is likely, in itself, to distort competition

With regard to such a de facto monopoly, the FCA considered that its acquisition of exclusive control by a fund will cause a risk of damaging the SPMR's offer, both in tariff and non-tariff terms . Indeed, according to the FCA:

- The lack of the target control prior to the transaction and the shareholders' presence, in particular user-shareholders, led to limit the profit maximization allowed by the PMR's de facto monopoly and to limit the possibilities for tariffs to increase and for quality to degrade ;
- On the contrary, the transaction would have led Ardian to be the exclusive decision-maker regarding SPMR's commercial and investment policies, so that it would have been able to

maximize the profits from the PMR's de facto monopoly.

In this respect, the FCA noticed that the public authorities control's over the PMR (and, in particular the Government Commissioner and the Ministry in charge of energy) is limited to the energy policy field and to the continuity of oil products supply in France, so that this control does not offer the possibility to rule out the risks of distorting competition. Also, the Authority rejected arguments raised by Ardian regarding the countervailing power of the PMR's clients, given the lack of sufficient alternatives to the infrastructure.

It is interesting to note that the FCA identified the present risks even though the project did not generate any overlap of activity, nor a vertical integration between the acquirer and the target. In other words, the Authority would likely have reached the same issue for any other financial investor.

Therefore, it is not excluded that the issue could almost be automatically applied to any other infrastructure acquisition project implying an essential infrastructure.

Notably, in July 2020, Pisto already abandoned the acquisition of Trapil, which owned and operated several oil pipelines. After a thorough investigation, Pisto withdrew its notification - with the likely intent to avoid a prohibition decision.

- No corrective injunction would remedy the identified risks

To remedy the identified risks, Ardian offered behavioral commitments for a 20-year-period "renewable in ten-year increments, as many times as the FCA deems necessary" and until a regulation regarding hydrocarbon transport by pipeline is adopted to remedy competition concerns.

First, Ardian offered (i) to keep some minority shareholders' representatives on the SPMR Board of directors, (ii) to refrain from voting on resolutions relating to tariffs grid increases, and (iii) to seek the Government Commissioner's assent concerning decisions about amendments of the PMR's functioning rules and of its commercial and investment policies. As the FCA considered these commitments insufficient, in a second phase, Ardian offered substantial measures to limit its representation on the Board of directors, so that it would not have been able to control the latter.

The FCA also considered that these commitments were not sufficient, as they "do not, strictly speaking, provide a solution to the identified competition distortions, which would have a concrete impact on the market functioning, but lead to deprive the transaction of its own object, and, as a consequence, the merger control led by the Authority". According to the FCA, the acceptance of the commitments offered by Ardian would imply the FCA's authorization of the change of control over the SPMR, as long as this change does not occur in practice.

In addition, the FCA excluded the issuance of injunctions in order to avoid the transaction prohibition, on the grounds that only injunctions appearing as a control exercised by a regulatory

authority are able to effectively address the concerns raised by the new entity's behavior and that a behavioral injunction "cannot be substituted to a regulation providing an ex ante control".

This is a clear message addressed to the legislator and the Government. Indeed, in the recent opinion n°21-A-01 of March 1st, 2021 "on the draft decree on the control of pipeline of general interest by the Minister in charge of energy", the FCA, seized by the Ministry of Economy, issued an unfavorable opinion and recommended to entrust an independent administrative authority with the control of the oil products conditions of use, which represents the only solution to allow, according to the FCA, "to consider changes in the oil products control".

Pending such a reform, undoubtedly, all pipeline acquisitions in France are likely to be prohibited. Beyond that, the FCA's reasoning signals to all financial investors to be extremely vigilant regarding any acquisition project involving non-regulated and essential infrastructure.

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