Kluwer Competition Law Blog

New French Competition Authority Merger Control Guidelines

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On 23 July 2020, the French Competition Authority (FCA or Authority) published new merger control guidelines, which replace the previous guidelines dated 4 July 2013. In the new guidelines, the Authority clarifies and completes (i) the procedural rules and (ii) the rules relating to the substantive examination of a merger.

Key points

- The new guidelines have a more didactic structure than the previous version. Moreover, they incorporate text boxes, summaries, and extracts of decisions from French and European decision-making practice and case law. These practical cases are particularly interesting and provide useful clarifications concerning the Authority's assessment of merger operations.
- The new guidelines **simplify some procedural rules** by (i) extending the means of access to both the simplified procedure and the online notification procedure (ii) reducing some timelines, and (iii) improving the transparency of the various stages.
- The new guidelines clarify the behaviors that parties to a merger should refrain from during the Authority's substantive examination in order to avoid any **gun-jumping** proceedings that could lead to high fines.
- The new guidelines emphasize the possibility for the Authority to request the merging parties to disclose **internal documents**. This brings the Authority in line with the recent practice of the European Commission, which has increasingly referred to internal documents in order to verify the elements set out by the notifying party, and to refine its own analysis of the notified operation. These documents will, therefore, play an increasing role in the Authority's analysis.

Simplification of the notification and examination procedure

Prior to notification, the notifying party may now request **the appointment of the deputy head of service responsible for examining the file within 5 working days** — as is done before the European Commission (points 188 to 190 of the new guidelines). This optional step will allow companies to speed up the notification of a merger by initiating exchanges with the deputy head of service and the deputy's team and providing them a limited amount of information.

For files not eligible to the online notification procedure (see below), the new guidelines endorse

the Authority's recent practice of **filing a single hard copy of the notification file** (instead of four copies) as well as a digital version of the notification in PDF format on an external drive or by email (points 201 to 203).

The new guidelines specify that the team in charge of the notification will **indicate the status of the file (complete or incomplete) to companies "generally" within 10 working days of the notification date** (point 207). Although this timeline is purely indicative, it represents a significant improvement compared to the Authority's current practice and may provide the parties more transparency regarding the applicable deadlines.

The new guidelines introduce the **online notification procedure**, announced in a press release in October 2019, at points 234 et seq. Under the new procedure, transactions notified pursuant to Article L. 430-2 II of the French commercial code that do not result in a change of brand name of the retail shop(s) (in the food and automobile distribution sector), or an overlap of activities between the parties, whether horizontal, vertical, or conglomerate (all sectors combined), are eligible to the online notification procedure and the notifying party will be able to use simplified forms available online.

In order to increase the notifying party's visibility on the progress of the in-depth examination of the operation (phase 2), the team in charge of the notification must now provide, at the beginning of this phase, **a provisional timetable outlining the main stages of the forthcoming procedure** (additional questionnaires, state-of-play meetings, provisional due date for the report, hearing date, etc.). However, this timetable is not binding, and the Authority may modify it following the arrival of new information (point 300).

Extension of the simplified procedure

The new guidelines extend the scope of the simplified procedure (consisting of a shorter notification file and a reduced procedural time), which now encompasses a larger number of transactions (points 230 et seq.).

The simplified procedure is no longer limited to transactions that do not lead to overlapping activities (horizontal, vertical) or conglomerate relationships, or transactions that do not result in a change of brand name of the retail shop(s). As indicated above, these transactions are now subject to an even more simplified treatment as they can follow an online notification procedure.

Under the new guidelines, the simplified procedure will be applicable to more transactions so long as they meet one of the following criteria:

- When the parties' activities overlap:
    - If the combined market share of the parties is less than 25%;
    - If the combined market share of the companies is less than 50%, and the increment is less than 2 points;
- In the case of vertically linked or related markets, if the combined market share of the parties on these markets is less than 30%;
- In the case of an exclusive control acquisition if the acquirer exercised joint control of the target prior to the transaction;
- In the creation of full-function joint ventures that are active exclusively outside of the national

territory; and
- If the transaction concerns the joint acquisition of real estate that is for sale in an as-yet incomplete state.

The Authority undertakes **to inform the notifying party of the eligibility of the proposed transaction for the simplified procedure** at the same time it acknowledges receipt of completion, i.e., "generally" within 10 working days of the date of notification (point 232).

Clarification of the rules on gun jumping

Following the 2013 guidelines, the Authority issued its first sanction for the early implementation of a merger, or gun jumping, in the *Altice/SFR* case (Decision No. 16-D-24) whereby the Authority imposed a record fine of €80 million.

The Authority is using its new guidelines to introduce several elements clarifying which actions parties are allowed — or not allowed — to implement prior to the Authority's authorization (points 173 et seq.). Specifically, the Authority:

- Emphasizes that the purpose of Article L. 430-8 of the French commercial code, which sanctions gun jumping, is to prevent the parties, prior to the date of authorization, from no longer behaving as competitors in order to act as a single entity with the acquirer exercising de jure or de facto control over the target. In this respect, the Authority will verify whether the buyer's behavior has exercised a decisive influence on the target in any way.
- Stresses that the parties must act as competitors defending their respective interests and not as a single entity already sharing a single objective (point 176). Any commercial agreements that are adopted between the parties in the pre-merger period must therefore not deviate from normal market practice (point 180).
- Confirms that concluding protocols of agreement between the acquirer and the target in order to govern their relationship during the period running up to the closing or the authorization of the transaction, for example with the aim of protecting the value of the acquirer's investment, does not "in itself" lead to the characterization of an early implementation of the transaction. Nevertheless, the Authority states that this type of agreement must not go beyond the protection of the interests of the acquirer by allowing it to take control of all or part of the target.
- Points out that this preparatory period requires vigilance with regard to the nature of the data exchanged, the persons to whom it is communicated, and the practical modalities of such exchanges.

Codification of the remedies monitoring procedure

The new guidelines codify the Authority's recent decision-making practice with regard to the monitoring of remedies (points 420 et seq.), intervention of the trustee (points 424 et seq.), the procedure for reviewing remedies (points 442 et seq.), and the penalties for non-compliance (points 456 et seq.).

With respect to the reexamination procedure, the Authority includes in its new guidelines the case law of the *Conseil d'Etat* in the *Numericable – Groupe Canal Plus* case (decision of March 21,

2016, in which the role of the Authority in monitoring remedies was enshrined), and in the *Altice and SFR Group* case of 2017 (points 445 and 446).

In the *Numericable – Groupe Canal Plus* decision, the *Conseil d'Etat* recognized the possibility for the Authority to modify or revoke remedies in the course of their implementation, considering that this prerogative stems from the provisions allowing the Authority to make its authorization conditional on the "effective" fulfilment of commitments or the issuance of injunctions to the notifying party to take measures to ensure sufficient competition (decision of March 21, 2016, *Numericable – Groupe Canal Plus*). In the *Altice and SFR Group* decision, the *Conseil d'Etat* recalled the conditions under which the parties could request the modification of the remedies, i.e., in the presence of new legal or de facto circumstances, such as to justify a release from their commitments, either because of a change in the situation in the relevant markets and the consequences that may result therefrom, or because such circumstances make the fulfilment of the commitments either impossible or particularly difficult (decision of September 28, 2017, *Société Altice Luxembourg and Société SFR Group*).

The new guidelines provide details on the main structural (points 371 et seq.) or behavioral (points 405 et seq.) remedies that may be adopted in the context of merger control, with extracts and summaries of several decisions.

The Authority includes its recent decision-making practice with regard to substitution commitments that the parties may propose if there are uncertainties as to the divestiture, viability, or competitiveness of the assets proposed by the notifying party, and only if the latter allows the competition problem to be solved in a manner at least equivalent to the former (points 383 and 384). To illustrate its point, the Authority cites its decision no. 19-DCC-36 of 28 February 2019, in which it considered that the extension of the scope of a brand divestiture at the global level, if the divestiture at the national level did not take place within the deadline, constituted a viable substitution commitment. Furthermore, the Authority stated that the parties may propose alternatives by committing to divest one of a number of assets, all of which are considered by the Authority to solve the competition problem (point 385). In this respect, the Authority cites its decision no. 17-DCC-95 of 23 June 2017, in which it considered that the Elsan group could commit to divest one clinic among a list of three in order to resolve the risks of harm to competition in the Auvergne region.

Integration of online sales in the Authority's analysis

The new guidelines incorporate, in Appendix D (points 838 et seq.), useful elements from **the Authority's recent decision-making practice concerning online sales**.

While the Authority traditionally considered that sales in physical shops and online sales constituted two separate markets, it has evolved its practice in recent years by integrating the two sales channels into a single retail distribution market.

In this respect, and on the basis of the *FNAC/Darty* case (decision no. 16-DCC-111) and the *Jellej Jouets* case (decision no. 19-DCC-65), the Authority has identified a number of indicators that enable it to assess, on a case-by-case basis, the existence of substitutability between online sales and sales in physical shops, including: the penetration rate of online sales, the internal organization of operators in the sector, the integration of online operators' behavior in determining the

commercial and pricing strategy of traditional operators, the rate of common products marketed through these two channels, the prices charged, etc.

Importance of internal documents

When analyzing the effects of a merger, the Authority may consider that the evidence provided by the parties is not "sufficiently substantiated" to analyze the effects of the transaction (point 842). In this case, the Authority may ask the parties to the transaction to provide internal documents to complete the file in its possession.

The new guidelines clarify what type of internal documents the Authority may request (Appendix E, points 842 et seq.).

- Presentations, working documents, internal notes, spreadsheets, and other data collections; studies carried out internally or by a third party; e-mails, etc. may enable the Authority to clarify the definition of the markets concerned, determine the competitive proximity of the parties, identify competitors, find out the parties' motivations, etc.

The new guidelines are part of a broader trend among other competition authorities, including the European Commission that gives the parties' internal documents increasing importance in the analysis of the effects of the transaction. The new guidelines therefore serve as a reminder to parties contemplating a merger to pay attention to the documents produced for this purpose.

Updated appendices

In addition to the new elements indicated above concerning the inclusion of online sales (Appendix D), and internal documents (Appendix E), the new guidelines include **new appendices** concerning:

- Local analysis in mergers in the retail sector with several examples of isochrones depending on the sector under review, taking into account the sales area and carrying out a qualitative analysis when the combined market share is above 50% (Appendix C); and
- A template of a trustee agreement in the context of a divestiture commitment (Appendix G).

Some of the updated appendices take into account recent decision-making practice, in particular with regard to the analysis of distribution networks (Appendix B) and the template of a divestiture commitment (Appendix F).

A number of appendices of the 2013 guidelines have been deleted, including those relating to issues specific to mutual funds, agricultural cooperatives, and the takeover of companies in difficulty within the context of collective procedures (the main information on the latter situation is now included in points 147 et seq. of the new guidelines).

References

The new guidelines are available in French here.

The Authority's press release on the new guidelines is available in English here.

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