Read this post online

Things to remember about the french competition authority's new guidelines on merger control

On December 16, 2009, the *Autorité de la concurrence* (French Competition Authority or hereinafter "*Autorité*") published new guidelines on merger control ("Guidelines") replacing and superseding the previous ones enacted by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control in 2004 and amended in 2007. These lengthy Guidelines (165 pages) aim at clarifying and simplifying the rules and analysis method applied by the *Autorité* to control all merger operations notified since January 1, 2010.

This "*educational tool designed for companies*", which incorporates the changes brought forward by the Law on the Modernization of the Economy of August 4, 2008 (hereinafter "LME Law") is to be considered a reference document (without, however, having the force of law) since "*merger projects are now managed in compliance with the procedural rules set forth in the Autorité's Guidelines dated December 16, 2009 relating to merger control*" (Article 23 of the *Autorité*'s internal regulations).

Further, in order to ensure maximum legal certainty, the Guidelines are not only enforceable against companies but they can also be relied upon and invoked by the latter, the *Autorité* being liable for complying with the principles it has enacted, "*unless there are particular circumstances (...) or considerations of public interest that justify derogation from such guidelines*".

This article outlines below the main issues addressed in the Guidelines.

1. Scope of application of the merger control: reference notions

and changes

1.1 Reminder of the main reference notions

Pursuant to Article L.430-1 of the French Commercial Code, a merger operation can arise in three cases: (i) when two or more previously independent companies merge, (ii) when one or more persons acquire the control of a company, or (iii) when companies create a joint venture.

The Guidelines do not contain any significant change in relation to the notions of "company", "control", "decisive influence" and "joint venture" that are used in connection with the merger control process. Likewise, regarding the method of calculation of the sales figures (used notably to check whether notification thresholds are exceeded), the Guidelines expressly refer to the method set forth in Article 5 of EC Regulation 139/2004.

(i) The notion of "company": the Guidelines recall that the companies concerned by the merger operation must be "*previously independent*", "*an operation turning out to be a group reorganization does not constitute a merger*". Both "*fusions de droit*" (i.e. merger formalized in legal documentation) and "*fusions de fait*" *(i.e.* a *de facto* amalgamation of companies that retain their individual legal personalities) must be considered merger operations as the Autorité takes into account all legal and factual circumstances to establish the existence of a "*unique and sustainable economic management*" that makes up a single economic whole.

(ii) The notion of "control" is defined by Article L.430-1 III of the French Commercial Code as resulting from "*rights, contracts or any other means which, either separately or in combination and having regard to the legal and factual considerations involved, confer the possibility of exercising a decisive influence over a company*". The Guidelines recall that the control can be exclusive or joint, depending on whether there is/are one or several controlling entity(ies). Again, the issue of joint or exclusive control is assessed on the basis of all factual and legal circumstances and, notably, on the "*power to control the strategic decisions of the controlled entity*".

(iii) The notion of "decisive influence" that a company can exercise over another is assessed in light of a series of factors, including but not limited to:

- The ownership of a majority of voting rights, or, for minority shareholders, the nature of the voting rights and the condition in which such shareholders can exercise them that are likely to confer the power to exercise a decisive influence, (e.g. veto right, pre-emption or preferential rights, etc. in the context of a potential dispersion of shares);
- Contractual relationships: lease-management agreements are likely to constitute factors that establish the existence of a decisive influence;
- Other factors based on existing economic connections such as the existence of long-term delivery contracts or exclusive commercial agreements entered into with the target company, the high percentage accounted for by the acquiring entity in the target company's sales figures, etc.

(i) The notion of "joint venture": the formation of a "*joint venture that sustainably performs all functions of an*

autonomous economic entity" and that has at its disposal "*all structural elements necessary for the operation of autonomous companies (in terms of human resources, budget, commercial liability)*" to perform such functions must be considered a merger operation.

1.2 New elements introduced by the Guidelines

(i) New notions: interconnected operations and transitional operations

- **Interconnected operations:** whenever several acquisitions are interconnected, they may be notified together at the same time, which substantially simplifies the obligations imposed upon the notifiers. Such acquisitions are to be examined as a single merger operation insofar as (i) the effectiveness of each transaction is subject to the effectiveness of the others (which often means that the merger agreements must be entered into concomitantly) and (ii) the control of each target company is acquired by the entity or the same entities.
- **Transitional operations:** the merger control process should only apply to operations that entail a "*sustainable change of control*", which excludes notably the operations in which "*credit institutions, other financial establishments or insurance companies, that notably trade and negotiate in the normal course of business securities for their own account or on behalf of others, temporarily hold shares that have been acquired for resale, insofar as such institutions, establishments or companies do not exercise the voting rights attached to such shares(…)*".
  Transitional operations that do not need to be notified to the *Autorité* are operations whose transitional nature has been acknowledged by the parties as "legally binding" (agreements) and in the context of which the acquired shares and assets shall obviously be resold very quickly (the Guidelines do not specify, however, the period of time within which such shares or assets must be resold).
- **Ancillary restraints:** the previous guidelines did not deal with this issue that has been addressed in a communication of the European Commission. The Guidelines indicate that the *Autorité* shall analyze, in light of the Commission's communication and on a case-by-case basis, whether the ancillary restraints can be "covered" by the merger authorization decision; it should be recalled at this stage that ancillary restraints mean restrictions contained in the agreements entered into between the parties to a transaction (post-contractual non-compete clause, exclusive supply contracts, etc.…) that are "covered" by the merger authorization decision if "t*hey are strictly necessary*" for the purpose of the merger operation. If such restraints are not necessary, they must be dealt with pursuant to the antitrust legislation (Article L.420-1 of the French Commercial Code).

(ii) Extension of the scope of application of the merger control: implementation of lower notification thresholds

First, it should be recalled that a merger operation is subject to a national merger control procedure and, therefore, must be notified to the competent bodies if three requirements are concurrently met: (i) the operation does not fall within the scope of EU regulations, (ii) the total worldwide sales figure (excluding VAT) of all involved companies or groups of companies/persons exceeds 150 million Euros and (iii) the total sales figure generated in France by at least two of the companies or group of companies/persons exceeds 50 million Euros.

In order to reflect the changes brought forward by the LME Law, the Guidelines lower the aforementioned operation notification thresholds in the retail trade sector and the overseas *départements* and territories [1].

- **Retail trade sector**: the *Autorité* had noticed that, in practice, certain merger operations in this sector of activity could locally result in a concentration of market shares in "*certain trading areas*" even when the aforementioned thresholds were not reached.
- Definition of "retail trade": in the Guidelines, the *Autorité* gives its definition of "*retail trade by reference to rules applicable to commercial equipment*" and excludes from this definition certain activities.

As such, "*retail store means a store that sells goods mainly to consumers for a domestic use ("mainly" means that more than half of the sales must be made to consumers). The sale of second-hand goods (in flea markets, consignment shops, etc.) falls within the scope of this definition. A certain number of artisanal services (dry cleaners, hairdressing and beauty, shoe repair, photography, car maintenance and tire mounting services) are traditionally considered retail activities even though no goods are sold. The supply of intellectual or intangible services (such as banks, insurance companies or travel agencies) as well as service or lease establishments (such as coin laundries, video stores, etc.) and restaurants are excluded from the scope of the definition, just like companies that sell their products exclusively online, it being specified that pursuant to Article 430-2-II only companies that operate at least one store are concerned".*

This definition – that was drafted in such a way to be as comprehensible as possible – leaves however some uncertainties: how should the supply of artisanal services that are not included in the definition be treated? Isn't it a risk of discrimination between distribution networks (including physical points of sales and online shops) and "*pure players*" that exclusively do business on the Internet and that are not subject to the lower notification thresholds (since they do not fall within the scope of the retail trade definition)?

– Lower thresholds: Merger operations in the retail distribution sector must be notified when: "*(i) the total worldwide sales figure of all companies involved exceeds 75 million Euros* [instead of 150] *and (ii) the sales figure generated in at least one département or local administrative area by at least two of the companies in question is greater than 15 million Euros* [instead of 50]".

- **French overseas *départements ("DOM") and territories (newly called "COM")*:** When at least one company involved in the merger operation conducts all or part of its operations in one or several French overseas DOM-COM, the contemplated merger must be notified to the *Autorité* if: (i) the total worldwide sales figure (excluding VAT) of all involved companies or groups of companies/persons exceeds 75 million Euros and (ii) the total sales figure generated in at least one overseas DOM-COM by at least two of the companies in question exceeds 15 million Euros.
  It must, however, be specified that the 15 million Euro threshold must be reached by each of the relevant companies in the same overseas DOM-COM.

2. Transfer of merger control powers to the *Autorité*

This is the most significant procedural change introduced by the LME Law and incorporated into the Guidelines. It should be recalled that the LME Law transferred to the *Autorité* powers that were previously vested with the Ministry of the Economy, which now retains only a residual right of oversight on merger operations ("implementing power") for reasons of public interest that are not related to the protection of competition (such as industrial development, creation or preservation of employment, etc.).

This change is particularly positive for two main reasons:

- It transfers the power to authorize a merger operation previously vested with the Ministry of the Economy – a predominantly political entity – to the *Autorité*, an independent administrative authority;
- It implements accelerated procedure timeframes: until now, when a contemplated operation required – in the eyes of the Minister – the opinion of the competition authority, the merger file would travel back and forth between the Minister and the competition authority, which automatically lengthened the examination process and postponed the final decision; henceforth, the *Autorité* is solely responsible for examining contemplated merger operations, thereby saving precious time: in principle, the approval decision shall be made (i) within 25 business days from the receipt of the complete merger notification file, if the contemplated operation does not entail any particular competition-related issues, or (ii) within 65 business days from the receipt of the complete merger notification file, if the contemplated operation requires an in-depth competition analysis.

3. Clarification and simplification efforts

3.1 A simplified merger notification file

The Guidelines list the types of operations that can be examined through a simplified merger notification file:

(i) Merger operations that do not have any impact on the market;

(ii) Merger operations that involve companies that annually perform a high number of operations falling within the scope of the merger control legislation (e.g. investment funds);

(iii) Merger operations performed within the retail trade sector and falling within the scope of the lower notification thresholds, as defined by the LME Law;

(iv) Merger operations in which the acquiring entity(ies) and the target company do not operate on any common market: neither the target company's market, nor any upstream, downstream or ancillary market.

3.2 Comfort letter

The Guidelines offer companies the possibility to obtain a comfort letter if they wish to obtain confirmation

during the pre-notification stage that the activities are not subject to the merger control procedure under applicable competition and antitrust laws.

3.3 New annexes

The Guidelines include new annexes that are clearer and more didactic, including (i) an annex on the economic studies to be included in the merger notification file, (ii) an annex on agricultural cooperatives aimed at clarifying the applicable sales calculation method and (iii) an annex concerning investment funds.

While the Guidelines partly respond to the need for transparency and clarification expressed by companies and their legal counsels, certain areas of concern do remain and, in a general manner, they are hardly comprehensible for neophytes. Yet, the *Autorité* admits – and this pragmatic approach is welcome – that the Guidelines will certainly evolve in the future as they are *"likely to be updated according to the decisions issued by the Autorité".*

---

[1] French overseas administrative region