



## Client Alert

### Client Alert on New Law Reforming French Competition Law

The Law No. 2008-776 on the Modernization of the Economy (the "LME") which was passed on August 4, 2008 brings significant changes in French competition law that may impact the business of non-French companies that sell their products or provide their services in France, or that intend to acquire French undertakings.

The most notable changes are the transfer of decision-making power with regard to merger control from the Minister of the Economy to a new Competition Authority which will replace the Competition Council and the abolishment of the per se prohibition of price discrimination in supplier-customer relations. We provide below an overview of the changes that will occur under the LME.

White & Case LLP has a specialized team of antitrust attorneys in its Paris office that would be pleased to assist you in learning more about the new legislation and to better understand its consequences for your business.

#### New Competition Authority

The LME creates a new Competition Authority. This new entity will have wider powers than the current Competition Council and will unify within one entity the powers currently held by the Competition Council and the Minister of the Economy.

One of the most important innovations is that the Competition Authority will have its own investigation service, whereas the Competition Council relied on the investigation service of the Ministry of the Economy (Directorate General for Competition, Consumer Affairs and Fraud Control).

#### Reform of Merger Control

##### Transfer of the decision-making power to the new Competition Authority

Another significant change brought by the LME is the transfer of almost all of the decision-making power with regard to merger control from the Minister of the Economy to the new Competition Authority. The Competition Authority will thus become the enforcement structure in charge of handling and reviewing merger notifications.

The Minister of the Economy will nevertheless retain a residual right of oversight over concentrations. Firstly, within five business days following a "phase 1"<sup>1</sup> clearance decision, the Minister may request that the Competition Authority open a "phase 2" and undertake an in-depth investigation on the concentration. In addition, within twenty-five business days following a decision by the Competition Authority, the Minister may refer the case and himself rule on the merger for reasons of general interest other than the protection of competition (for instance,

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<sup>1</sup> "Phase 1" is to last 25 working days. If the case does not raise any significant competition problem, the Competition Authority grants a clearance at the end of this delay, either through an express decision or by remaining silent.

## Antitrust/Competition Client Alert

industrial development, competition at the international level, creation or preservation of employment). In such cases, the Minister shall be entitled to authorize a merger previously prohibited by the Competition Authority or to prohibit a merger previously cleared by the Competition Authority.

### Specific thresholds for mergers in the retail trade sector

The LME sets out new specific merger control thresholds for mergers in the retail trade sector: any merger involving at least two parties running one or several retail trade sale points will have to be notified if the total worldwide turnover of all of the parties concerned exceeds 75 million euros (instead of 150 million) and the turnover in France of each of at least two of the parties concerned exceeds 15 million euros (instead of 50 million).

The provisions of the LME regarding merger control will come into effect as soon as the order creating the new Competition Authority is promulgated and, at the latest, on January 1, 2009.

## Supplier-Customer<sup>2</sup> Relations

### Payment terms

The LME provides that the payment period shall not extend beyond 45 days from the end of the month or 60 days from the invoice date (with possible exceptions in case there is a specific industry agreement). This reform is intended to bring payment terms in France in line with the European average and to assist small and medium businesses.

### Negotiable prices and terms and conditions

Previously, discrimination with respect to prices and terms and conditions was prohibited unless economically justified by effective consideration. Now, suppliers and their customers will be able to freely negotiate prices and terms and conditions.

However, the LME introduces safeguards limiting the freedom to negotiate prices and terms and conditions.

- First, the LME maintains the requirement of a unique written agreement (or a master agreement) between a supplier and customer, which must include all consideration negotiated by the parties including the mutual obligations the parties have agreed upon. Such agreements must be concluded before March 1 of each year.
- In addition, the LME adds new prohibitions to those already contained in Article L. 442-6 of the Commercial Code, based on the notions of “abuse” and “significant imbalance” in bilateral relations between a supplier and a customer. Imposing or attempting to impose upon a commercial partner obligations that create a significant imbalance in the rights and obligations of the parties is prohibited. Similarly, obtaining or attempting to obtain conditions that are manifestly abusive with respect to prices, payment terms, conditions of sale or services by threatening to suddenly terminate commercial relations is prohibited.
- Importantly, the LME reinforces the level of civil sanctions applicable to restrictive behaviors listed in Article L. 442-6 of the Commercial Code. Fines of up to three times the amount that was unduly paid as determined by the court may now be imposed. This provision introduces into the French Commercial Code a concept similar to treble damages. It is important to note, however, that the fine will be paid to the Minister of Finance. Victims of restrictive behavior may only seek to recover compensatory damages.

In addition to the above mentioned safeguards, suppliers and customers must of course also refrain from anticompetitive behaviors (i.e., cartel, abuse of dominance).

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<sup>2</sup> “Customer” includes wholesalers, distributors and retailers.

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