

Further details about the upcoming French merger control reform

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Brief reminder of the context

On October 20, 2017 the French Competition Authority (FCA) has launched a public consultation to modernize and simplify French merger control regime. This public consultation covered three main topics, namely the possible need to create a new case of merger control in order to handle operations that can raise competition issues and are not currently covered by merger control procedures, the simplification of merger procedures, and the role of trustees in merger control.

According to the FCA, ten years after the 2008 reform entrusting merger control to the FCA, it was time to “*make a qualitative assessment: are the general rules and applicable thresholds still fit for purpose, and are there any ‘shortcomings’ in this control, which the legislator needs to remedy?*”

The results of the public consultation

On Thursday June 7, 2018, the FCA presented the results of the public consultation and put forward the first options that can be considered to modernize the French merger control regime.

No change in the current thresholds but the FCA considers the introduction of an *ex post* filing requirement

As a general remark, the FCA indicates that French merger control is deemed to be well-calibrated.

The FCA therefore does not deem it necessary to adjust or reassess existing thresholds general or specific for mergers in the retail sector.

Additionally, the FCA states that there will be no introduction of an alternative threshold based on transaction value (the latter solution has been recently adopted in Germany and Austria). Concerning this option, the FCA indicates that such a control is not justified for the French economy and would only concern a limited number of problematic mergers.

As for the opportunity of an *ex post* intervention, the FCA indicates that it should be assessed specifically, in order to handle operations that are currently beyond its control but can lead to competition concerns.

This statement was predictable. Indeed, Isabelle de Silva, President of the FCA, had already indicated in March 2018 (before the French Senate Commission for Economic Affairs) that recent highly priced deals “*demonstrated the need to create a highly targeted *ex post* control framework that does not depend on the turnover of the companies concerned*”

The FCA considers that the introduction of such *ex post* notification requirement, based on the models used in different EU Member states, such as UK, Ireland, Sweden and Lithuania, would concern a very limited number of transactions that may raise competition issues, leading to dominant or monopolistic positions on specific markets or to a reduction of competition.

This solution raises several questions as to the types of cases in which the FCA will be entitled to exercise an *ex post* control and the limits of the FCA's intervention, in particular in terms of time-limits (the FCA is considering a time frame of between 6 months and two years at this stage) and competition concerns in France that would justify such *ex post* control.

Besides, also comes into play the issue of proportionality between situations where an *ex post* intervention of the FCA could be relevant and the legal uncertainty for companies that could result from the introduction of such possibility for the FCA.

The FCA itself had specified in the public consultation of October 2017 that the Swedish Authority had only exercised its *ex post* residual power five times in the last 20 years. The introduction of an *ex post* control could lead to an unjustified increase in the number of controls and, correlatively, in the risks for companies.

The launching of a specific public consultation has been announced by the FCA for a new period of 4 months, relating to this potential legislative change. Stakeholders will therefore have until September 28, 2018 to submit their observations relating to the introduction of an *ex-post* control system.

Simplification

Notification form

First, in order to reduce the companies' administrative workload, the following measures will be taken: (i) the removal from the list of requirements, of several items not considered as indispensable for the control – especially financial information, (ii) the reduction of the required number of paper copies from four to just one, and (iii) regarding Annex 4-4 of the French Commercial Code, only the total European and French annual turnovers (excluding taxes), along with the companies' net results will be required in the “general case”.

Simplified procedure

The FCA and competition authorities of other countries, as well as the European Commission, have a simplified procedure for speeding up the handling of cases that are the least likely to present competition concerns. The simplified French procedure, which enables companies to submit a simplified file and allows the FCA to issue a decision within a shorter time frame (three weeks on average instead of five), is one of the few in Europe that does not have any separate form (or “short form”) for simplified notifications. For mergers that are eligible for the simplified procedure, the FCA's Merger Control Guidelines nevertheless exempts the parties from the obligation to supply certain details required in the notification form.

The FCA is now considering extending the simplified procedure to other types of operations:

- In case of a horizontal overlap of activities (the companies operate in the same markets), when the cumulative market share of the concerned companies is below 25%;
- In case of vertically linked markets (the companies operate in different markets but are still linked), when the market share of the companies concerned in one market or the other is below 30%;
- In case of horizontal overlap, when the total market share of the companies concerned is below 50% and the growth of market share following the operation is below two percentage points;
- In case of acquisition of sole control of companies where the acquirer already has joint control over the target with another stakeholder;
- When the transaction relates to the planned creation of a full-function joint venture exclusively active outside the national territory;
- When the transaction relates to the joint acquisition of “VEFA” real-estate assets (sold before completion).

The FCA's objective is to increase the number of mergers that could be subject to the simplified procedure, from 50% (current proportion of mergers subject to the simplified procedure) to 70% (as is the case before the EU Commission).

Finally, the FCA has indicated that an online form on the FCA website will be created in order to facilitate the notification process for operations benefiting from the simplified procedure in its current form.

New guidelines for 2019

In view of revising its July 2013 merger control guidelines, the FCA has announced its intention to update soft law rules, and to take into account the evolution of the decision-making practice in recent years and the abovementioned simplifications. Any interested third party is invited to contribute until 28 September 2018 by proposing any amendments to the current guidelines.

Regarding the role of the trustees mentioned in the public consultation of October 2017, the FCA gives no further details at this stage.

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