FRANCE

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1. Relevant legislation

Articles L.430-1 to L.430-10 and R.430-2 to R.430-10 of the French commercial code (FCC) and FCA's guidelines regarding merger control which latest version was published on 23 July 2020.

2. Authority

Autorité de la concurrence (French Competition Authority / FCA)

www.autoritedelaconcurrence.fr

The French Minister of Economy also has ancillary powers permitting him to intervene at two stages of the merger control process. First, it may request the Competition Authority to open a Phase II review after a decision of the Competition Authority following a Phase I review. Second, after a decision of the Competition Authority following a Phase II review, the Minister of Economy has the possibility to overrule the decision and either authorise or prohibit the merger for reasons of public interest other than the protection of competition.

3. Types of transactions caught

The FCA interprets the term "concentration" in a manner consistent with the European Commission.

Therefore, French merger control rules apply to "concentrations" including:

- mergers;
- acquisitions;
- full function joint ventures;
- changes of control.

4. Thresholds

General thresholds

- Combined worldwide pre-tax turnover of all parties exceeds EUR 150 million; AND
- French pre-tax turnover of each of at least two of the merging parties is more than EUR 50 million.

Specific thresholds applying to transactions in the retail sector

- Combined worldwide pre-tax turnover of all parties exceeds EUR 75 million; AND

- French pre-tax turnover of each of at least two of the merging parties is more than EUR 15 million.

  These rules being stated to apply to a company that operate one or more retail store. The concept of retail sector (*commerce de détail*) may be interpreted broadly (mixed activities, wholesale and retail, certain services such as hairdressing or dry cleaning).

Specific thresholds applying to transactions in French overseas territories

- Special thresholds apply for concentrations concerning one or more companies with an activity in the overseas departments (i.e French Guiana, Guadeloupe, Martinique, la Réunion and Mayotte) or in the overseas collectivities (Saint-Pierre-et-Miquelon, Saint-Martin, Saint-Barthélemy and Wallis-and-Futuna). A concentration must be notified when:
  - Combined worldwide pre-tax turnover of all parties to the concentration exceeds EUR 75 million; AND
  - Two of the parties to the concentration have a pre-tax turnover in one or more of the relevant departments or collectives of more than EUR 15 million OR EUR 5 million in the retail sector; AND
  - The concentration does not have a community dimension.

  To determine if the second threshold has been crossed, one must consider the aggregate turnover generated by the firm concerned in each of the overseas departments and overseas local and regional administrations, on an individual basis. For example, if a firm generates a pre-tax aggregate turnover of EUR 8 million on Reunion Island, and a pre-tax aggregate turnover of EUR 8 million on Mayotte, it will be considered that this firm has not crossed the EUR 15 million threshold. The same reasoning applies with the EUR 5 million thresholds in the retail sector.
- It should be noted that these provisions do not apply to New Caledonia and to French Polynesia, as stipulated in Articles L. 930-1 and L. 940-1 of the FCC; these territories however have their own specific merger control rules.

Article 22 of the EUMR

- NB: the FCA strongly advocated for a change with respect to the referral mechanism under Article 22 of the EUMR. Since the EC has shifted its approach and encouraged referrals from Member States, even where the national filing thresholds are not met, the FCA confirmed that it would scrutinize the merger transactions that are not reportable before its jurisdiction. It is worth mentioning the EC decision to review acquisition of biotech company Grail by Illumina was notably issued following an inquiry submitted by the FCA. In order to detect transactions that could be subject to such referral procedure under Article 22 of the EUMR, the Competition Authority has announced that it will monitor the market.

5. Exceptions

Specific rules concerning the creation of a referencing/purchasing entity in the retail sector

Article L.462-10 of the FCC provides that the FCA must be informed of any agreement between companies operating one or more retail stores of consumer goods or operating in the retail distribution sector as a referencing or purchasing entity, 4 months prior the effectivity of the agreement.

The FCA powers carries out a competitive assessment of the competitive impact of the agreement, on its own initiative or at the request of the Minister for the Economy. For this purpose, the FCA may request the parties to the agreement to submit a report assessing the effect on competition of their agreement.

If the agreement has anti-competitive effects, the parties to the agreement must undertake to take measures to remedy them within a deadline set by the FCA; otherwise, the FCA can pronounce interim measures or injunction or even lodge an investigation. Finally, the FCA can also ask the parties to go back to the previous state or request an amendment to the said agreement.

The FCA shall be informed when:

- the worldwide pre-tax turnover of the parties to such agreement exceeds EUR 10 billion; AND
- the pre-tax turnover on purchase in France in the framework of those agreements exceeds EUR 3 billion (R. 462-5 of the FCC). This threshold shall include all agreements between those companies during a two years period.

6. Notifying party(-ies)

The FCA interprets the term "notifying party(-ies)" in a manner consistent with the European Commission:

- If the concentration is an acquisition, the buyer is responsible for the filing. In case of a joint acquisition, all the parties having joint control are responsible for the filling, included parties that already had a joint control of the company.
- If the concentration is a merger or the creation of a full-function JV, both parties are responsible for a joint filing.

7. Submission deadline

Prior to completion.

NB:

The formal notification may be filed once a "'sufficiently advanced project" ("*suffisamment abouti*") is in place, which implies that there is an understanding or a commitment on the object, modalities and scope of the transaction. This sufficiently advanced project is typically formalised by the signing of a letter of intent. Filing on the basis of draft SPA/contract (so long as it is sufficiently precise / advanced) prior to signing is possible.

Prior to the formal notification, the parties have the possibility to request the appointment of a case handler in charge of the examination of the file. This request is optional. If made, a name will be communicated to the notifying party within five business days.

Pre-notification is strongly recommended (see below).

8. Filing fee

None.

9. Proceedings timetable

Length of Phase I Review Period

- The official review will only start to run if (and when) the filing application is deemed complete by the FCA. The letter declaring the notification complete or incomplete is usually sent within 10 business days after its submission.
- **25 business days from receipt of a complete notification**; 15 business day extension if the notifying parties propose commitments. However, the review process can be extended for an additional 15 business days at the request of the parties (e.g., for negotiating commitments) or by the FCA (e.g., failure to provide requested information, etc.), with no time-limit.
- The timetable may sometimes be shorter in the case of straightforward deals (e.g. involving private equity and investment funds). **A simplified procedure is available for certain type of transaction and the FCA may issue a decision within 15 business days**. However, the FCA is not bound to follow the simplified procedure for transactions that fall within its scope and may still decide, at its sole discretion, to adopt its decision within the standard 25 business days deadline.

As explained below. the French Minister of the Economy has the power to ask the FCA to conduct a Phase II investigation (no precedent), no matter the content of the FCA's decision at Phase I (e.g. clearance decision with / without commitments)..

Length of Phase II Review Period

- **65 business days from date of Phase II referral**. 20 business day deadline if the notifying parties propose commitments less than 20 business days before the expiry of the 65 business day period. The review process can also be extended for an additional 20 business days at the request of the parties (e.g., for negotiating commitments) or by the FCA (e.g., failure to provide requested information, etc.), with no time-limit.
- The FCA's decision will in theory be final, with one exception: the French Minister of the Economy has the power to reverse a decision of the FCA on grounds of general interest (that include industrial development, the international standing of French companies, and the creation or conservation of employment: one precedent in 2018).

Appeal procedure

Appeal against FCA merger decision is opened before Conseil d'Etat (French supreme administrative court) for notifying parties as well as third parties having an interest in bringing such action. Action can be brought within two months following notification of the FCA decision for notifying parties/ vs publication (website) for third parties.

An interlocutory proceeding may also be introduced asking for the decision to be suspended.

10. Availability of pre-notification/informal consultation

The optional but strongly recommended pre-notification phase (especially in order to confirm that the notification is complete before filing) is launched at the initiative of the notifying parties who wish to consult with the FCA's mergers unit when uncertainties arise as to the operation involves control or, for complex operations, when the parties plan to file ad hoc economic studies, or when they wish to get an initial idea as to the acceptability of their project, so as to anticipate possible future modifications.

The whole pre-notification phase is strictly confidential: it does not result in any publication on the Website of the FCA, nor in any contact with third parties. Nevertheless, subject to the

prior written approval of the notifying parties, a market consultation may be initiated as of this phase such as to gather more precise information without waiting for the official notification.

11. Test for clearance/prohibition

The test applied by the FCA is to analyse if a merger is likely to harm competition by creating or strengthening a dominant position or by creating or strengthening purchasing power which places suppliers in a situation of economic dependence.

The FCA first examines the combined market shares of the merging parties and the degree of market concentration, then it performs a prospective assessment of the competitive risks of the merger, based on the available data and plausible economic scenario.

When a merger is likely to harm competition, parties must present remedies (see below).

If no corrective measure appears to be satisfactory, the FCA prohibits the operation.

12. Conditional clearance - remedies

When a merger is likely to harm competition, commitments can be made by the merging parties during the Phase I or Phase II to receive clearance.

These correctives measures can be structural (ex: disinvestments of assets) or behavioural (ex: termination of exclusive contracts or the obligation to grant access to certain infrastructures).

More rarely, the FCA can also impose injunctions or requirements to merging parties.

13. Stand-still obligation

Yes: no completion permitted prior to clearance.

However, derogation from suspension is possible under two cases:

- for listed securities (suspension of the voting rights only); and
- if the parties apply for a derogation and justify their demand.

14. Failure to notify/obtain clearance

- Fine up to 5% of pre-tax turnover in France for corporate entities (and EUR 1.5 million for an individual).
- Order the parties to notify the transaction, coupled with a daily penalty payment of a maximum of 5% of their average daily turnover, unless they revert to the situation which existed prior to the operation.

Failure to notify was until a few years ago sanctioned by fines below EUR 1 million (ex: Colruyt case, decision n° 12-D-12, €392,000, or Réunica and Arpège case, decision n°13-D-01, EUR 400,000); however, the FCA has clearly become more severe since 2013 with the Castel case (decision n° 13-D-22). In this case, the fine was set to EUR 4 million, then reduced to EUR 3 million by the Conseil d'Etat (French supreme administrative court).

A case of gun jumping has also been fined by the FCA in 2016 (decision n° 16-D-24). In this case, Altice Luxembourg and SFR Group reached a settlement with the FCA to set the fine at EUR 80 million. On April 2022, the FCA fined Cofepp for acquiring control of MBWS without prior notification of the transaction and without waiting for its decision: Cofepp exercised a decisive influence on MBWS, in particular by appointing its new CEO,

negotiating with its suppliers in place of MBWS's managers, directly participating in the establishment of MBWS's commercial and budgetary policy and intervening in several operational management decisions. Cofepp, which did not contest the practices, benefitted from a settlement procedure. The FCA handed down a EUR 7 million fine (decision n° 22-D-10).