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French Competition Law Newsletter

Highlights

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— The Paris Court of Appeals Reduces Stihl's Fine For Online Sales Restrictions

— The French National Architects Council fined €1.5 million for anticompetitive practices

French Competition Authority Launches Consultation On Revised Merger Guidelines

On September 16, 2019, the French competition authority ("FCA") launched a two-month public consultation on revised merger guidelines ("the draft guidelines"), which constitutes the final step of the modernization and simplification of merger control the FCA had initiated in the fall of 2017. This overhaul of the FCA's merger control guidelines aims to extend the scope of the simplified procedure, update the 2013 guidelines with recent case law and the FCA's exchanges with the European Commission and other national competition authorities, while reorganizing the guidelines and enriching them with examples. The public consultation was open until November 16, 2019. The new guidelines are scheduled to be adopted before the end of the year.

Simplified procedure

The simplified procedure is currently available notably where (i) there is no horizontal, vertical, or conglomerate overlap; or (ii) the parties are companies which typically submit several filings per year (*e.g.*, investment funds or key retail trade players). Eligible parties can thus submit a shorter notification form and obtain a simplified decision within 15 working days (instead of the standard 25-day procedure). Based on the draft guidelines, the simplified procedure would be extended to apply to various new circumstances:

— if the parties to the transaction's combined market share is below 25%;

— if the parties combined market share is below 50 % and the increment resulting from the transaction is below 2%;

— in the event of a presence in vertically related markets, if the combined market share of the parties in these markets is lower than 30 %;

— in the event of a presence in related markets, if the market shares of the parties in the related markets are below 30%;

— if the transaction consists in the acquisition of sole control over a target company by an acquirer which already exercised joint control prior to the transaction;

— if the transaction concerns the creation of a full-function joint venture exclusively active outside the national territory;

— if the transaction concerns the acquisition of joint control over a real estate asset before completion ("*vente en l'état futur d'achèvement*").

In addition, the FCA launched an online notification platform available for transactions currently falling under the simplified notification procedure, which has been live since October 18, 2019. This platform allows notifying parties to file their notification online—although they may still opt for a traditional paper filing.

The draft guidelines also introduced a 10 working-day deadline for the FCA to confirm that a notified transaction is eligible to the simplified procedure.

Case team allocation request

Following a process similar to the European Commission's, the draft guidelines create an initial procedural step for the notifying parties to formally initiate preliminary contacts with the FCA by submitting a case team allocation request providing key information on the contemplated transaction. The draft guidelines also provide for a five working-day deadline for the FCA to appoint a case handler in charge of the transaction.

Gun jumping

The draft guidelines clarify the scope of Article L. 430-8, II of the French Commercial Code, which provides for sanctions in case the parties close the transaction—and stop acting as competitors—before clearance. In particular, the draft guidelines incorporate the principles laid out in the *Altice/SFR*[1] decision, in which the FCA imposed its first gun-jumping fine.[2]

Under the draft guidelines, the FCA would make a concrete assessment of the parties' behaviour. In particular, the FCA would examine whether the parties' memorandum of understanding or the information exchanged by the parties could confer control to the buyer over the target before clearance or lead the parties to behave in a different way (*e.g.*, by concluding commercial agreements that completely differ from standard market practice). Parties must therefore pay attention to the clauses of the contractual arrangements and the exchanges of information during the pre-closing period. Although the draft guidelines do not list specific examples of unlawful behaviour, they do refer parties to an article published in 2018 by the President of the FCA in this regard.[3] Such examples notably include closing one of the target's plants and reorienting customers to the buyer's plant, setting up a management team within the target's premises, and submitting contracts concluded by the target as part of its day-to-day operations to the buyer's approval.

Clarification of the FCA's methodology for reviewing transactions in the retail sector

The draft guidelines aim to better set out the FCA's methodology applicable to transactions in the retail sector, notably with regard to the assessment of competitive effects on local markets and the competitive pressure exercised by online sales. For example, Annex D of the draft guidelines lists the factors to be taken into account to integrate online sales when assessing a transaction in the retail sector.

Clarification of the FCA's approach regarding remedies

The draft guidelines do not bring any new element regarding the assessment of remedies, but clarify the elements taken into account by the FCA. In particular, the remedies should be effective (*i.e.*, they should effectively remedy the identified competitive concerns), proportionate (*e.g.*, they are not intended to increase the degree of competition existing prior to the concentration), and controllable (*e.g.*, the parties must ensure

[1] FCA's Decision n° 16-D-24, November 8, 2016.

[2] The FCA imposed a fine of €80 million on Altice Luxembourg and SFR Group jointly for implementing two proposed acquisitions in the telecommunications industry before obtaining the FCA's clearance.

[3] Draft guidelines, footnote 21, referring to I. de Silva, « Gun-jumping : Quelles sont les pratiques à éviter ? », September 2018, *Concurrences* N° 3-2018, Art. N° 87364, pp. 55-66.

effective completion of the remedies, through the nomination of an independent monitoring trustee, where appropriate). Their implementation must not raise doubts, which implies that they must be presented in a precise and unambiguous manner, and follow a sufficiently detailed and swift procedure.

Regarding the monitoring trustee, the draft guidelines also provide that the notifying parties should propose three candidates to the FCA. Once the monitoring trustee has been selected, the FCA would publish its contact details on its website in order to further publicise their role. The draft guidelines no longer contain a template of monitoring trustee mandate.

Finally, the draft guidelines clarify the procedure for revising remedies. For example, when behavioral remedies that are renewable reach their set term, the FCA may reassess the competitive situation to decide whether or not to renew these remedies. The draft guidelines also clarify the conditions under which remedies can be revised *before* their term. In particular, parties may request a revision of remedies based on legal and factual circumstances (i) different from those on which the initial decision was based and (ii) that call into question the adequacy of the initial remedies. Under exceptional circumstances, the parties may also request the substitution of assets to be sold.

Failure to comply with remedies

The 2013 guidelines provided that failure to comply with remedies could lead to an injunction to comply under a certain time period, a fine and the withdrawal of the clearance decision. In addition to these sanctions, the draft guidelines recall the possibility since 2015 for the FCA to impose new obligations to the parties, which may differ from their original obligations under the remedies.[4]

The FCA may thus impose new remedies to correct the anticompetitive problems identified in the clearance decision, rather than requiring compliance with commitments that the parties failed to implement. These corrective measures may be structural (*e.g.*, tangible or intangible asset sale, putting an end to a franchise contract, revising contractual provisions) or behavioural (*e.g.*, granting a third party non-discriminatory and transparent access to networks or infrastructures, prohibiting bundled sales, defining a set framework for the entity's commercial behaviour).

The draft guidelines also clarify that the FCA must take into account in its assessment the gravity of the breach, the competitive harm that the remedies aimed to prevent, the time elapsed since the concentration, and any particular difficulties encountered by the parties in fulfilling their obligations. Finally, the injunctions and sanctions imposed by the FCA must be proportionate to the breach, and the financial sanction must be sufficiently deterrent.

Envisaged modifications that the FCA chose not to integrate in the draft guidelines

First, the draft guidelines do not include any revision of notification thresholds. The FCA considered, in particular, that the French economy does not justify new thresholds based on the transaction value.[5] The FCA also found that the specific notification thresholds with regard to the retail sector allow the FCA to review potentially problematic transactions, and therefore do not need to be amended.

Second, the draft guidelines do not introduce any form of *ex-post* merger control procedure. However, the FCA is currently supporting a legislative amendment to introduce an *ex-post*-merger regime and may subsequently issue an *ad hoc* document on the issue.

[4] Law No. 2015-990 of August 6, 2015.

[5] French Competition Authority Press Release, "Modernisation et simplification du contrôle des concentrations", June, 7, 2018, available at: https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/7-juin-2018-modernisation-et-simplification-du-controle-des-concentrations.

The Paris Court of Appeals Reduces Stihl's Fine For Online Sales Restrictions

On October 17, 2019, the Paris Court of Appeals confirmed the FCA's decision against Stihl for online sales restrictions, but reduced the fine from EUR 7 million to EUR 6 million.[6]

On October 24, 2018, the FCA fined Stihl, a manufacturer of power tools (such as chainsaws), for online sales restriction between 2006 and 2017.[7] The FCA found that the contractual clause imposing an in-store hand-delivery obligation on distributors for certain products sold to customers amounted to a *de facto* ban on online sales and therefore constituted a restriction of competition by object. Stihl appealed the FCA's decision on the following main grounds, all of which were rejected by the Court of Appeals.

First, Stihl argued that the German, Swedish, and Swiss competition authorities, in letters exchanged with Stihl, recognized that the online sale contractual clauses imposing an in-store hand-delivery were compatible with competition law. The Court of Appeals rejected the argument as these authorities only decided not to engage in proceedings against the contractual clauses at stake, rather than expressly approving their validity. The Court of Appeals further underlined that national competition authorities—in line with settled case-law and contrary to the European Commission—do not have the power to adopt compatibility decisions.[8]

Second, Stihl argued that the clauses did not restrict competition as 20-30% of its distributors generated online sales in 2016. The Court of Appeals rejected this argument, noting that the in-store hand-delivery obligation was understood and enforced as a *de facto* online sales ban. The Court of Appeals further noted that Stihl's extensive distribution network did not counterbalance this conclusion as the equipment sold online could not be collected from any of Stihl's 1,200 distributors, but only from the specific distributor which sold the product.

Third, Stihl argued that the in-store hand-delivery obligation was justified and proportionate to its public safety objective (due to the equipment's intrinsic dangerousness). While the Court of Appeals considered that the in-store hand-delivery obligation was suitable to fulfill its public safety objective—contrary to the FCA's decision, it found that it was not necessary. The Court of Appeals noted that in-store hand-delivery exceeded the scope of what is necessary to ensure the protection of consumers as it also applied to professional customers. In addition, the Court of Appeals considered that distributors did not need to make explanations on how the product functions in person. Stihl's distributors should have been able to outsource this obligation to allow home delivery. The Court of Appeals further noted that Stihl could have fulfilled its consumer safety objective with less restrictive means, notably through remote assistance or online training.

At the stage of determining the fine, Stihl argued that it should be exempt from a fine since the German, Swedish, and Swiss competition authorities communicated assurances about the validity of the contractual clause in their correspondence with Stihl, which created legitimate expectations on the validity of the contractual clause. The Court of Appeals rejected Stihl's argument because such letters could not constitute precise, unconditional, and consistent information as they did not provide express approval of the practice. However, the Court agreed with Stihl that the EUR 7 million fine was disproportionate due to the uncertainty around the legality of the practice and the limited economic damage. According to the Court of

[6] *See* Paris Court of Appeal, *Stihl*, Judgment of October 17, 2019, n°18/24456.

[7] *See* FCA, Decision n°18-D-23 of October 24, 2018.

[8] *See* CJEU, *Tele2 Polska*, case C-375/09, Judgment of the Court of May 3, 2011, paras. 19 to 30.

Appeals, the FCA should have taken into account Stihl's good faith behavior, as demonstrated by Stihl's contacts with national competition authorities on contract clauses at stake, and the fact that online sales of the products at stake were limited. The Court thus reduced the fine from EUR 7 million to EUR 6 million.

The French National Architects Council fined €1.5 million for anticompetitive practices

On September 30, 2019, the FCA sanctioned the French National Architects Council (Ordre des architectes) for fixing prices in the context of public works contracts.

From 2013, the French National Architects Council circulated to their members a formula for calculating fee rates. This practice was initiated in reaction to low rates applied by certain architects on public work contracts.

To ensure compliance with the pricing methodology, the French National Architects Council imposed coercive measures on public procurement authorities and architects. For instance, the Council initiated pre-disciplinary and disciplinary proceedings against architects not complying with the imposed fee rate. The French National Architects Council also alerted public procurement authorities that undervalued bids would be associated with increased litigation risks, as well as technical risks. The FCA considered that this price policy discouraged certain local authorities from selecting architects with lower fees. Several local authorities also called into question contracts already awarded or in course of negotiations.

The FCA rejected the National Architects Council's claim that the conduct at stake fell within the exclusive competence of the administrative jurisdiction. The FCA held that it was competent to assess the anti-competitive nature of practices carried out by a professional order, including prerogatives of public-authority powers, since such practices pursued a manifestly anticompetitive goal. The FCA concluded that these practices prevented architects from freely setting the price of their services and therefore constituted an infringement of competition by object. It imposed a fine of €1.5m on the French National Architects Council and a penalty of €1 on each architect and architectural firm that participated in the conduct.

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