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FRENCH COMPETITION LAW UPDATE

France: Creation Of A New Competition Authority And Reform Of Commercial Relations

Paris
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On August 4, 2008, French law no. 2008-776 which purports to modernize aspects of competition and commercial law, was enacted ("*Loi de modernisation de l'économie*", hereinafter, the "LME"). In the field of competition law, the LME provides for:

- The creation of a new "Competition Authority" centralizing most of the powers and resources currently shared between the Competition Council (*Conseil de la concurrence*) and the ministry of Economy, and
- The reform of commercial relations between suppliers and purchasers by allowing for a broader individual negotiation of sales terms; in particular, the LME repeals the general liability rule previously attached to any unjustified discrimination.

The creation of the Competition Authority will become effective upon the adoption of implementation legislation, which should be issued by January 1st, 2009. In contrast, most of the new rules that apply to commercial relations have entered into force.

I. CREATION OF A NEW COMPETITION AUTHORITY

The LME establishes a new "Competition Authority" ("the Authority") with greater powers and resources in competition and merger control matters.

The aim of the reform is to concentrate within the new Competition Authority the powers and resources formerly shared between the Competition Council, on the one hand, and the Ministry of Economy and its administration in charge of protecting competition (Competition Directorate), on the other. However, the LME does not entirely put an end to this duality of functions, since it gives the Minister of the Economy the ability to review certain concentrations and certain anti-competitive practices considered to be less significant.

Status And Composition. The composition of the Competition Authority is generally similar to that of the Council (*i.e.*, 17 members, appointed for 5 years instead of 6, among which 4 vice-presidents instead of 3 for the Council); however, there are slightly more members chosen based on their economic or competition qualifications or

their professional experience compared to those chosen based on their judiciary background.

Like the Chairman of the Council, the Chairman of the Authority will be appointed by the Minister of the Economy, however the LME introduces a consultation procedure of certain Parliament Commissions.[1]

The LME reinforces the power of the Authority's Chairman by allowing him to make decisions concerning:

- The inadmissibility or dismissal of a claim,
- Decisions concerning anti-competitive practices, in cases referred to the Authority by the Minister, and
- In merger control matters, decisions relating to stage I (initial investigation), including conditional or unconditional authorization decisions, or decisions to initiate stage II (in-depth investigation).

The Chairman may also delegate his individual decision-making powers to one of the Authority's four deputy chairmen.

Expanded Jurisdiction In Merger Control Related Matters. The Competition Authority, rather than the Ministry of Economy's services (Competition Directorate), will receive notifications of concentrations and investigate proposed mergers, both in stage I and in stage II. However, the LME reserves two significant means of intervention to the Minister:

- In-depth investigation request: the Minister may request the Authority to carry out an in-depth investigation with respect to a merger transaction authorized by the Authority in stage I; this option must be exercised within 5 business days from the notification to the Minister of the stage I decision;
- Review, for general interest purposes, of a transaction that has already been subject to an in-depth investigation, and authorized or prohibited, by the Authority: the LME provides that the Minister may exercise this option "*for general interest purposes other than the protection of competition and which may, if applicable, compensate the harm to competition resulting from the transaction*". The LME includes the following non-limitative list of "*general interest purposes*":
  - industrial development,

[1] Commissions of economic matters of the National Assembly and of the Senate. These commissions may also hear the Chairman of the Authority during his term of office.

  - the competitiveness of the relevant companies with respect to international competition
  - the creation or maintenance of employment.

- In the case of a review for general interest purposes, the Minister himself investigates the proposed merger, including by inviting the parties to submit their observations, and rules on the case. This review option may be exercised within 25 business days of the notification to the Minister of the Authority's stage II decision, irrespective of whether this decision prohibited or authorized the transaction.

These provisions have raised questions and criticisms. Concerning the power to request an in an-depth investigation, it has been suggested that such a request from the Minister would force the Authority, which would already have issued a decision finding no adverse economic effect, to reformulate its conclusion. However, it is conceivable that the Minister would want the Authority to examine a specific aspect of the case that may not have been analyzed in detail in stage I; moreover, in stage I, decisions may be made by the Chairman or deputy chairman, whereas stage II decisions are made by a panel of Authority members.

As for the option to review a case for "*general interest purposes*", it has been suggested that it should only be exercised where the Authority has, following an in-depth investigation, prohibited a transaction. The argument was that allowing the Minister to override an authorization issued after a stage II investigation would allow the use of merger control, a competition law mechanism, for non-competition purposes already governed by specific legal provisions (*e.g.*, foreign investment legislation). In its comments on the draft LME, the Competition Council suggested limiting the Minister's review and overriding power to cases where the Authority had issued a prohibition decision, *i.e.*, the Minister could only have authorized, on grounds other than competition, a transaction prohibited on competition grounds. However, the Competition Council's suggestion was rejected. As the LME stands, the Minister's review power may thus be used to prohibit, on grounds other than the protection of competition, a transaction authorized by the Authority.

The LME also modifies the thresholds and time-periods applicable to merger control:

- The time periods are now expressed in business days (instead of calendar days) and are of 25 working days for phase I and 65 working days for phase II;

- These time periods may be suspended at the request of the parties "*on an ad hoc basis, such as in order to finalize commitments*", and at the Authority's initiative in the case of a delay in the provision of certain information;

- Specific turnover thresholds (€75 and 15 million instead of €150 and 50 million for the general thresholds), may apply when the parties to the merger are active in the area of retail or in overseas territories.

Reinforcement Of The Resources And Autonomy Of The Authority's Investigation Services. The Government took the view that the new concentration of investigative and decision-making functions within the same authority required the implementation of measures intended to ensure the impartiality of the decision-makers. Thus, the Authority's investigation service will act under the direction of a Chief Case-Handler (*rapporteur general*) appointed by the Minister and not by the Chairman of the Authority.

The Chief Case-Handler will appoint, in addition to assistant chief case-handlers and permanent case-handlers, non-permanent case-handlers and investigators. The Authority will thus have its own investigators, unlike the Council which currently must request the assistance of the Competition Directorate's inspection services. However, the scope of the investigation services allocated to the Authority is not known yet. While the Competition Directorate currently has approximately 170 investigators at the national and regional level, it was indicated that only about 30 investigators from the national office would be transferred to the Authority.

Designation Of A Hearing Officer. The LME creates the position of a hearing officer within the Authority, whose task will be to collect, "*as the case may be, the comments of the challenged and filing parties concerning the manner in which the procedures affecting them are carried out once the statement of objections is sent"* [and to] transmit "*a report to the chairman evaluating these comments and proposing, if necessary, any measure that will enhance the ability of the parties to exercise their rights."*[2] However, the hearing officer is not expected to participate in the Authority's hearings, unlike the hearing officers of the European Commission.

Other Aspects. Certain topics initially included in the draft legislation, but not incorporated in the LME, may appear in the implementing legislation, notably:

- The designation of the court competent for appeals of merger control decisions (the draft bill provided that the highest administrative Court, the *Conseil d'Etat*, would, rather than the Paris Court of Appeals, retain jurisdiction);
- The retention by the Minister and the DGCCRF of an investigative, injunctive and even settlement power with respect to anti-competitive practices considered of lesser importance ("micro-anti-competitive practices");

[2] Article 461-4of the new commercial Code.

- The creation of a court with jurisdiction over appeals of judicial decisions authorizing visits and seizures: the draft provided for the referral of this dispute to the chief justice (*premier president)* of the Court of Appeals, with the possibility of appealing the decision to the supreme court (currently, the order authorizing such visits and seizures may only be appealed to the supreme court, with the review limited to questions of law).

II. REFORM OF COMMERCIAL RELATIONS

The LME introduces more flexibility in the negotiation of sales terms between suppliers and purchasers, while reinforcing the sanctions in cases of abuse.

A. Negotiability Of Sales Terms And Repeal Of Liability For Discriminatory Practices

The LME considerably increases the leeway of suppliers and purchasers with respect to the negotiation of their sales terms:

- General sales terms may be distinguished depending upon the categories of purchasers; the law thus no longer includes a regulatory definition of the criteria justifying a distinction, and suppliers may thus make distinctions based on their own criteria (within certain limits, see below),

- Terms specific to certain individual customers may be agreed upon, without having to provide a justification, and

- The general liability attached to discriminatory practices "*unjustified by actual consideration*" is repealed (deletion of article L. 442-6, I, 1° of the Commerce Code).

Since these provisions of the LME are immediately applicable, suppliers can now apply different sales terms and notably prices to different purchasers without having to provide a justification, provided they remain within certain limits (see below).

B. New Liability Provisions And Reinforcement Of Financial Sanctions

Article L. 442-6, I of the Commerce Code lists a certain number of commercial practices that may result in the civil liability. LME repeals provisions dealing with practices such as discriminations "*unjustified by actual consideration"* or liability for abuse of dependence or abuse of purchasing power or sale resulting in "*unjustified commercial terms or obligations"*. Nevertheless, the ability to negotiate sales terms and conditions on a case-by-case basis remains subject to certain limitations. The LME introduces two new grounds for liability:

- Creation of a significant imbalance in commercial relations, that is, "*to impose or attempt to impose obligations on a commercial partner that create a significant imbalance in the rights and obligations of the parties*".

- Imposition of obviously abusive terms, that is, "*to obtain or attempt to obtain, under a threat of a total or partial termination of commercial relations, obviously abusive terms concerning the prices, payment deadlines, sales terms or services not arising from the obligations to purchase and sell"*.

Thus, suppliers may vary their sales terms depending upon the purchasers without having to provide a justification provided that, first, such a variation does not result in a "significant imbalance" in the rights and obligations of the parties and, second, that the resulting terms are not "obviously abusive". The content of these notions remains to be determined.[3]

The LME also prohibits, subject to cancellation, provisions that automatically grants the benefit of more favorable terms granted to a competitor; and the imposition of exclusive supply contracts with terms of more than two years to an independent reseller (who is not the beneficiary of a license) conducting a retail business in a surface area of less than 300 m².

Finally, the punishment of restrictive practices is reinforced by allowing the resulting civil fine, which may not exceed 2 million euros, to "*be raised to three times the amount of the sums unduly paid"*.

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[3] To this end, the LME introduces the possibility for the courts in which complaints are filed concerning these practices to consult the Commission in charge of examining commercial practices.

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