

From the Conseil de la concurrence to the Autorité de la concurrence

On 2 March, 2009 was held the first meeting of the members of the Autorité de la concurrence collegial board, which marks the effective transfer of the powers of the Conseil de la concurrence to the new Autorité de la concurrence (hereafter Competition Authority), and the change of the substantial rules applied to it.

This new organisation of the regulation of competition in France was established by the law on modernization of the economy n° 2008-776 of 4 August, 2008 (hereafter “LME”), completed by the ordinance on modernization of the competition regulation of 13 November, 2008 and several other orders of February and March 2009.

Now an independent administrative Authority, provided with a new possibility of intervention in competition regulation (3.), the Competition Authority enjoys additional powers and means regarding merger control (1.) and anticompetitive practices monitoring (2.).

1. A UNIFIED MERGER CONTROL

The LME puts an end to the duality of powers between the Minister of Economy and the Conseil de la Concurrence which prevailed until then. From now on, merger control is entirely performed by the Competition Authority, to which merger projects will have to be notified¹.

The Authority will be in charge of performing the balance of the effects on competition (“*bilan concurrentiel*”) of merger cases which will include, if necessary, the efficiency gains it entails. Depending on the complexity of the cases at stake, the Authority may:

- authorize the operations, subject or not to commitments made by the parties at the merger, after a quick analysis in simple cases (phase 1 – in theory 25 working days starting from the date of the reception of the complete notification, extended for a period of 15 working days if commitments were made), or
- take the decision of authorizing or prohibiting, after a thorough review, in cases in which a serious doubt of adverse effect on competition remains (phase 2 – in theory 65 working days starting from the beginning of phase 2).

¹ The Authority indicated at its first meeting on 2 March, 2009 that it intended to pass new guidelines regarding merger control. Until that adoption, it intends to follow the guidelines of the ministry of economy, industry and employment (General Directorate for Competition Policy, Consumer Affairs and Fraud Control) of 30 April, 2007 which were applied until then.

If the competitive analysis is now up to the Competition Authority, the executive power remains the guardian of the general interest. In that respect, the Minister of Economy may, after the Competition Authority has taken a decision at the end of phase 2, examine an operation which has a strategic importance for the country. For that purpose, he may disregard the decision of the Competition Authority if it appears necessary, by taking a decision justified by reasons of general interest which are unrelated to competition (ex : industrial development, national security or the preservation of employment). These interventions should however remain exceptional.

The President of the Competition Authority, Mister Bruno Lasserre, declared his will to perform merger controls in a quick and efficient manner. In order to do so, a service dedicated to merger operations was established within the discovery services of the Competition Authority, and under the authority of the Head Case Officer. The companies should quickly get to know their interlocutor of reference within the service as well as the member of the collegial board they may refer to who will be in charge of handling the case. This organisation should enable a better visibility for the companies who will be able to discuss in advance the possible competition problems and the appropriate remedies with the person who will take the decision in the end.

President Lasserre also expressed his will to encourage a process of quick decision, at least in cases in which the notified projects do not present any problems in terms of competition. But he insisted on the counterparts this quickness implied: First, the companies will have to themselves act with diligence in their relations with the service in charge of the discovery of their case; second the companies must accept that the decisions taken within this context shall not be thoroughly justified concerning the relevant markets and will therefore not constitute a precedent.

2. THE BATTLE AGAINST ANTICOMPETITIVE PRACTICES

Regarding the anticompetitive practices, the reform introduced by the LME also provided the Competition Authority with strengthened powers and means, even though it was not given the possibility to decide on the opportunity of prosecuting, which means that all cases brought before the Authority of Competition must be examined.

Firstly the control of anticompetitive practices has been united at almost every level:

- The dichotomy which existed between the services of the Minister of economy, in charge of investigations, and those of the Conseil de la Concurrence, in charge of the discovery, has disappeared with instead an important service of discovery within the Competition Authority, in which the capacities of Case Officer and investigator are no longer separate. The Case Officers of the Authority may now conduct the appropriate investigations, with the possibility to perform seizures when necessary, in order to fulfil their mission²;

² The powers of investigation of the Minister of Economy have not completely disappeared, since he still has the power to lead investigations, essentially of local interest. The combination of these powers and of those of the Competition Authority has been organized for two specific moments: Before the investigation is launched, the Minister must inform the Head Case Officer of the Authority of the investigation he plans to lead; the Head Case Officer decides whether he wishes to head it or let the services of the Minister perform it. In this last case, the Minister has the obligation to submit his conclusions to the Head Case Officer of the Authority, who may then, once again, choose whether to ask the Authority to examine the practices which might have been identified, or let them be handled by the services of the Minister; the latter enjoy in this case a power of injunction and transaction (article L. 464-9 of the French Commercial code).

- At the other end of the procedure, the Authority is awarded the control of the execution of the decisions, power which before the reform was left to the Minister. This power reaches its full meaning in cases in which the decisions are supported with commitments or injunctions and should enable the Competition Authority to play a true regulatory role ;
- The unification caused by the reform also led to substantial changes since the Authority now has the power to review abuses of dominant position following a merger operation.

Secondly, the procedure related to the anticompetitive practices was largely modernized, based on the experience acquired by the Conseil de la Concurrence over the past twenty years. For instance, the Head Case Officer now has the authority to deal with all questions related to the protection of business secrets or with the requests of companies which wish to be granted an additional delay to answer the statement of objections or the report. It is also the Head Case Officer who decides whether the simplified procedure should be applied or not when the statement of objections is sent. However the main innovation of the LME regarding procedure consists in the creation of a hearing officer, who will have to make sure the principle of hearing the parties is applied, and who may present to the Authority collegial board an autonomous point of view as to whether procedure rules were correctly applied.

Last, the Authority enjoys new powers to penalize, particularly regarding the sector of distribution. The Authority may thereby order structural injunctions in the case of a persistent abuse of dominant position in a given customer service area, despite having taken a decision imposing behavioural injunctions or financial penalties. In this case, the structural injunction may go as far as obliging the companies at fault to sell some of their assets to revive the competition.

3. THE INDEPENDANCE OF THE COMPETITION AUTHORITY ESTABLISHED

The LME, which put the Competition Authority into place, clearly establishes its independent administrative authority status; the counterpart is that the Authority will be accountable to Congress.

More importantly maybe from the economic operator's point of view, the Competition Authority now enjoys the possibility to give public opinions, on its own initiative, without any prior request. This new possibility may be used for any question concerning competition, and President Lasserre has expressed on several occasions his will to embrace this new power, may it be to express the view of the Authority on a general question regarding competition, to propose balance of the effects on competition of a legislation which has been passed or is being elaborated, or to perform a sector-based investigation in a particular area. The Authority may when appropriate recommend necessary measures for the improvement of the functioning of the market from a competition point of view.

Strongly attached to the pedagogical role awarded to the Competition Authority, President Lasserre intends to use this possibility in order to contribute with voluntarism to the development of competition on new markets. Were mentioned as examples the liberalisation of rail transport, the press distribution, the privatisation of autoroutes or the sale on internet.

Armed with its new powers, the Authority is now equipped with the necessary means to develop a true strategy of competition in France. The future will tell if the efficiency gains expected for the economic operators, and, at the end of the chain for the consumers will indeed eventuate.

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