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Merger Control in Dynamic Markets

- Contribution from France -

1. Introduction

1. The constant adjustment of analytical methods to take into account the very short innovation cycles of markets represents a real challenge for competition authorities.
2. The exponential growth of digital platforms and online sales in this regard in recent years has encouraged the *Autorité de la concurrence* (hereinafter the *Autorité*) to review the definition of markets for products and services and to adapt its methods for analysing the effects of mergers on competition. The *Autorité* has also undertaken discussions on the relevant time horizon to be taken into account when assessing the existence of potential competition in dynamic markets and adopting commitments in response to the evolving nature of these markets.

2. Taking into account market developments in the context of merger control

3. As part of merger control, the *Autorité* has been confronted with the significant transformations brought about by the emergence of online sales in the retail sector, or e-commerce, which has disrupted both customer consumption patterns and the traditional distribution patterns of companies in the sector marked by the development of “phygital” (or “omnichannel”) strategies, a term that refers to the merger of “physical” and “digital” distribution. In this context, the *Autorité* first questioned whether it would be appropriate to analyse a merger in the retail sector of two distinct distribution channels (distance selling and sales in physical stores)¹ or a combined market including both distribution channels².
4. Initially, market conditions did not seem to indicate that online sales could be substituted for in-store sales. In a decision handed down in 2011 in the sector of electronic goods known as “brown” (televisions, cameras, audio products, etc.) and “grey” (computers, smartphones, etc.), the *Autorité* thus rejected the notifying parties' argument that such segmentation was no longer relevant because of the increasing competitive pressure exerted on physical points of sale by Internet sales³. According to the *Autorité*, the significant differences between remote and in-store distribution, both in terms of prices and

¹Decisions of the *Autorité de la concurrence*: 09-DCC-26 of 24 July 2009 relating to the acquisition of Camif Collectivités by Manutan International; 14-DCC-28 of 5 March 2014 relating to the acquisition of sole control of Mistergooddeal S.A by Darty; 15-DCC-101 of 30 July 2015 relating to the acquisition of sole control of GrosBill SA by mutares AG; and 16-DCC-75 relating to the acquisition of Becquet SAS by Domoti SAS; 17-DCC-39 relating to the acquisition of sole control of Livelle and 3Suisse Belgium by Domoti SAS and 18-DCC-01 of 10 January 2018 relating to the acquisition of sole control of La Redoute by Motier (Groupe Galeries Lafayette).

²Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac.

³Decision 11-DCC-87 of 10 June 2011 on the acquisition of sole control of Media Concorde SNC by High Tech Multicanal Group, Sections 30 to 38.

services, still made these distribution channels imperfectly substitutable from the point of view of both consumers and distributors. This analysis, which was shared at the time by the majority of competition authorities in the world (and which is now very dominant), does not imply ignoring the competitive pressure of online commerce, but simply taking it into account qualitatively without defining a single market for physical and online commerce.

5. In its Opinion 12-A-20 on the functioning of electronic commerce, the *Autorité* outlined an initial development, acknowledging the growing convergence between the two distribution channels. The *Autorité* noted this trend both on the demand side, with consumers increasingly using either channel, and on the supply side, with distributors increasingly offering “multi-channel” solutions⁴. The *Autorité* however concluded that the two distribution channels remained imperfectly substitutable.

6. It was at the time of the takeover of Darty by Fnac that the *Autorité* considered that the transformations linked to the advent of e-commerce in the retail sector of grey and brown goods should lead to an analysis of the competitive effects by defining a single market for this sector (hereinafter referred to as the “Fnac/Darty decision”)⁵. For the first time, the *Autorité* considered that sales in physical stores and online belonged to the same market⁶.

7. In the decision, the *Autorité* considered that the development of online sales in the grey and brown goods sector over the previous five years had been accompanied by a significant reduction in the differences identified by earlier decision-making practice between online and in-store sales. This observation was based on an examination of shifts in demand in the event of a price increase by Fnac and Darty, estimated by the *Autorité* on the basis of a large survey carried out by a specialised institute among a representative sample of over 20,000 people. This survey found empirically that online sales in the sector were now significantly integrated into consumers' buying behaviour, both for the comparison of offers and the purchase itself.

8. In the context of the Fnac/Darty decision, the *Autorité* also analysed the new uses linked to digital transformations and noted that, from the supply side, traditional brands have adapted their internal, pricing and commercial strategy by developing their own online sales sites, in particular with a view to responding to the emergence of major “pure players” in the sector⁷. At the same time, online retailers have improved the services offered to customers to bring them closer to the level of services offered in stores.

9. In its subsequent decisions, the *Autorité* has continued to adapt its analytical framework to new consumer uses in various sectors. It has recently considered that online sales of toys exert a sufficiently strong competitive pressure on in-store sales that these two channels are now considered to be part of the same market⁸. Similarly, in the sale of books,

⁴Opinion 12-A-20 of 18 September 2012 on the competitive functioning of electronic commerce, Section 175 et seq.

⁵Decision 16-DCC-111 of 27 July 2016 cited above.

⁶Decision 16-DCC-111 of 27 July 2016 cited above, Sections 78-155.

⁷Decision 16-DCC-111 of 27 July 2016 cited above, Sections 151 to 155.

⁸Decision 19-DCC-65 of 17 April 2019 on the acquisition of joint control of Luderix International by Jellej Jouets and the Mulliez undivided ownership, Sections 32 to 69.

the *Autorité* has taken into account the significant and increasing competitive pressure on physical bookstores from online retailers such as Amazon, Cdiscount, Chapitre.com, PriceMinister, and Momox, without defining a single market due to persistent divergences in the sector between the two distribution channels⁹.

10. Other recent transactions demonstrate the *Autorité's* ability to adjust, where necessary, its competitive analysis to innovative sales strategies implemented by market players. For example, the *Autorité* has been able to effectively understand the development of new omnichannel or phygital distribution strategies. In two recent decisions handed down simultaneously in the footwear sales sector, the *Autorité* cleared the acquisition of an online retailer (Sarenza) by a mass-market retailer (Monoprix)¹⁰ and the acquisition of a chain of specialised shops (André) by an online sales site (Spartoo)¹¹.

11. In the same vein, the proposed joint purchasing agreement between supermarket groups Auchan and Système U, which was ultimately withdrawn by the parties, provided the *Autorité* with an opportunity to take into account changes in consumption patterns in the mass retail distribution sector¹².

12. The de facto merger, referred by the European Commission, would have enabled the *Autorité* to measure for the first time the competitive pressure exerted by online grocery sites and to examine the pressure exerted on traditional marketing methods when customers use the Internet to order groceries for pick-up at remote locations.

13. As a result of these decisions, a new framework for analysing mergers was developed to assess the substitutability between online and in-store sales and to determine in which cases this substitutability leads to the adoption of a single market. Indeed, taking into account the pressure exerted by online sales at the market definition stage is not intended to be generalised to all sectors, but will depend on several indicators identified by the *Autorité*. The indicators, which are included in the draft merger control guidelines recently submitted for public consultation¹³, relate to penetration of online sales, analogy with product and service lines offered in stores, increasing price uniformity within the various distribution channels, development of an all-channel distribution model and significant rates of shifts in demand between distribution channels.

14. Nor does the *Autorité* hesitate to define new markets in response to the emergence of new economic activity. Most recently, the *Autorité* has focused for the first time on the industry of monetising “influence” on content-sharing platforms such as YouTube and social networks¹⁴. In Webedia’s acquisition of sole control of audiovisual production company Elephant, the *Autorité* focused particular attention on the possible risk of vertical

⁹Decision 17-DCC-186 of 10 November 2017 on the acquisition of sole control of Gibert Jeune by Gibert Joseph, Sections 38 to 42.

¹⁰Decision 18-DCC-50 of 20 April 2018 on the acquisition of sole control of Sarenza SA by Monoprix SAS (Casino Group).

¹¹Decision 18-DCC-53 of 20 April 2018 on the acquisition of sole control of André by Spartoo.

¹²Decision 16-DEX-03 of 23 May 2016 on the merger between Auchan and Système U.

¹³https://www.autoritedelaconcurrence.fr/sites/default/files/ld_concentrations_consultation_pub_sept19.pdf

¹⁴Decision 19-DCC-94 of 24 May 2019 on the acquisition of sole control of Groupe Elephant by Webedia.

effects related to the respective positions of Webedia, which offers management services to “talent and digital influencers”, and Elephant as a distributor of audiovisual programme rights. In this case, it was able to issue a clearance without any remedies.

3. Adoption of an innovative methodology to measure the competitive intensity of online sales

15. After integrating online sales at the market definition stage, the question arises as to how to measure the intensity of competitive pressure from digital platforms. In this respect, the *Autorité* did not consider that the competitive situation should be understood exclusively at the national level. The existence of local competition parameters in fact proves that offers for grey and brown goods are likely to respond to business and pricing practices specific to a given area. For this reason, these markets have been analysed at both the local and national levels.

16. At the local level, it was therefore necessary to integrate the market shares of online sales made by e-commerce sites and those of traditional distributors who, like the parties to the transaction, operate an Internet distribution site.

17. In the Fnac/Darty decision, this integration raised a methodological difficulty for the *Autorité*, since there are no public data to reconstruct online sales in each of the local areas examined. This therefore meant adopting a specific calculation method resulting in the most accurate possible estimate of the share that online sales represent for the catchment areas under consideration.

18. In order to integrate the competitive pressure of online sales, the *Autorité* considered that each brand's local market shares in the online sales channel were equal to its national market shares in the online sales segment. The total online turnover for each area was calculated by applying locally the national online sales penetration rate to total in-store turnover. The online turnover of each area was then allocated to each competitor in proportion to its online market shares at national level, including for specialised online retailers, to whom a local market share was thus allocated. The results of this pragmatic approach were consistent with those obtained using an alternative calculation methodology proposed by the notifying party, consisting in relating the actual sales made by the parties to consumers living in the catchment area to an estimate of the total demand for grey or brown goods by consumers in the area – assessed in terms of the socio-demographic characteristics of the area.

19. The analysis of the impact of the transaction in the 19 affected areas, i.e., where the market share of the new entity exceeded 50%, was then carried out using the scoring method, which provides a qualitative assessment of the competitive pressure exerted by the parties' competitors in the catchment area of a target store¹⁵. The use of this method is particularly justified when it is necessary to carry out a detailed analysis of competitive pressure in complex cases, such as the transaction analysed in the Fnac/Darty decision.

20. Under this method, each competitor of the target store is assigned a score from 1 to 3. The score is based on the category to which the target store belongs (department store,

¹⁵The method is based on that used by the UK's Competition and Markets Authority. See in particular the Final Report issued by the CMA on 18 September 2015 in the Poundland/99p decision, Section 6.117 et seq.

food superstore, e-commerce, speciality store, etc.), the distance from the target store, the results of the market test, and the shift rates in the event of unavailability and a 10% increase in prices charged by Fnac and Darty. The method was applied to websites such as Amazon and Cdiscount, which were given the highest scores as surveys showed that they would benefit the most from a shift in demand in the event of a price increase.

4. Potential competition and time horizon for analysing mergers

21. The relevance of the framework for analysing mergers in dynamic markets could be questioned in particular in the light of the time horizon chosen – as highlighted in Section 3 of the reference note of the Secretariat of the OECD Competition Division.

22. The *Autorité's* draft guidelines, referred to above, point out that “the time horizon in which market entry appears reasonably foreseeable is an essential element of the analysis” and that the European Commission's guidelines on the assessment of horizontal mergers specify that the Commission “examines whether the entry of new competitors would be sufficiently swift and sustained to deter or hinder the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants. However, entry is normally considered timely only if it occurs within two years.”¹⁶

23. The consideration of anti-competitive effects and the structure of competition on the market during the analysis of a merger requires some degree of certainty and time is thus necessarily limited. If the perspective studied is more distant in time, the risk of error may be increased, as well as the legal uncertainty for notifying parties and other market players.

24. However, in a market subject to rapid change, a dynamic analysis of the evolution of competitive conditions in the market may be necessary in order to properly assess the effects of a merger.

25. It has been argued that such an analysis requires competition authorities to operate within a more flexible time horizon. Forecasting work has recently been published on this subject. In France, a report on competition law and the strategic interests of the European Union, prepared by a joint mission of the Inspectorate-General of Finance¹⁷ and the General Council of Economy, Industry, Energy and Technology¹⁸ was submitted to the Minister of Economy on 19 April 2019. In particular, it proposes to “promote a better consideration of long-term elements”, preferring to refer to a general principle according to which the time horizon “depends on the characteristics and dynamics of the market, as well as the specific capabilities of potential entrants”¹⁹ rather than to a defined time period.

¹⁶Point 591 of the draft guidelines (emphasis added).

¹⁷The *Inspection générale des finances* is responsible for carrying out control, audit, study, consulting and evaluation in administrative, economic and financial matters on behalf of the ministers responsible for the economy and the budget.

¹⁸The *Conseil général de l'économie, de l'industrie, de l'énergie et des technologies* is a body under the authority of the Minister of Economy and Finance, responsible for inspection, audit and advisory missions on behalf of the Minister of Economy and Finance and, more generally, the government and administrative authorities.

¹⁹*La politique de la concurrence et les intérêts stratégiques de l'UE* (Competition policy and the strategic

26. The questioning on the relevance of the time horizon of the analysis is based on the concern to take better account of existing as well as potential competition in a constantly changing economic environment.

27. The globalisation of the economy multiplies the number of potential participants, and technological developments are continuously changing the contours of a market, the prospects of the participants and all conditions of competition. Taking into account potential rivals in assessing the competitive pressure that would be placed on the merged entity is therefore both more necessary and more difficult to oversee.

28. This is a dimension that the *Autorité's* decision-making practice has already embraced. By a decision of 1 February 2018, it unconditionally cleared, after a thorough examination phase, the merger of LogicImmo and SeLoger²⁰, two online platforms in the real estate advertising sector. During its analysis, the *Autorité* took into account both current competition from specialist (AvendreALouer, Explorimmo, etc.) and generalist (LeBonCoin, ParuVendu) real estate websites, recent entrants to the market (Bien'ici), as well as potential competitors likely to enter the market. The ability of Google, Amazon, and Facebook to penetrate the market, by taking advantage of their name recognition and audience, was examined. The case of Facebook's Marketplace was studied in particular, because the company "has already developed innovative tools to bring together real estate sellers and buyers", which have been available in France since August 2017 (point 183). While the characteristics of the market concerned have led the *Autorité* to consider that "Facebook's Marketplace does not currently appear to be a substitute for websites of online real estate classifieds", it has nevertheless held that the GAFAs, without being able to shape the competitive behaviour of market players in France in the short term, "could constitute sources of competitive constraint" and thus have a longer-term impact, "as their breakthrough in the online real estate classified ad sector could be very swift" (paragraphs 198 and 201).

29. It should be noted that the *Autorité* expressly referred in its decision to the analysis carried out in comparable cases by other competition authorities – for example, the UK's CMA, ruling on the acquisition of Hungryhouse Holdings Ltd by Just Eat.co.uk Ltd in December 2017. The *Autorité* is therefore committed, particularly on these digital subjects, to drawing inspiration from the decision-making practice of its partner competition authorities, especially within the European Competition Network.

30. The assessment of competitive pressure on the merged entity from potential competitors therefore requires identifying the possible emergence of rivals, with special attention paid to the level of barriers to entry and the examination of innovation cycles.

31. The analysis of entry barriers is commonly conducted by competition authorities when examining a merger – for example, regulatory barriers, or switching costs for customers. Taking innovation cycles into consideration is all the more necessary in the case of dynamic markets. Innovative participants can indeed bring about major changes over relatively short periods of time, particularly in the digital economy.

interests of the European Union, in French), a report by the *Inspection générale des finances* and the *Conseil général de l'économie, de l'industrie, de l'énergie et des technologies*, April 2019, p. 26.

1. ²⁰Decision 18-DCC-18 of 1 February 2018 relating to the acquisition of sole control of Concept Multimedia by Axel Springer.

32. However, this assessment seems particularly difficult to conduct. In this respect, in an attempt to overcome the methodological difficulties specific to these expectations, the above-mentioned report²¹ suggests that the European competitive regulator be able to rely on benchmarks of competitive developments observed in other sectors close to that concerned by a given transaction. By analogy, lessons could be learned about market developments that may also occur in the sector concerned.

33. Such comparisons are not without interest and could support other elements to identify the emergence of potential competition. However, reasoning by analogy alone would clearly not be sufficient to demonstrate this, since the decisions of a competition authority, subject to judicial review, cannot be based on elements whose future certainty cannot be assured, and relating to a market other than that defined as relevant to the case in hand.

5. Commitments in the context of mergers in dynamic markets

34. As part of its active approach to sharpening its expertise, the *Autorité* produced a study on behavioural commitments in 2019 (to be published in December 2019). It is immediately noted that the behavioural commitment, which is intended “only to temporarily constrain the parties’ competitive behaviour in order to enable operators (competitors, customers or suppliers) to react to the structural change in the market brought about by the merger”, does not freeze “the competitive structure of a market and is thus fully in line with a prospective and dynamic analysis”²².

35. The above-mentioned report includes a recommendation, addressed to the European Commission, to favour the use of behavioural commitments rather than an “almost exclusive use [...] of binding and irreversible structural corrective measures,” and to include a review clause with such commitments²³.

36. However, the European Commission regularly makes use of its right to use such behavioural commitments, sometimes in addition to structural commitments, on a case-by-case basis. Similarly, “the *Autorité* shall give priority to structural measures aimed at ensuring competitive market structures”, but they “may be supplemented by behavioural measures aimed at regulating the competitive behaviour of the company resulting from the transaction” and “in some cases, only behavioural measures may be adopted”²⁴.

37. A recent decision illustrates how the *Autorité* considers the dynamic nature of the market in defining behavioural commitments²⁵.

38. After a referral from the European Commission, the *Autorité* conditionally cleared the proposed creation of a joint venture, Salto, by TF1, France Télévisions and M6 for the distribution of television services (including the digital terrestrial television (DTT) channels of the parent companies) and a subscription video-on-demand service. Taking into

²¹*La politique de la concurrence et les intérêts stratégiques de l’UE*, p. 27.

²²*Les engagements comportementaux*, Collection Les essentiels, Autorité de la concurrence, ed. Direction de l’information légale et administrative, 2019, p. 30 (emphasis added).

²³*La politique de la concurrence et les intérêts stratégiques de l’UE*, p. 27.

²⁴Point 575 of the Guidelines, points 398 and 399 of the draft Guidelines.

²⁵Decision 19-DCC-157 of 12 August 2019 on the creation of a joint venture by France Télévisions, TF1 and Métropole Télévision (M6).

account recent market developments, the *Autorité* for the first time envisaged a market for the operating and marketing of free-to-air DTT channels. The *Autorité* considered that, following the launch of Salto, the parent companies could have the ability and incentive to prevent their competing distributors from accessing their channels and associated services. To remedy the situation, TF1, France Télévisions and M6 undertook to offer directly, i.e., without the intermediary of Salto, the distribution of their free-to-air DTT channels along with their associated services on objective and non-discriminatory terms. In order to ensure the principle of non-discriminatory remuneration between Salto and third-party distributors, the commitments provide for an innovative mechanism by which two independent experts set the remuneration due by Salto to its parent companies.

39. Moreover, for clauses that call for a review of commitments, in particular in a dynamic market context, it is accepted in the *Autorité*'s decision-making practice that commitments, defined and accepted in the light of a given competitive situation, may subsequently be modified in order to maintain their effectiveness.

40. The review may take place “at the end of an initial period of execution of the remedies pursuant to a review clause”²⁶. A request for review before the end of the commitment period is subject to the occurrence of exceptional circumstances, which the parties must justify. As long as the merged entity is active in a dynamic market, this feature may be taken into account in the possible review of remedies. While the *Autorité* may decide on its own initiative to revise commitments (as judged by the French Administrative Supreme Court (*Conseil d'État*)²⁷), this review is usually triggered by a request from the parties, “who are in the best position to identify changes in the functioning of their sector that may lead to a change in the remedies”²⁸.

41. The *Autorité* has frequently carried out such a review of the remedies that are a condition for a merger clearance decision.

42. An important decision, thus acknowledging clear changes in the television market, was taken as part of the review of the commitments made by Groupe Canal Plus (GCP) and Vivendi in connection with the acquisition of Direct 8 and Direct Star²⁹.

43. The *Autorité* has noted that, since its clearance decision (issued in April 2014), the pay and free-to-air television sectors have developed at a particularly rapid pace, in particular due to the role of a new player in these markets having implemented an aggressive strategy of convergence between its activity as an Internet access provider and that of a publisher and distributor of pay and free television. While GCP retained, at the date of the review of the commitments, a central position in the markets for the acquisition of pay-TV broadcasting rights, the *Autorité* found that it faced new and increasing competitive pressure. In view of these developments, some commitments have been maintained, others lifted and others adapted (for example, by extending the possibility of acquiring broadcasting rights for recent American films).

²⁶See above, *Les engagements comportementaux*, p. 96.

²⁷CE, 21 March 2016, Soc. NC Numericable.

²⁸See above, *Les engagements comportementaux*, p. 97 (emphasis added).

²⁹Decision 17-DCC-93 of 22 June 2017 reviewing the commitments of Decision 14-DCC-50 of 2 April 2014.

44. An application for early review was also filed with respect to commitments made by Canal+ Overseas in connection with the conditional clearance for the acquisition of sole control of Mediaserv and others by Canal Plus Overseas³⁰ (now Canal+ International). On that occasion, the examination of the commitments proposed by Canal+ International led the *Autorité* to maintain unchanged some of the initial commitments and to amend some of them in accordance with the proposal of Canal+ International. In addition, the *Autorité* expressly stated that, with regard to one of the obligations incumbent on Canal + International (Commitment 11), which has been significantly modified, “possible changes in legal or factual circumstances likely to justify a reduction in the commitment would be taken into account during the follow-up of this corrective measure”. In doing so, the *Autorité*, beginning with the stage of its decision to revise commitments on a new set of remedies, took note of what market developments would require adjustment.

6. Conclusion

45. The combination of the relative difficulty in defining an appropriate time horizon for the analysis of mergers in dynamic markets, the rapid evolution of competitive conditions in certain markets, in particular in the digital economy, and the pace at which some digital firms are acquiring innovative companies (from 2008 to 2018, Amazon, Facebook and Google reportedly acquired nearly 300 companies³¹) encourage many competition authorities to consider the possibility of developing new merger control tools.

46. The question was raised of taking into account mergers that are outside the scope of control of competitive regulators due to the low or non-existent turnover of the target but which are likely to lead to a deterioration in the conditions of competition.

47. Some of these transactions could be described as predatory, in that the acquisition of young innovative companies by powerful players would, in some cases, be primarily intended to stifle competition.

48. The *Autorité* is taking part in the debate that has arisen in the international competition community on the relevance of seeking the establishment of a control mechanism enabling the competitive regulator to intervene, including *ex post*, in such transactions with a high competitive stake – as has been the case in recent times in several European countries.

³⁰Decision 14-DCC-15 of 10 February 2014.

³¹*Ex-post Assessment of Merger Control Decisions in Digital Markets*, a document prepared by the economic consultancy Lear for the Competition and Markets Authority, 9 May 2019, Paragraph I.48.