

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Non-price Effects of Mergers - Note by France

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More documents related to this discussion can be found at www.oecd.org/daf/competition/non-price-effects-of-mergers.htm.

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Introduction

1. Analysis of the effects of a merger on the competitive environment focuses primarily on the capacity of the merged entity to increase its prices to a level that exceeds competitive prices. However, this price-focused approach fails to fully take into account the diversity of new business models that competition authorities encounter in merger control. Such business models based on free services, quality and innovation have grown significantly in recent years, especially within the digital economy, and the biotechnology sector. They present competition authorities with new challenges, and require new approaches to conventional quantitative instruments to improve their understanding of market realities. In this context, non-price effects are taking on increasing importance, and when reviewing mergers, competition regulators have to identify their impacts by including the advantages of a qualitative approach in their analysis.

2. European and French legislation governing merger control does not contain a definition of non-price effects. This makes for a complex and potentially vast concept, in that it is defined in opposition to pricing effects, i.e. involving anything that is not connected with price increases. Since it is not clearly defined, it may also include issues that are not associated with competition law, which can lead to assessment problems for competition authorities.

3. However, the scope of non-price effects can be determined in line with the guiding principles of merger control in terms of efficiency, speed, predictability and the requirements imposed by review court case law.

4. In this respect, the European Commission's Guidelines on the assessment of horizontal mergers (point 8) states¹ that analysis of the effects of a transaction should prevent mergers that "by significantly increasing the market power of firms", would deprive consumers of the advantages generated by effective competition, "such as low prices, high quality products, a wide selection of goods and services, and innovation."

5. In the same way, the Autorité de la concurrence (hereinafter the "Autorité") guidelines for merger control states that "merger control seeks the general interest by protecting competition and its positive effects on the overall competitiveness of the economy, innovation and consumer welfare (...)"². They also state that "a merger of two companies on the same market can negatively impact competition simply by removing competition between them." After the merger, the new entity may be able to profitably increase its prices or reduce supply or production quality, in a way that, prior to the transaction, would have caused too great a loss in sales to other operators."³

6. In this context, merger control legitimately goes beyond price analysis, and includes the non-price effects of the planned transaction. These may include all

¹ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, point 8.

² Autorité de la concurrence, Guidelines on Merger Control, 10 July 2013, point 317.

³ Autorité de la concurrence, Guidelines on Merger Control, 10 July 2013, point 392.

competition factors other than price which may be affected by a merger transaction and have an impact on the overall competitiveness of the economy, innovation and consumer welfare, such as production levels, the choice and quality of goods and services, and innovation.

7. The concept of the non-price effects of merger transactions has been defined incrementally as the *Autorité* has taken it into account in past decisions when addressing the specific questions raised by various transactions.

1. Quality of goods and services: examples from the hospital and retail sectors

1.1. Hospital sector

8. A number of competition authorities in Europe have paid particular attention to the hospital sector.

9. One specific feature of competition analysis in the French healthcare system is that a hospital merger is not likely to lead to an increase in treatment prices. For both public and private healthcare institutions, these prices are regulated and set annually at a national level through an activity pricing system which healthcare institutions are obliged to comply with. The regulations in force therefore prevent private clinics from unilaterally increasing treatment prices. Only the pricing of ancillary “hospitality” services (individual rooms, telephone line, television, etc.) is at the discretion of institutions.

10. On 30 January 2017, the European Commission referred the takeover of the third largest group of private clinics in France, Médipôle Partenaires, by the second largest group, Elsan, to the *Autorité*. The structure of these entities at the time was the result of the merger transactions authorised by the *Autorité* in 2014 and 2015.

11. The *Autorité* first restated the extent to which the healthcare sector presents specific regulatory and economic operating procedures, which means that the effect of mergers between healthcare institutions “*must be assessed from the point of view of protecting patient welfare, as well as the interests of practitioners offering services to healthcare institutions and the performance of the current system for regulating hospital healthcare and diagnostics in France.*”

12. As stated above, in the specific regulatory context associated with this sector, the *Autorité* sought to examine the potential price-effect of the merger on the ancillary services segment where prices can be adjusted, and study the potential effects of the transaction on the quality and diversity of services provided. The potential downgrading of quality is limited by the controls performed by the healthcare authorities, but the restructuring of services and reallocation of resources as a result of the merger are likely to reduce the diversity of treatment available to patients in a given geographical area.

13. The *Autorité* therefore took into account the effects of the proposed transaction on quality in its analysis. It considered that in addition to a risk of increased prices for hospitality services, the transaction presented a risk of reducing the diversity of healthcare services in three *départements* in mainland France. This was backed up via a broad consultation with market players including healthcare authorities, competing operators from the public and private sectors, healthcare insurance bodies, supplemental healthcare insurance bodies, etc.

14. For a majority of market test respondents, a single group with a market share of over 50% in several “major diagnostic categories” (terminology in this case used for sub-segmentation of the markets concerned), or more than 50% of healthcare institutions in a relevant geographical market, is likely to encourage the new entity not only to increase the price of ancillary services, but also to focus its resources on the specialties that generate the most business, to the detriment of less profitable services. This strategy would lead to deterioration in the access, diversity and quality of healthcare services.

15. In response to these concerns, Elsan made certain commitments, involving the divestiture of three healthcare institutions in the geographical areas concerned, and an obligation to guarantee the freedom of practitioners who wish to work in its clinics and those of competing groups. The *Autorité* authorised the transaction, which resulted in the creation of a private clinic group on a par with sector leader, Ramsay Générale de Santé⁴.

1.2. Retail

16. Once again, in the retail sector, the *Autorité* had the opportunity to focus competition analysis on consumer interests, by examining the non-price effects of the proposed transaction, in terms of service quality.

17. On 17 February 2016, the Fnac group notified the *Autorité* of its intention to acquire Darty. Fnac mainly sells publishing products (books, music, video, etc.) and electronics (photography, TV/video, sound systems, microcomputers, consoles and video games), and operates tickets sales. Darty sells white goods (small and major home appliances), grey goods (communication and multimedia products such as computers, tablets, smartphones, etc.), and “brown goods” (televisions, cameras, MP3 players, DVD players, etc.). On 23 March 2016, the *Autorité* opened a phase 2, in-depth investigation in order to examine the competitive pressure exercised by the online retailers on electronics retail markets and its effects on the delineation of the markets affected by the transaction.

18. This decision was significant because, for the first time in Europe, in order to define the relevant markets and assess the brown and grey goods retail distribution market, the *Autorité* took into account competition from online sales, from the websites of the retailers in question, as well as competition from pure players (including Amazon and Cdiscount) on brick-and-mortar retailers. It considered that both sales channels were now part of the same market.

19. The *Autorité* substantiated its analysis through two surveys conducted during the investigation, including, for the first time in its practice, an online survey it commissioned from a polling organisation, focused on a representative sample of over 20,000 individuals. This survey identified a risk that the quality of the parties’ products and services could be negatively affected by the transaction.

20. It showed that service quality was a key factor of competition for consumers on this market, with the majority of respondents stating that they would not have made their most recent purchase at Fnac (between 52.2% and 55.8%) or Darty (between 51.8% and 60.1%), had the service quality been lower. In the terms of the question they were asked, a drop in quality was understood to include no sales representative to advise consumers, poor presentation of products, shorter opening hours, or a long wait at the tills. It was

⁴ Decision 17-DCC-95 of 23 June 2017.

shown that a reduction in quality would cause a shift in demand, providing a measure of the non-price effects of the transaction.

21. Where stores were located in areas with lower competitive pressure, the transaction was even more likely to affect service quality. Lower competition areas were identified in Paris and part of the greater Paris area, where the new entity would have had significant market power which would have been insufficiently restricted by competition from other retailers.

22. In this case, the *Autorité* authorised the takeover after an in-depth investigation phase, subject to structural commitments intended to mitigate the concerns identified, involving the divestiture by the Fnac group of six stores located in Paris and the greater Paris area⁵.

2. Pluralism and service diversity: the press and media sector

2.1. Audiovisual media

23. The French competition regulator has identified impacts on pluralism and diversity as a non-price effect to be taken into account when examining proposed mergers in the culture and media sectors.

24. A transaction between the two major pay television operators in France, Canal Plus and TPS, provides a clear example. An initial conditional clearance was issued in 2006⁶ – by the Minister of the Economy, who had this responsibility at the time – subject to the implementation of a series of behavioural measures, and withdrawn in 2011⁷ in the light of a number of infringements thereof.

25. A fresh authorisation was issued in 2012⁸, subject to a series of injunctions of a five-year duration, with the purpose of encouraging the diversity of players in the pay television sector in order to provide a more accessible offering for consumers.

26. These corrective measures aimed to create favourable conditions for the diversification and development of pay television services by internet service providers, by providing them with better access to the major market of attractive pay television channels. The measures imposed were also designed to maintain editorial diversity by providing independent channels with the same distribution conditions as the channels broadcast by the Canal Plus group, by strengthening their negotiating power and allowing alternative distributors to work with them to build attractive packages. Finally, the injunctions sought not to affect the funding system for the French film industry, which is organised around a vertically integrated stakeholder (combining the roles of producer/distributor) and a premium channel that was, at the time, the leading contributor of funding for French cinema production. The *Autorité* considered that the volume and

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

⁶ Decision (NOR: ECOC0600258Y) of the Minister of the Economy, Finance and Industry of 30 August 2006.

⁷ Decision 11-D-12 of 20 September 2011.

⁸ Decision 12-DCC-100 of 23 July 2012.

quality of this production benefited the end consumer and it was careful not to destabilise either the balance of the self-distribution system, or the vertical integration between the producer Canal Plus and the channel broadcaster, CanalSat.

27. The scope and nature of these injunctions was re-examined in 2017⁹, as their validity came to an end. On this occasion, and after in-depth analysis on changes to the sector, the *Autorité* modified the obligations weighing on the Canal Plus group, while being attentive again to its particular role in funding French cinema production. Given the fundamental transformations that this sector had undergone, the *Autorité* decided that this new framework would apply until 31 December 2019.

2.2. Print media

28. In a similar way, the print media sector has seen the goal of pluralism taken into account in several merger decisions.

29. When the Banque Fédérative du Crédit Mutuel took sole control of the Est Républicain group¹⁰ (July 2011), the *Autorité* imposed remedies to prevent homogenisation of newspaper content which would reduce the quality and diversity of regional daily newspapers, and would have been considered to harm competition. Commitments were made by the parties with a view to preserving the diversity of content, maintaining dedicated chief editors and guaranteeing the distribution of acquired daily regional press in the areas concerned.

30. Similar commitments were made upon the exclusive takeover of companies in the Hersant Média group's Champagne-Ardenne-Picardie Hub by the Belgian media group, Rossel, in 2013¹¹, and the acquisition of the Journal du Midi group (which owned, in particular, the regional daily Midi Libre) by the Dépêche du Midi group in 2015¹².

2.3. Interaction with the sector regulator

31. In the media sector, taking pluralism into account as a non-price effect of a merger transaction comes under the specific context of interaction between the respective missions of the competition regulator and the sector regulator, in this case the *Conseil supérieur de l'audiovisuel* (French broadcasting regulator, CSA).

32. As the *Autorité* is responsible for competition regulation across the board, with no shared jurisdiction for specific sectors, coordination between the two authorities involves a mandatory reciprocal consultation mechanism. The *Autorité* consults the CSA for opinion when investigating a case or examining a transaction in the media sector, and the CSA is required to consult the *Autorité* when it is involved in resolving a dispute which is liable to involve anticompetitive practice (Articles 17, 24 and 41-4 of Act 86-1067 of 30 September 1986). This cooperation framework allows the objectives pursued by each authority within its exclusive field of jurisdiction to converge and, for the competition regulator, creates an

⁹ Decision 17-DCC-92 of 22 June 2017 reviewing the injunctions of Decision 12-DCC-100 of 23 July 2012.

¹⁰ Decision 11-DCC-114 of 12 July 2011.

¹¹ Decision 13-DCC-46 of 16 April 2013.

¹² Decision 15-DCC-63 of 4 June 2015.

environment that helps it take into account a concept such as pluralism as a non-price effect of a merger transaction, and to do so in a well-informed manner.

33. In an opinion issued at the request of the CSA pertaining to the competitive impact of three television channels switching to free-to-air DTT, the *Autorité* had the opportunity to explain that its own analysis had been performed without undermining the CSA's analysis, since the CSA alone was tasked with defending pluralism in this field, but that *"in order to protect consumers, competition law needed to take into account the diversity and pluralism of broadcasters, in that they constitute a specific manifestation of consumer access to a diverse and innovative range of goods and services."*¹³.

3. Conclusion – Scope defined by the principle of merger control efficiency

34. Non-price effects can be complex to understand, in a context where merger control needs to be efficient, expeditious and predictable, both in the interests of the notifying parties and to economise regulator resources. It may be uneasy to establish the difference between pricing effects and non-price effects, given, for example, the correlation between price and quality or innovation, and various competition parameters can be difficult to assess, especially with regard to privacy protection issues and the use of data in the digital sector. However, when examining merger transactions, non-price effects need to be analysed, while protecting the procedural efficiency required by the *Autorité* and the legal security required by companies.

35. The question of non-price effects is likely to become increasingly important. The European Commission and the *Autorité* are considering how alternative thresholds could be put in place to enable them to examine transactions in innovative sectors for which turnover may be low despite a high transaction price and likely impacts on competition. Germany and Austria have started to do this by introducing alternative transaction value thresholds. Non-price effects are at the heart of their thinking, and will play a central role in the competitive analysis of these transactions involving players whose products or services are offered free of charge or have not yet been valued on a market. This new challenge, resulting from the intense external growth in the digital and biotechnology sectors, is of great interest to the entire international competition community.

¹³ Opinion 15-A-14 of 21 October 2015 relating to a request for an opinion from the French broadcasting regulator (CSA) on the basis of Article 41-4 of the Act of 30 September 1986 on the request for switchover to the free-to-air DTT of the channels LCI, Paris Première and Planète +, section 80.