

Unclassified

English - Or. French

16 June 2025

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 11 June 2025

Working Party No. 3 on Co-operation and Enforcement

Efficiencies in Merger Control – Note by France

17 June 2025

This document reproduces a written contribution from France submitted for Item 2 of the 141st meeting of Working Party 3 on 17 June 2025.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03568254

France

Introduction

1. French merger control has long recognised the possibility of offsetting the competitive impact of a merger by the efficiencies it is likely to produce¹. This possibility, recognised both by law and by the case law to date of the French Administrative Supreme Court (*Conseil d'Etat*), was set out by the French authorities in a previous contribution to the work of the OECD Competition Committee, at a round table in June 2008 dedicated to taking dynamic efficiencies into account when analysing mergers².
2. A further contribution from the French authorities on this subject is justified for several reasons.
3. On the one hand, the institutional framework for analysing efficiencies in France has changed significantly since 2008. At the time of the previous contribution, merger control was the prerogative of the French Minister of Economy, in certain cases on the advice of the French competition authority. Since 2009, the *Autorité de la concurrence* (the "*Autorité*") has had sole jurisdiction over merger control, with the French Minister of Economy able to raise the case, in certain circumstances, following the *Autorité's* decision. It is therefore interesting to take a closer look at the *Autorité's* decision-making practice with regard to efficiencies, even though it has yet to authorise a merger that is problematic from a competitive point of view, on the basis of the efficiencies it would generate.
4. On the other hand, the theme of efficiencies is particularly relevant in the current European context, in which member States and the European Commission ("the Commission") are called upon to mobilise all their economic policies, including competition policy, to boost European competitiveness. In this respect, the Draghi report identifies several levers enabling competition authorities to better align their actions with the Union's strategic priorities. Better integration of innovation, sustainable development and resilience in their analyses is one of the levers identified.
5. Following on from the Draghi report, the mission statement by Commission Executive Vice-President Teresa Ribera, and the Competitiveness Compass³ presented by the Commission in January 2025, reiterate the need for competition authorities' practices to evolve in line with current economic transformations, and in particular invite the Commission to revise its merger control guidelines.
6. The purpose of this contribution is to present the legal framework applicable to merger control efficiencies in France (A), their assessment in the competitive analysis

¹ The consideration of efficiencies in French merger control law is not a recent phenomenon. Developments in this area began in France with a law passed on 19 July 1977. Very early on, legislators envisaged the possibility that a merger might be authorised on the grounds of the economic or social progress it would generate. Since then, the legislative framework has evolved to a limited extent, in particular to divide responsibilities between the *Autorité de la concurrence* (formerly the French competition authority) and the French Minister of Economy. In 1986, when the French competition authority was set up, it was stipulated that it would confine itself to a purely economic analysis of efficiencies, while the Minister could carry out a broader analysis that incorporated social considerations, for example.

² Dynamic Efficiencies in Merger Analysis, Competition Committee, Series Roundtables on Competition Policy, OECD.

³ https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34_en

carried out by the *Autorité* (B) and their consideration in the context of commitments and injunctions (C).

1. The legal framework applicable to efficiencies

1.1. The notion of sufficient contribution to economic progress

1.1.1. Legal framework

7. While the notions of "efficiencies" or "effectiveness gains" do not appear, in these words, in French merger control legislation, French law refers to the more or less equivalent notion of "sufficient contribution to economic progress"⁴. This contribution, which is strictly limited to the in-depth merger review procedure (commonly referred to as "Phase 2"), is taken into account in two respects.

8. Firstly, Article [L. 430-6](#), paragraph 1, of the French Commercial Code (Code de commerce)⁵, which governs the in-depth examination of a merger, stipulates that the *Autorité* must balance the effects of the transaction on competition against the contribution that the transaction makes to economic progress:

"When a merger is the subject of an in-depth review pursuant to the last paragraph of III of Article L. 430-5, the Autorité de la concurrence examines whether it is likely to harm competition, in particular by creating or strengthening a dominant position or by creating or strengthening purchasing power that places suppliers in a situation of economic dependence. It assesses whether the transaction makes a sufficient contribution to economic progress to offset the harm to competition."

9. Secondly, the *Autorité* can take into account the sufficient contribution of a merger to economic progress in the context of its injunctive and prescriptive powers. Under the terms of Article [L. 430-7](#) III of the French Commercial Code (Code de commerce), the *Autorité* can clear a transaction subject to a Phase 2 procedure "by ordering the parties to take any measure likely to ensure sufficient competition, or by requiring them to observe prescriptions likely to make a sufficient contribution to economic progress to offset the harm to competition." The *Autorité* has never imposed such requirements on parties to a transaction to date.

10. The French legal framework therefore allows the *Autorité* to take efficiencies into account, both as part of the competitive analysis of mergers undergoing in-depth review, and at the stage of the remedies it may impose to clear such transactions. On the other hand, French legislation does not allow the *Autorité* to clear a transaction based on commitments proposed by the parties that would make a sufficient contribution to economic progress to offset the harm to competition previously identified by the *Autorité*.

1.1.2. The analysis criteria defined by case law to date and decision-making practice

11. The implementation of the notion of "sufficient contribution to economic progress" has been defined by the case law to date of the French Administrative Supreme Court, notably in two rulings, *The Coca-Cola Company* of 9 April 1999 and *Pernod Ricard* of 6

⁴ In this contribution, the notions of efficiencies, effectiveness or sufficient contribution to economic progress will be used interchangeably.

⁵ Underlining added. Article L. 430-6 of the French Commercial Code (Code de commerce) has been in force since 13 November 2008 and has not been amended since.

October 2000, concerning the acquisition by Coca-Cola of the Pernod-Ricard group's Orangina beverage assets in France⁶. This case law to date, the Commission's 2004 guidelines⁷, those of the French Ministry of the Economy's Directorate General for Competition Policy, Consumer Affairs and Fraud Control (Ministry of Economy) in 2005⁸, the decision-making practice of the French Minister of Economy, the opinions of the French competition authority, and subsequently the decision-making practice of the *Autorité*, have allowed the identification of three criteria for taking efficiencies into account. These criteria are included and explained in the *Autorité's* 2020 merger control guidelines, which devote a specific chapter to the subject of contributions to economic progress⁹.

12. More specifically, economic efficiencies must be:

- quantifiable and verifiable;
- specific to mergers;
- in part passed on to consumers.

13. It should be specified that, according to French Administrative Supreme Court case law to date, the last criterion de facto excludes benefits that accrue solely to the parties to the transaction. Such benefits do not in themselves constitute "*a contribution to economic and social progress likely to offset the anticompetitive effects of the planned transaction.*"

1.2. The power of the French Minister of Economy to raise an issue

14. Under Article [L. 430-7-1](#) II of the French Commercial Code (Code de commerce), the French Minister of Economy has the power to take up a case, following a decision by the *Autorité* regarding a transaction that has been the subject of an in-depth review, enabling them to ultimately rule on the transaction "*for reasons of general interest other than the maintenance of competition*", including in particular "*industrial development, the competitiveness of the companies in question with regard to international competition, or the creation or maintenance of jobs.*"

15. The notion of "reasons of general interest other than the maintenance of competition" is not equivalent to that of "sufficient contribution to economic progress", but could, in some hypotheses, include certain efficiencies put forward by the parties and dismissed by the *Autorité* in the course of its examination. In fact, the scope of the reasons of general interest that can be accepted by the Minister appears to be significantly greater than that of the efficiencies that can be accepted by the *Autorité*, and could include public objectives that go beyond the transaction in question. Furthermore, the Minister is not bound by the conclusions of the *Autorité's* competitive analysis. They can therefore justify

⁶ [French Administrative Supreme Court Decision 2853 of 9 April 1999](#); [French Administrative Supreme Court Decision 216645 of 6 October 2000](#).

⁷ [Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings](#)

⁸ [Directorate General for Consumer Affairs, Competition and Fraud Prevention, Merger Control Guidelines, § 410](#).

⁹ [Autorité de la concurrence merger control guidelines from 2020](#), paragraphs 767 to 784. The European Commission also used similar criteria in [its guidelines on the assessment of horizontal mergers](#) (§78): "*For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.*"

their decision on certain grounds of general interest, even if these do not offset the harm to competition resulting from the transaction identified by the *Autorité*, and therefore do not meet the criteria established by case law to date and decision-making practice in this area, as set out above.

16. If the Minister decides to raise an *Autorité*'s decision, they have the power to issue a new reasoned decision, which may authorise the transaction subject to commitments

17. It should be pointed out that the French Minister of Economy exercised this power to take up a case only once, in the context of *Financière Cofigeo*'s acquisition of sole control of part of the *Agripole Group*'s assets.

18. This particular transaction, which concerned a disposal plan following receivership proceedings, had been cleared by the *Autorité* subject to the implementation of asset divestiture injunctions¹⁰. In this respect, it is interesting to note that, in its decision, the *Autorité* considered that the efficiencies put forward by the parties (notably synergies in purchasing, production and commercial strategy, or a strengthening of their capacity for innovation) were based on partial, uncertain and relatively old data, which was not sufficient to demonstrate that the supposed gains were such as to offset the effects of the transaction¹¹. The Minister's decision on this transaction states that the reason of general interest that justifies the use of the power to take up a case is to safeguard jobs. In particular, the Minister considered that the "*implementation of the injunctions issued by the Autorité de la concurrence would pose a significant threat to employment*" and that "*these factors therefore justify the unconditional clearance of the transaction to maintain employment at all Cofigeo Group sites*"¹². The Minister's decision was therefore accompanied by a commitment to jobs and an industrial commitment to modernise and bring production facilities up to standard.

2. Assessing efficiencies as part of a competitive analysis

2.1. The types of efficiencies envisaged by the *Autorité*

19. French law does not specify the type of efficiencies that the *Autorité* might consider in its competitive analysis. In this context, it is case law to date and decision-making practice that have gradually defined its contours. Based on examples drawn from French decision-making practice, the *Autorité*'s guidelines develop several types of efficiencies that can be taken into account, whether static or dynamic in nature¹³. These efficiencies can

¹⁰ [Decision 18-DCC-95 of the Autorité de la concurrence of 14 June 2018 regarding the acquisition of sole control of part of the ready meals division of the Agripole Group by Financière Cofigeo](#); [Decision of 21 June 2018 of the French Minister of Economy and Finance regarding the issue of the acquisition of sole control of part of the ready meals division of the Agripole Group by Financière Cofigeo](#).

¹¹ [Autorité de la concurrence Decision 18-DCC-95 of 14 June 2018 regarding the acquisition of sole control of part of the Agripole Group's ready meals division by Financière Cofigeo](#), paragraphs 335 to 346.

¹² [Decision of 19 July 2018 of the French Minister of Economy and Finance ruling on the acquisition of sole control of part of the ready meals division of the Agripole Group by Financière Cofigeo](#).

¹³ See *Dynamic Efficiencies in Merger Analysis*, Competition Committee, Series Roundtables on Competition Policy, OECD, page 9: "*In general, dynamic efficiencies are synergies that enable firms to improve their performance, whether in terms of cost, quality, service, or new product development, on a potentially continuing basis. Efficiencies that enhance the ability or incentive to innovate, for example, are considered dynamic. Learning by doing, eliminating redundant research and development expenditures, and achieving economies of scale in R&D are all examples of dynamic efficiencies. Static efficiencies, in contrast, enable improvements that occur only once. Economies of scale in production, for instance, are a static efficiency.*"

be linked to costs (scale effects or productivity gains)¹⁴, to the enhanced and improved quality of the services and products offered to consumers (particularly in the case of conglomerate mergers)¹⁵, to the economic benefits for the community, to the improvement of innovation capacities and the strengthening of research and development resources¹⁶, or to the improvement of international competitiveness. Certain efficiencies are specific to vertical and conglomerate mergers¹⁷.

20. It should be noted that the different examples of efficiencies cited in the *Autorité's* guidelines do not constitute an exhaustive list¹⁸.

21. For example, in a 2021 *Ardian/SPMR* decision regarding the transport of hydrocarbons by pipeline sector, subsequent to the publication of the aforementioned guidelines, the *Autorité* also considered the possible existence of environmental gains likely to offset the risks of harm to competition raised by the transaction. In this respect, the parties alleged that the transaction would have enabled the new entity to make the investments necessary for the pipeline to transport biofuels. The *Autorité* noted that, although "*environmental gains could, in theory, be admissible to counterbalance the risks of harm to competition associated with a merger*", the gains alleged by the parties in this case were not sufficiently substantiated and were not specific to the transaction¹⁹.

22. The *Autorité's* decision-making practice and guidelines do not favour any particular category of efficiencies. However, it should be noted that certain efficiencies appear more or less likely to be retained, and more or less easy to demonstrate. In this respect, the *Autorité's* guidelines point out that "*efficiencies resulting in the reduction of variable or marginal costs are more likely to lead to lower consumer prices than reductions in fixed costs, since the relationship between fixed costs and consumer prices is usually less direct, at least in the short term. Nevertheless [...] it is possible to take into account the effect of the transaction on fixed costs, despite the fact that it is not as easy to demonstrate that these fixed cost savings will be passed on to consumers.*"²⁰ This position was also confirmed in a 2016 *Fnac/Darty* decision regarding the retail sale of electronic products, which recalled that certain types of efficiencies are more difficult to establish than others²¹. However, it should be noted that, in principle, the gains passed on to consumers do not necessarily involve lower prices.

¹⁴ [Autorité Decision 13-DCC-101 of 26 July 2013 regarding the acquisition of sole control of Imerys TC's "structural materials" assets by Bouyer-Leroux](#), paragraphs 181 et seq.

¹⁵ [Autorité Decision 10-DCC-11 of January 2010 regarding the acquisition of sole control by the TF1 group of NT1 and Monte-Carlo Participations \(AB Group\)](#), paragraph 576 et seq.; [Autorité Decision 20-DCC-38 of 28 February 2020 regarding the acquisition of sole control of Hexagone Santé Méditerranée and SCI Bonnefont-Carnot by the Elsan Group](#), paragraphs 320 et seq.

¹⁶ [Opinion 05-A-01 of 7 January 2005 on the acquisition of Laboratoires Dolisos by Boiron](#), paragraphs 124 et seq.

¹⁷ [Opinion 04-A-08 of the French competition authority of 18 May 2004 on several acquisitions of warehouses by the Scottish & Newcastle-Kronenbourg Group in the beer distribution sector in the CHR distribution channel](#).

¹⁸ [See the Autorité guidelines](#), paragraphs 776 et seq.

¹⁹ [Autorité Decision 21-DCC-79 of 12 May 2021 regarding the acquisition of sole control of Pipeline Méditerranée-Rhône by Transport Stockage Énergies](#), paragraph 189.

²⁰ [See paragraph 778 of the Autorité's merger control guidelines](#).

²¹ [Autorité Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac](#), paragraph 519 et seq.

23. The wide range of possible efficiencies identified by decision-making practice bears witness to the *Autorité's* broad appreciation of the notion of "economic progress", as it is prepared to examine all the parties' arguments provided they are based on sufficiently substantiated evidence.

2.2. Methodology for assessing efficiencies

2.2.1. Efficiencies are independent of competitive analysis

24. As mentioned above, the *Autorité* analyses efficiencies exclusively as part of the in-depth examination of a merger, i.e. when there are serious doubts regarding harm to competition at the end of the *Autorité's* first phase of investigation.

25. Before determining whether a merger produces efficiencies, the *Autorité* always first analyses the effects on competition resulting from the transaction. This two-stage analysis is based on the very structure of Article L. 430-6 of the French Commercial Code (Code de commerce) and enables the *Autorité* to assess whether the supposed gains are likely to offset the anticompetitive effects it has previously identified.

26. The *Autorité's* guidelines confirm this approach, specifying that "these [anticompetitive] effects are assessed independently of the efficiencies that the merger may generate"²².

2.2.2. An assessment based primarily on the parties' evidence

27. As part of its in-depth examination of a merger, the *Autorité* does not systematically assess the existence of efficiencies on its own initiative. The *Autorité* only carries out this assessment if the parties present a sufficiently substantiated and credible demonstration on each of the three criteria defined above. As specified in the *Autorité's* guidelines²³, "it is the responsibility of the parties to develop '*substantiated and quantified*' arguments demonstrating that the economic efficiencies from the transaction are likely to offset its anticompetitive effects, and to provide evidence to support this demonstration." To illustrate the elements that can be used to demonstrate the existence of efficiencies, which can be of different kinds, the *Autorité* refers to those considered by the Commission in its guidelines on the assessment of horizontal mergers²⁴.

28. The fact that the burden of proof with regard to efficiencies lies with the parties is explained in particular by the fact that, as the *Autorité's* guidelines point out, the companies "[...] *are the only ones to control all of the evidence required to assess them*"²⁵. Although the evidence must be substantiated and quantified, the *Autorité* does not impose any specific method or evidence on the parties to demonstrate the existence of such gains when they consider that the merger is likely to produce them.

29. In its guidelines, the *Autorité* also draws companies' attention to the importance of initiating discussions on efficiencies sufficiently in advance of the transaction review

²² See the [Autorité guidelines](#), paragraph 620.

²³ See the [Autorité guidelines](#), paragraph 768.

²⁴ See [Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings](#), paragraph 88. These state that "*Evidence relevant to the assessment of efficiency claims includes, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiencies, and on the extent to which consumers are likely to benefit.*"

²⁵ See the [Autorité guidelines](#), paragraph 769.

procedure, without waiting for the *Autorité* to identify a risk of harm to competition, and a fortiori before the opening of an in-depth examination.

2.2.3. *Decision-making practice adopts a high standard of proof*

30. The criteria identified in particular by the case law to date of the French Administrative Supreme Court, and the decision-making practice, as set out above, correspond to a demanding standard of proof for the parties; this is justified by the fact that, if their arguments on the existence of efficiencies are to be accepted, a merger could be cleared even though it produces harmful effects on competition. The *Autorité* has never cleared a merger solely based on the existence of efficiencies, as these have never been sufficiently substantiated by the parties or have been deemed insufficient to offset the identified risks of harm to competition.

31. In its 2016 *Fnac/Darty* decision in the electronics retail sector, for example, the notifying party argued that the transaction would have led to efficiencies at three levels, namely the future group's sourcing and purchasing, the organisation of its logistics network and the reorganisation of its development model. The *Autorité* noted that, for each of these elements, the notifying party had not produced a sufficiently credible or verifiable analysis to enable it to confirm these arguments. In addition, the *Autorité* found that the notifying party had not provided the information needed to assess the scale of the efficiencies, and that the information provided did not allow it to be assumed that the expected cost savings would necessarily be passed on to consumers by the new entity²⁶.

32. Similarly, in the predominantly food retail sector, the *Autorité* considered in its 2020 *Soditroy* decision²⁷ that the cost reductions alleged by the parties were not necessarily specific to the transaction, and that the probability and scale of passing on efficiencies to consumers were uncertain, given the risks of tacit coordination it had previously identified.

33. The inadequacy of the information relating to the efficiencies alleged by the parties was also noted in the aforementioned 2021 *Ardian/SPMR* decision. The *Autorité* considered that the notifying party had not provided sufficiently substantiated data to quantify the scale of the efficiencies, and that there was insufficient evidence to demonstrate that any investments in the ecological transition would result sufficiently directly from the transaction itself, even though this transaction took place against a backdrop of a downward trend in the consumption of standard products in favour of the transport of biofuel²⁸.

34. In 2022, in the context of a *Mobilux/Conforama* transaction in the home furnishings retail distribution sector²⁹, the parties put forward the existence of efficiencies, including cost savings, a continued offer diversity and an improvement in the quality of the products and services offered. The *Autorité* considered that the parties had not provided any concrete information, even though financial information should have been available since the transaction had taken place several months earlier, on the basis that the *Autorité* had granted a waiver regarding the suspensive effect of its control.

35. Conversely, in an *Elsan/Hexagone* decision regarding the healthcare sector, the *Autorité* considered that some of the efficiencies put forward by the parties met the criteria

²⁶ [Decision of the Autorité 16-DCC-111 cited above](#), paragraphs 495 et seq.

²⁷ [Decision 20-DCC-116 of 28 August 2020](#) relating to the acquisition of joint control of a food retail business by Soditroy alongside the Association des Centres Distributeurs E. Leclerc. paragraphs 225 et seq.

²⁸ [Decision of the Autorité 21-DCC-79 cited above](#), paragraphs 188 and 189.

²⁹ [Decision 22-DCC-78 of 28 April 2022 regarding the acquisition of sole control of the assets of Conforama France by the Mobilux Group](#), paragraphs 322 et seq.

required by decision-making practice, but were not sufficient to offset the identified harm to competition. More specifically, the parties put forward three types of gains, namely purchasing savings, payroll savings and quality of care gains. With regard to the first two, the *Autorité* found that the notifying party had not "*provided any precise explanation as to how the financial gains made on purchases or payroll would be passed on to patients.*" On the contrary, the *Autorité* noted that the reduced competitive pressure exerted on Elsan following the transaction could have led the new entity to limit rather than increase investments that were not directly profitable³⁰. With regard to the quality of care gains, the *Autorité* recognised that these would indeed benefit patients in certain specialities, notably obstetrics, since the merger would have enabled the number of births in one of the establishments concerned to exceed a certain threshold, leading to the mandatory increase - provided for by the French Public Health Code (*Code de la santé publique*) - of the human resources dedicated to the safety of patients and newborns. These gains, while certainly proven, were nonetheless deemed insufficient to offset the anticompetitive risks identified, not least because they had only been demonstrated for certain specialities.

36. More generally, the difficulty for parties to demonstrate the existence or sufficiency of efficiencies is also due to the fact that these gains are often assessed in the context of mergers that significantly strengthen the position of the new entity, making the demonstration of efficiencies more complex. This point is underlined by the Commission's guidelines on the assessment of horizontal mergers, which state in particular that "*It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiencies would be sufficient to counteract its potential anti-competitive effects*"³¹.

37. By way of illustration, the above-mentioned *Autorité Ardian/SPMR* decision emphasises that, given SPMR's monopoly position following the transaction, and in the context of a very inelastic demand in terms of price, the new entity would have had no "*structural incentive to pass on any gains from the transaction downstream*"³².

2.2.4. A few points to bear in mind when assessing efficiencies

The *Autorité's* decision-making practice highlights a number of points that are worth mentioning here.

38. Firstly, the *Autorité* pays particular attention to ensuring that efficiencies are passed on to consumers at least in part. The *Autorité* has not yet ruled on the exact scope of the consumers concerned, i.e. whether these are only consumers in the markets affected by the merger, or whether these gains may also benefit consumers not directly concerned by the transaction.

39. Furthermore, Article L. 430-6 of the French Commercial Code (Code de commerce) requires the *Autorité* to assess whether the transaction makes a sufficient contribution to economic progress to offset the harm to competition. This balancing act raises two questions in particular.

40. On the one hand, the *Autorité* takes into account the scale of the alleged gains in relation to the scale of the anticompetitive effects identified, as well as the speed with which

³⁰ [Decision of the Autorité 20-DCC-38 cited above](#), paragraph 321.

³¹ See [Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings](#), paragraph 84.

³² [Decision of the Autorité 21-DCC-79](#), paragraphs 186 and 187.

these gains are likely to be realised³³. On several occasions, the *Autorité* has taken the view that, given the structure of the post-merger market and/or the low price sensitivity of buyers, it was unlikely that the new entity would have an incentive to pass on to consumers all or part of the efficiencies likely to result from the transaction³⁴. Without prejudging the *Autorité's* future analyses in this area, the parties must take account of the requirements set out in the decision-making practice to best adapt their arguments and present the most convincing case possible.

41. On the other hand, the legal framework and decision-making practice dictate that the efficiencies generated by a merger must be capable of offsetting all the anticompetitive effects identified during the examination of the transaction. Otherwise, it is unlikely that the *Autorité* will clear the transaction in question without any conditions.

3. Assessing efficiencies in the context of commitments and injunctions

42. The *Autorité's* guidelines state that, as a general rule, for both commitments and injunctions, there is no need to take into account any efficiencies linked to the transaction when analysing the proportionality of the remedies to which the clearance decision is subject. In particular, when a transaction gives rise to anticompetitive effects, this clarification enables the *Autorité* to select the most appropriate remedies to rectify the situation and ensure effective competition in the markets concerned.

43. However, the guidelines also state that the *Autorité a priori* prefers remedies that are just as effective in rectifying the anticompetitive effects of the merger, while preserving the efficiencies generated by the transaction³⁵.

44. Decision-making practice shows that the *Autorité* does indeed ensure that the remedies taken as part of a transaction preserve the efficiencies it generates³⁶, particularly when these gains stem from a merger with a vertical or conglomerate dimension³⁷.

45. The *Autorité's* vigilance is illustrated by the aforementioned *Elsan/Hexagone* decision. In this case, the *Autorité* considered that the transaction entailed a number of risks to competition, including a possible reduction in the availability of healthcare services in several medical specialities, a rise in prices, a fall in the quality of ancillary services, and a possible drying-up of the pool of practitioners for healthcare establishments competing with the new entity. As mentioned above, the *Autorité* nevertheless recognised the existence of certain efficiencies in terms of quality of care, but considered them insufficient to offset the anticompetitive risks identified. When examining the commitments proposed by the parties, the *Autorité* ensured that they addressed the competition concerns identified, while preserving the efficiencies for patients linked to the grouping together of the parties' activities. These commitments consisted of a mixed proposal comprising a structural component (transfer of activities to the target healthcare establishments, with a commitment to maintain the healthcare services offered) and a behavioural component

³³See the [Autorité's merger control guidelines](#), paragraphs 772 and 773, and the [European Commission's guidelines on the assessment of horizontal mergers](#), paragraph 86.

³⁴ See, for example, *Autorité* Decisions [16-DCC-111](#), [21, DCC-79](#) and [22-DCC-78](#), cited above.

³⁵ See [the merger control guidelines](#), paragraph 357.

³⁶ See [Decision of the Autorité 20-DCC-38 cited above](#), paragraphs 355 et seq.

³⁷ See [the merger control guidelines](#), paragraph 416.

(maintenance of quality standards and content of ancillary services, and absence of an exclusivity clause with private practitioners).

46. Lastly, to date, the *Autorité* has not conducted any study or report to determine whether the efficiencies put forward by the parties in the context of certain mergers have subsequently materialised.

Conclusion

47. Under French merger control law, the *Autorité* assesses the existence of efficiencies resulting from any merger under examination, provided that the parties submit sufficiently substantiated and credible evidence. Without a precise legal definition, these efficiencies can be of different kinds, as shown by the decision-making practice. However, given the high standards required in this area, and the often insufficient and late evidence provided by the companies, the *Autorité* has not yet had occasion to clear a merger that is problematic from a competitive point of view, based on the existence of efficiencies. Nevertheless, the *Autorité* remains ready to use all the tools available to it by law, and to carry out such an analysis in depth, provided that the parties have credible and complete information and that the *Autorité* is informed of this sufficiently in advance of the procedure.

48. The forthcoming revision of the Commission's guidelines on the assessment of horizontal and non-horizontal mergers will also provide an opportunity for French authorities and all stakeholders to reflect on how efficiencies can be taken into account in the competitive analysis of a merger. French authorities will closely monitor any changes to European guidelines in this area.