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NEW MERGER CONTROL GUIDELINES: AN UPDATE RATHER THAN A REVOLUTION

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On 23 July 2020, the French Competition Authority (hereinafter the "**FCA**") published its new guidelines regarding merger control (hereinafter the "**Guidelines**"). They supersede the previous guidelines published on 10 July 2013 and come into force immediately.

In September 2019, the FCA had presented its draft Guidelines and opened a public consultation. This draft did not constitute a revolution but rather an update, a modernisation and simplification of the 2013 guidelines.

These principles are preserved by the Guidelines. They include significant contributions, incorporate the most recent decision-making practice of the FCA and that of the *Conseil d'État* (which oversees merger decisions issued by the FCA) and take into account some suggestions from the public consultation of 2019.

The Guidelines essentially amend the monitoring procedure.

The appointment of a team in charge of the case, as practiced by the European Commission, has been requested for years by practitioners and companies, and is now possible.

The notifying party can now request the appointment of a rapporteur in charge of the examination of the case, under certain formal conditions[1].

The Guidelines also provide that the FCA also undertakes to inform the notifying party whether its file is complete within ten working days of notification.

The practice of addressing the confirmation of completeness just before the decision should therefore disappear and companies should benefit from more legal certainty regarding the starting point of the review period.

It is not yet the same system as at the European Commission level (where a file considered complete unless there are missing elements) but the progress is significant.

However, it is regrettable that the Guidelines do not contain any limitation, particularly in terms of duration, of the pre-notification period, given the growing importance of this "informal" phase these past years.

The scope of the simplified procedure is clearly defined. The operations that will be eligible for this procedure will be the following:

"– where the combined market share of the undertakings concerned is less than 25% in markets consistently defined by decision-making practice;

– where there is an overlap between the parties, where the combined market share of the undertakings concerned is less than 50 % and the addition of market shares resulting from the operation is less than 2 percentage points in markets consistently defined by decision-making practice;

– in the case of presence on vertically related markets, where the combined market share of the undertakings concerned on those markets is less than 30% in markets consistently defined by decision-making practice;

– in the case of presence on related markets, where the market shares of the undertakings concerned on the related markets are below 30 % in markets consistently defined by decision-making practice;

– in the case of the acquisition of exclusive control of undertakings, where the acquirer exercised joint control of the target prior to the transaction;

– where the operation consists in the creation of a full-function joint venture exclusively active outside the national territory;

– when the transaction concerns the acquisition of joint control of a real estate asset for sale before completion ("VEFA").
[2]"

Regarding the analysis of transactions, the drafting of the Guidelines has been adjusted to highlight the main criteria for analysis, in particular by including numerous examples from decision-making practice.

In particular, the analysis of two-sided markets[3], which has been developed with digital players, or the consideration of online sales and their development, to which an appendix is dedicated, are useful contributions.



Furthermore, the Guidelines bring together all the principles applicable to remedies that may be adopted to offset the negative effects of proposed concentrations. New models for divestiture commitments and agency agreements are attached to the Guidelines. They incorporate elements relating to the control of these remedies, which has significantly increased in recent years.

Finally, specific annexes are devoted to distribution networks and local analysis for mergers in the retail sector.

[1] Paragraphs 188 and 189 of the Guidelines

[2] Paragraph 230 of the Guidelines

[3] Two-sided markets are based on platforms or intermediaries that bring together different types of players interacting with each other. Each "face" in contact with the platform is likely to constitute a market.
