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Creation of the Autorité de la Concurrence – A First Review
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THE AUTORITÉ DE LA CONCURRENCE (FRENCH COMPETITION AUTHORITY) PUBLISHED ITS FIRST ACTIVITY REPORT IN JULY 2010, JUST OVER ONE YEAR AFTER IT WAS CREATED. ALTHOUGH IT HAS SUCCESSFULLY PERFORMED ITS NEW TASKS, ITS STRICTER FINING POLICY IS CALLED INTO QUESTION, AS DOES THE REPORT ON SETTING FINES FOR ANTI-COMPETITIVE PRACTICES SUBMITTED TO THE MINISTER FOR THE ECONOMY ON SEPTEMBER 20, 2010.

The law for the Modernisation of the Economy (loi de modernisation de l'économie ("LME")) of August 4, 2008 paved the way for the creation, in March 2009, of the Autorité de la concurrence ("Autorité") – a unique authority vested with powers which were previously split between the Conseil de la concurrence and the Minister for the Economy.

The reform has thus created a 'single agency' empowered to handle both preliminary enquiries and full investigations relating to anti-competitive practices and the whole merger control procedure. The Autorité has also been granted a right of self-referral whereby it can issue opinions of its own initiative.

A successful transfer of powers for merger control

The main innovation of the reform is the transfer to the Autorité de la concurrence of the entire merger control procedure, which was previously split between the Conseil de la concurrence and the Minister for the Economy.

From now on, undertakings must notify their proposed operations to the Autorité, and the merger control department of the Autorité analyses the effects of the notified transaction and takes the appropriate decisions, both in Phase I and Phase II. However, the Minister for the Economy retains the right to call back cases when they raise political issues.

At present, it is still too early to know whether the Autorité has managed to meet the objectives of this reform, namely greater efficiency and swiftness in merger control. The creation of a department dedicated to this control, which works in liaison with the Autorité's legal department and economics department should nevertheless ensure a good technical approach to the economic analysis of each operation's effects on competition. Another positive point: direct dialogue with the parties is now encouraged, as was the case for the merger between the Caisse d'Epargne and Banque Populaire groups1. The Autorité has stated that its objective is to "optimize the balance between undertakings' time constraints, transparency of procedures and thorough competition analysis"2. In several of its decisions, the Autorité has also shown that it is pragmatic and flexible where it is necessary to impose behavioural commitments. Finally, many concentrations have been authorised in Phase I in less than the 25 business days required by law.

Endowing the powers for merger control and the sanction of anti-competitive practices to the same agency ensures tighter legal security. The Autorité's recognition of the concept of ancillary restraints in its guidelines is proof of this3. Therefore, it will not be possible to later challenge a clause validated by the Autorité's merger control department if it was considered as being directly linked and necessary to the operation4.

A debated fining policy

The LME is innovative as regards anti-competitive practices in that it attributes the powers to handle both preliminary enquiries and full investigations to the Autorité. The full investigations were previously handled by the Minister for the Economy.

These changes should allow to better follow each case and ensure better technical methods as the investigation departments work in liaison with the other departments (legal and economic). Once again, it is difficult to know what impact this organisation will have on decisions, as, to date, no decisions have yet been rendered since.

However, two recent decisions of the Paris Court of Appeal5 and the Cour de cassation6 have called into question the Autorité's stricter fining policy, as the first decision reduced the ordered fines from 575 to 75 million and the second decision did away with the presumption of damage to the economy in the event of collusion. The President of the Autorité, Bruno Lasserre, then announced that he was "in favour of [publishing] guidelines on calculating fines and the Minister for the Economy, Christine Lagarde, asked an ad hoc commission to draft a discussion paper on the appropriate methods to calculate fines for anticompetitive practices."7

This report, published on September 20, 20108, sets forth a number of recommendations on the setting of fines, ranging from the procedure (instituting a discussion between all parties concerned regarding the fine) to fine calculation methods (base amount representing 5 to 15% of the amount of sales affected by the practices in question; taking into

account the damage to the economy solely when the fine is being weighted; use of postponements for violations limited to antitrust law and creation of individual fines).

In the future, the Autorité will therefore be expected to provide stronger grounds justifying its decisions on the damage to the economy calculation methods, like it did in its latest decision rendered on the same day as the report, and in which 11 banks were fined EUR 384.9 million for collusion in the processing of cheques9.

Regulation through advisory opinions

The Autorité may now review, of its own initiative, antitrust issues in order to make public its analysis of proposed regulation or of the state of play of competition in a given market by issuing an opinion.

To date, only one opinion has been issued based on a self-referral by the Autorité: on the public passenger transport sector10. However, it has also taken the initiative to review other issues, like the cross use of customer databases11. This latter issue reflects the Autorité's aim not to limit itself to proposed regulations, but to also address practices which have not yet given rise to litigation.

These new powers will also improve legal security, as market players will be offered a form of guidance on the practices which the Autorité considers to be anti-competitive, before risking fines – so long as undertakings follow these opinions.

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