



«Remedies in merger control – a legal viewpoint »

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Alain Mouzon, deputy head of the legal service**

Introduction

- ▶ When an operation has significant anticompetitive effects and when the failing firm defence cannot be employed : prohibition unless it is addressed by measures that remedy or compensate for the anticompetitive effects.
- ▶ Proposed by the parties pursuant to Article L. 430-5(II) of the commercial code (phase 1 commitments)
- ▶ Proposed on the basis of Article L. 430-7(II) of the commercial code (phase 2 commitments)
- ▶ Or injunctions and conditions imposed by the *Autorité* pursuant to Article L. 430-7(III).

Phase I commitments

- ▶ Article L. 430-5 of the commercial code : *"the parties to the operation can undertake to carry out measures that are notably intended to remedy, if relevant, the operation's anticompetitive effects, either at the time of the operation's notification or at any time before the end of the interval of **twenty-five working days** as of the date of receipt of the complete notification, provided that the decision indicated in (I) has not been made"*.
- ▶ The commitments can be discussed during the pre-notification phase, added to the notification file or proposed during phase 1.
- ▶ The maximum timeframe for phase 1 is automatically extended by 15 working days. The examination time limits can also be suspended (maximum of 15 working days).

Phase I commitments

- ▶ Commitment letter : precise, detailed and exhaustive list of the commitments.
- ▶ Structural remedies : guarantee, for the transitory period, the independence, viability, value and competitiveness of the assets.
- ▶ Behavioural remedies : demonstrate their feasibility and ensure their verification.
- ▶ Monitoring measures.
- ▶ Commitments are tested.

Phase II commitments

- ▶ Article L. 430-7 :
- ▶ *"I.- [] the Autorité de la concurrence makes its decision within an interval of sixty-five working days as of the opening of the procedure.*
- ▶ *II.-[] If conveyed to the Autorité de la concurrence less than 20 working days before the end of the time limit indicated in (I), this time limit will expire 20 working days after the receipt date of the commitments.*
- ▶ *In case of special need, [], the parties can ask the Autorité de la concurrence to suspend the operation's examination time limits for a maximum of 20 working days.*
- ▶ *These time limits can also be suspended at the initiative of the Autorité de la concurrence []*

Phase II commitments

- ▶ The legislator has introduced a "*stop the clock*" procedure only in phase 2. Two cases:
 - ▶ 1) Firstly, the parties are required to inform the *Autorité* of **any new fact as of its occurrence**. When the parties fail to meet this information obligation, the time limit can be suspended.
 - ▶ 2) Secondly, if the parties **do not provide the *Autorité*, in whole or in part, with the information requested** of them within the timeframe allotted, the timeframes can be suspended.
- ▶ In all cases, the time limits will only resume when the cause that generated the suspension will have disappeared.



Injunctions

- ▶ Article L. 430-7(III) : The *Autorité* can authorise the operation *"while requiring the parties to undertake all measures in order to ensure sufficient competition or obliging them to observe provisions that will serve to make a sufficient contribution to economic progress so as to compensate for the anticompetitive effects"*.
- ▶ Recourse to injunctions are rare (c. 5% of commitment cases)
- ▶ When the parties refuse to propose commitments or when the proposed commitments are insufficient.



Criteria

- ▶ They must effectively serve to overcome the identified anticompetitive effects.
- ▶ Their implementation must not raise any doubts.
- ▶ Their implementation must be timely.
- ▶ They must be verifiable (monitoring mechanisms).

Criteria

- ▶ The remedies are neutral : their objective is to protect competition, not specific competitors.
- ▶ The remedies are proportionate : the obligations imposed on firms are strictly necessary in order to maintain or re-establish sufficient competition (ruling “Coca-Cola Company”).
- ▶ Priority to structural remedies

Divestiture : Characteristics of divested activities

- ▶ Viable and competitive (all assets and all the personnel needed for its proper operation).
- ▶ Detail of the tangible and intangible fixed assets (brands, intellectual property rights, know-how and goodwill) that are being sold.
- ▶ Undertake to maintain, until the divestiture, the economic, commercial and competitive viability of the divested assets
- ▶ In certain cases, rather than involving an autonomous economic activity, the divestiture may be limited to certain assets such as patents, licences or brands, if their sale is sufficient to remedy the identified anticompetitive effects.

Divestiture : Characteristics of a suitable buyer

- ▶ The buyer is independent of the parties, in capitalistic as well as in contractual terms.
- ▶ Adequate competence and financial capacity in order to develop the activity and efficiently compete.
- ▶ Identified in two ways:
 - ▶ 1) within a fixed timeframe.
 - ▶ 2) Upfront buyer.
 - ▶
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● Divestiture : Deadlines and trustee

- ▶ Deadline : as short as possible (varies depending on the complexity of the implementation of the concentration).
- ▶ Description of the transition stipulations (to preserve the activity's viability and competitiveness).
- ▶ Trustee.
- ▶ Examples : Horizontal. Bigard / Socopa (sale of several slaughterhouses). LVMH/Les Echos (sale of La Tribune).
- ▶ Vertical. Heineken/Kronenbourg (sale of several wholesalers).

Cancellation of structural links

- ▶ In certain cases, the parties can propose the sale of minority interests in this competitor or in a jointly held firm (on an exceptional basis, the parties can also propose to waive the rights related to minority interests without selling the shares).
- ▶ Examples : *Solvey/Montedison-Ausimont* (commitment to withdraw from a joint venture). *Nordbanken/Postgirot* (discontinuation of representation within the board of directors of a competing firm).

Creation of new capacities

- ▶ Example : CCIP / Unibail (creation of new exhibition surfaces in the Paris region).

Behavioral remedies

- ▶ They can involve:
 - ▶ 1) granting access to networks or infrastructures, in a non-discriminatory and transparent manner,
 - ▶ 2) granting access to licences, patents, brands or technologies,
 - ▶ altering pricing conditions,
 - ▶ 3) terminating or modifying exclusivity contracts,
 - ▶ 4) altering the conditions for the distribution or supply of a product,
 - ▶ 5) disclosing information on a non-exclusive basis etc.

Behavioral remedies

- ▶ Behavioural measures can be envisaged as a supplement to structural measures : Lesieur/ Puget (Lesieur undertook to sell the olive oil brand "Oli" but also to discontinue the use of brand and assortment discounts).
- ▶ Behavioural measures can also be envisaged as a substitute for structural measures, particularly when a divestiture would be difficult to arrange : Banques Populaires / Caisses d'Epargne (measures intended to maintain the autonomy and legal independence of the new group's three agency networks on Reunion Island).
- ▶ Behavioural remedies intended to protect consumers: TPS/CanalPlus (59 behavioural commitments proposed such as a commitment to make seven channels available to third party distributors).

Breach of remedies

- ▶ The Canal Plus decision in 2011.

- ▶ Article L.430-8 :

- 1) Financial penalties

- 2) Withdrawal of the decision

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Thank you very much !