



The French competition authority blocked a merger for the very first time!

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To quote this paper: I. GUITTARD, “The French competition authority blocked a merger for the very first time!”, *Competition Forum – French Insights*, 2021, n°0006, <https://competition-forum.com>.

Resume: *A very first! Last summer, the French Competition Authority (FCA) blocked a merger for the first time since its creation in 2009. The operation showed a risk of coordinated effects that would have harmed competition by creating a duopoly. Neither the efficiency gains nor remedies were likely to address these competitive concerns. The decision n°20-DCC-116 is a historic case in French merger law, in the mass distribution.*

The major party: a leader of the mass distribution, Leclerc. Soditroy and Leclerc (precisely the *Association des Centres Distributeurs E. Leclerc*) were the entities involved. Leclerc is known as the first company in the horizontal distribution network. In this case, it had a decisive influence on the other party - Soditroy - due to many prerogatives. Indeed, Leclerc could appoint or dismiss Soditroy's President, determine its commercial policy and use a priority right in a sale of shares. This situation originated from their contractual relations: Soditroy's holder owned another company under the « Leclerc » banner. In addition, Soditroy and Leclerc were linked by a sponsorship agreement. Given the position of Leclerc, it appears that a new acquisition

would potentially bring more power to the firm and become dangerous for the market.

The proposed operation: the acquisition of a great rival, Casino. Leclerc and Soditroy primarily planned to acquire by joint control an hypermarket, owned then by Casino. This operation is defined as a merger and the parties' turnovers were higher than 75 billions euros. Consequently, the acquisition had to realize a merger control.

Background on the French merger law.

The French legislator instituted a system by which an authority, the FCA, must control a concentration operation (merger, acquisition or joint venture) between two companies. In France, the choice of an *ex ante* control prevailed to the *ex post* control: the operation

is analyzed before its completion. Some countries adopted both types of control as in the United States. Besides, the FCA controls businesses according to their turnovers. Another criterion exists, based on the value of the transaction, as in Germany.

The relevant market: the distribution of food products in the region of Troyes.

Two types of markets were identified: the upstream market and the downstream market. The first one had an important size, due to its national dimension and to the inclusion of all mass distribution products. It is an autonomous market¹, where products are distributed from producers and wholesalers to hypermarkets. The downstream market was also sizable: it comprised the retail distribution of food products, but in the local territory. Surprisingly², we can notice that the FCA included a large variety of competitors in this market: hypermarkets, but also supermarkets, discounters and variety stores³. However the geographic analysis, limited to the region of Troyes, was more plausible.

Non-coordinated effects: a risk of higher prices. First, the FCA identified barriers to entry on the relevant market that were due to a local specificity: the limitation of news commercial and property places. Secondly, two situations of non-coordinated effects were drawn: a risk of price decrease and a risk of price increase. The second one is based on consumer surveys: they declared that they would have continued to shop in Leclerc hypermarkets, despite a price increase⁴. It can be explained by the large variety of products (food and non-food products). However the realization of these effects was evaluated as a simple « risk ». Indeed, the decisive argument dealt with coordinate effects.

Coordinated effects: the creation of a duopoly. The acquisition would have induced a coordination of behaviors by turning the market into a duopoly. In that structure, the market is very concentrated: economics teach us that companies tend to adopt a same action line⁵. Their attitudes could have converged to a « coordination », meaning a risk of harming competition and consumers. In our case, Leclerc and its rival Carrefour would have constituted a duopoly:

¹ European Commission, 25 January 2000, M.1684, Carrefour/Promodès, pt. 21.

² See also: A. Ronzano, « Contrôle conjoint : L'Autorité de la concurrence interdit pour la première fois depuis sa création une opération de concentration (Soditroy, E. Leclerc) », 28 August 2020, *Concurrences*, n° 4-2020, art. N° 96979.

³ Autorité de la concurrence, 28 August 2020, dec. n°20-DCC-116, « relative à la prise de contrôle

conjoint d'un fonds de commerce de détail à dominante alimentaire par Soditroy aux côtés de l'Association des Centres Distributeurs E. Leclerc », pt. 38.

⁴ Autorité de la concurrence, *op. cit.*, pt. 69.

⁵ Autorité de la concurrence, *Merger Control Guidelines of the Autorité de la concurrence*, Revised, 23 July 2020, pt. 738 and 739.

they would probably have coordinated (but not competed...). Taking into account these anti-competitive effects, the parties tried to demonstrate the existence of efficiency gains.

Efficiency gains : no specificity to the merger. They also pretended that the operation could have driven the prices down, balancing the coordinate effects. A condition was missing: this decrease in prices was not proper to the merger. Generally, the French merger law practice shows that it is very hard to convince the FCA about the efficiency gains defense. The last chance of Soditroy and Leclerc was also to find remedies.

Problematic: was there any structural remedy to save the merger? Generally, parties consent to behavioural measures and especially to structural measures, in merger control law. Was there any measure appropriated to address anticompetitive concerns induced by the duopoly structure?

Last but not least: no appropriate remedy to save the acquisition! Finally, both companies proposed to sell their sale area by nearly 2000 square meters. However, this remedy was insufficient to resolve competition concerns, particularity, the risks arising from a duopoly structure. Even worse, this remedy could have induced anticompetitive effects! The only issue was a structural measure: to sell the principal target

of the operation, Casino. That was certainly not serving the interests of the parties... For the first time since its creation, the French competition authority also had to block the merger.

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