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The French competition authority identifies competition risks, but authorises the transaction, a first application of the failing firm exception

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Resume: Competition objective or policy? What should be prioritised? This is the question that arose before the French Competition Authority here. What could have been a classic merger control between two large companies becomes a first for the French Competition Authority. Indeed, after an in-depth investigation, the Authority identified competition risks and authorised the merger. This fact, which might seem surprising, was possible thanks to the first application of the principle of the "failing firm exception". Let's take a look at this novelty and this surprising case.

I- The context of the case

1. The beginnings of the takeover of Conforama by the parent company of But. Mobilux is the parent company of the well-known French furniture group "But" and has a strong presence in France with over 300 shops. Conforama is active in similar areas and has a network of 170 sales outlets. At the end of the 2010s, Conforama encountered enormous difficulties and the Covid crisis did not help matters. The company is heading for bankruptcy[i] . In February 2020 the company even launched a safeguard plan providing for the closure of 42 shops. These difficulties led to the opening of a conciliation procedure by the Bobigny court on 19 May 2020, under the aegis of the interministerial Committee for Industrial Restructuring, in order to allow the company to continue its activity. This procedure led to a takeover offer from Mobilux on 9 June 2020.

2. The chronology of the merger control of the Conforama and But merger. This merger initially had a European dimension given the turnover of the two companies concerned, hence the fact that they filed their notification with the European Commission. However, the parties requested that the case be referred to the French competition authority, as permitted by the European

regulation on the control of mergers between undertakings[ii] , considering that the latter was "better placed to examine it"[iii] . In view of the urgency of the situation, the authority granted, by letter dated 23 July 2020, a waiver of the suspensive effect of merger control pursuant to Article L.430-4 of the Commercial Code. In a ruling dated 21 September 2020, the Commercial Court approved the conciliation protocol opened in July, which provides for the acquisition of the assets of Conforama by Mobilux[iv] . The company is therefore officially sold in September 2020, although the merger has yet to be validated, the fact remains that the financial emergency in which Conforama found itself required a rapid restructuring, but this does not mean that the ADLC will take its role lightly. On 15 September 2021, the Authority will announce that it is opening an in-depth examination phase[v] . This in-depth study will require the analysis of three main questions: The first question is "Will there be sufficient competition, particularly in the catchment areas", which is a classic analysis of this type of large-scale operation; the second question is whether "Are *furniture suppliers likely to be economically dependent on the Mobilux group? "The* third and last question is whether "Is the transaction indispensable to avoid any closure of Conforama shops?[vi] , a crucial question as it will be the vector of a potential novelty in the decisional practice of the Competition Authority with a potential application of the failing firm theory.

II - A concentration with a competitive risk, yet authorised by the Authority

a) Different risks of harm to competition identified

This is the surprising part of this decision, because at the end of its analysis the Authority clearly identified competitive risks and also demonstrated that the negative effects of the identified issues could not be offset by efficiency gains[vii] . The

3. The risks of economic dependence. The first of these issues is the risk of creating or reinforcing purchasing power that could place suppliers of bedding products in a state of economic dependence. This is one of the main issues that the competition authority had to address during the second phase of the review and also an issue that was already troubling the media and professionals upstream[viii] . After the operation, the new entity will represent nearly 50% of the bedding products distribution market in France, which means that suppliers will have strong risks of dependence on this new brand. A problem that can be the subject of an abuse of economic dependence. The decision recognises this by considering that "there is a risk of harm to competition through the creation or reinforcement of the buyer's purchasing power on the upstream

market (...), and the absence of a credible alternative for suppliers (...)"[ix] . The same observation is made, but in great detail, on the question of the downstream market[x] .

4. The risks due to the disappearance of a franchisor group. The second risk identified and analysed by the authority relates to the overseas departments and regions and more specifically the risk of deterioration in the contractual conditions of franchisees in these areas. The two groups are both franchisors and in particular the two main franchisors in these overseas areas, which risks the problem of a lack of alternative for franchisees in these sectors and de facto risks of an increase in franchise contract fees due to this quasi-monopolistic position. Although the groups maintain in their observations that there are numerous alternatives for franchise applicants in the DROMs[xi] , this does not convince the Authority, which considers that the alternatives cited by the brands are not credible[xii] . This leads to the conclusion of the Authority that because of the lack of alternatives in the DROMs, there is no guarantee that there will be no risk of deterioration in the contractual conditions of But and Conforama franchisees located in the DROMs[xiii] .

5. risks relating to the downstream market. The third risk identified relates to the risks of overlapping activities on the various downstream markets for the retail distribution of furniture products. This risk is interesting to look at, as it has led to a certain evolution in the Authority's decision-making practice concerning the furniture retail sector. We are moving towards a more precise assessment of the market, the Authority considering that it was no longer relevant to retain an overall market for furniture, it is now more appropriate to segment the latter into six major product families[xiv] . But also in line with the Fnac-Darty case[xv] , to consider that sales in physical shops and online belong to the same market. In the context of this new decision-making practice, the Authority identifies competition problems in several catchment areas in different furniture segments. The most likely risk identified by the ADLC is that due to the new market power in the different sectors[xvi] , and the growing influence of the online market with the proliferation of players, competitors will necessarily have very limited market shares[xvii] , which will create a general incentive for the new entity to raise prices[xviii] . Moreover, there will be numerous barriers to entry, which will make it unlikely that any player capable of driving competition in the markets analysed by the authority will be able to enter[xix] . The authority therefore concludes that there is a risk of harm to competition through price increases on the local distribution markets of the various sectors observed[xx] .

6. The issue of efficiencies. As provided for in Article L.430-6 of the French Commercial Code, when the authority conducts an in-depth merger review, it assesses whether there are any efficiencies, or in other words, a contribution to economic progress that could offset the harm to competition.

The parties to the transaction will argue that the transaction leads to efficiencies, already according to the parties, the fact that the ADLC has granted a waiver of the suspensive effect of the control demonstrates the existence of efficiencies and that this is also an indicator for the future[xxi] . The parties also consider that this leads to cost savings which should, in their view, be passed on to the consumer[xxii] .

The Competition Authority assesses the evidence provided by the parties and considers that it remains very hypothetical, that it is limited to the statement of principles and is not sufficiently documented to provide real evidence of efficiencies *in concreto*[xxiii] .

In a classic merger situation, in view of the above discussion, the takeover could not have been carried out in these terms. There would necessarily have been commitments or even a refusal in view of the risks identified. However, the situation is exceptional in several respects, in particular because it is a first for the Competition Authority.

b) A first for the application of the defaulting company exception theory

7. The origins of the theory. This theory stems from US antitrust case law[xxiv] , it "*allows the competition authorities to approve a merger even though the transaction substantially affects competition and should be prohibited. In this case, the authorities consider that the transaction is neutral from the point of view of competition law, i.e. that the restriction of competition due to the transaction would have occurred in any case due to the bankruptcy of one of the companies involved in the transaction*[xxv] . The latter is very rarely used in France and was only used in the early 2000s[xxvi] . It was in a famous case concerning the merger of the companies Seb and Moulinex[xxvii] that the Conseil d'Etat came to define the application of this theory.The Conseil d'Etat established that: "in the *case of the takeover of a company in difficulty by a competitor, [the national merger control authority] must authorise the transaction without imposing any requirements when it appears at the end of the assessment that the effects of the transaction on competition would not be more unfavourable than those that would result from the disappearance of the company in difficulty.*" [xxviii]

To implement this theory, three cumulative criteria have been identified by the Court of Justice[xxix] : The first is that the difficulties of the target company should lead to its rapid disappearance in the absence of a takeover; the second is that there should be no takeover offer other than that of the notifying party which is less damaging to competition and which relates to all or a substantial part of the company; and the third

criterion, which can be identified with the consumer welfare criterion, which is that the disappearance of the company in difficulty should not be less damaging to consumers than the planned takeover[xxx] .

8. The positions of Mobilux and Conforama on this issue. The notifying party (Mobilux) states that the Conforama France Target has been experiencing significant financial difficulties since 2017[xxxi] , and that these difficulties have only increased in 2020 with the Covid[xxxii] . That de facto for them in the face of such difficulties the first condition was met, as the company would necessarily face a rapid demise if it was not taken over[xxxiii] . As regards the second condition, Mobilux considers that this criterion should be analysed at the date of the derogation and not at the date of the decision and that, as things stand, no serious takeover offer was made at the date of the derogation. In their view, the second condition is therefore satisfied. The last is the most technical and the notifying party does not fail to point it out. Indeed, several methodological remarks are made by the company[xxxiv] . Firstly, it considers that the counterfactual analysis to be carried out should take into account the scope of Conforama France as a whole[xxxv] . A very detailed analysis is then made of the various plausible scenarios if there were no takeover, continuing the analysis by looking at the upstream and downstream markets[xxxvi] . Two scenarios are considered, the first of which foresees the disappearance of all of Conforama's assets from the market and the second is based on the assumption that the company would only take over some of the company's assets. The company concludes that regardless of the scenario, the competitive balance sheet is favourable to the transaction[xxxvii] .

9. The analysis of these conditions by the ADLC. The Authority therefore had to analyse the arguments made by the company on the three criteria and verify that they were all met in order to potentially apply the theory.

With regard to the first element, the Authority appreciates the elements transmitted by the notifying party, noting Conforama's inability to pay in the spring of 2020, and that the latter was in a financial state that announced the end of the company[xxxviii] . In light of this, the Authority recognises that only the takeover by the Mobilux group has enabled Conforama to obtain the necessary financing to continue its business[xxxix] . The Authority considers that in view of these elements, the first criterion is fully met.

The second criterion was analysed in a little more detail, both on the question of publicity, where the company's situation had to be sufficiently publicised to enable market players to express their interest in the takeover[xl] . Advertising that the ADLC

considered sufficient[xli] . The second part of the analysis deals with the question of alternative takeover bids, the Authority confirms what Mobilux alleges in the sense that no bid was made except for that of Mobilux[xlii] .

The third criterion, on the other hand, required an in-depth analysis, pointing out that this criterion makes it possible to compare the effects of the transaction with the spontaneous dynamics of the market, in a broader framework than the analysis of the second criterion[xliii] . The Authority returned to the methodological point raised by the notifying party, considering that the analysis should not be carried out solely at the level of the Conforama France entity, but it remained on the same line by considering that the analysis should be carried out at the level of each relevant market[xliv] . The authority proposed a counterfactual analysis of the different scenarios market by market, in order to be able to compare the potential effects of the break-up with those of a takeover by Mobilux[xlv] . The ADLC concludes by considering that, in view of the various elements provided by the notifying party, the third criterion is fulfilled on all the markets on which the Authority has identified competition risks. The effects of the disappearance of Conforama France do not appear to be any less harmful than those of the takeover of its assets[xlvi] .

This application of the failing firm exception is a first for the authority since it was given jurisdiction over merger control in 2009. This is what makes it so rare and exceptional.

III - Analysis of the case

10. The objectives of competition law disturbed by the application of this theory. As a reminder, competition law has fairly broad objectives, in particular: to ensure freedom of competition, i.e. to allow market mechanisms to function as well as possible[xlvii] . Some authors are keen to point out that "*Competition law protects competition, not competitors*[xlviii] ". These objectives are clearly in line with a desire to protect the market and competition in the sense that it can be understood. However, when this objective comes into conflict with other objectives/policies, it will take a back seat to social or consumer protection aspects[xlix] .

This is notably what is at stake in the case we are analysing, as the use of the theory of the exception of the failing company puts forward as one of its criteria the difficulty of the company and the risk of its disappearance. As some authors have pointed out, this theory is at the crossroads of competition law and the law on companies in difficulty, or the surprising meeting of two laws that respond to different objectives[l] . One preserves the market, as we have analysed above, and the second is intended to try to safeguard companies in difficulty, with the main corollary of safeguarding

employment (this brings us back to the objective of social protection, which takes precedence over the objective of protecting the market). These disparate objectives may create a form of legal mismatch or even a "clash of legal cultures"[li] . The fact is that the Competition Authority has, by applying this preferred theory in our case, protected the structure of a company employing thousands of people rather than the competitors and other economic actors who may be victims of these potential competition risks. Beyond that, it is very much frowned upon in France that a company employing thousands of people could close down, and when such a risk occurs, it is rare that politicians do not take it up or influence it. The Conforama/But merger was not publicly and mediately apprehended by political leaders, however there is a good chance that a certain amount of interference could have existed or could have existed if the merger had been refused.

11. The balance between competition law objectives and competition policy. These objectives are matched by competition policy, which can be defined as the way in which our competition rules are applied. At the end of the 1990s, a major drive to modernise European competition policy was launched, which led to a focus on consumer welfare with the aim of better understanding the harmfulness of market power[lii] . This idea of consumer welfare can sometimes lead to decisions that do not *de facto* correspond to a strict application of competition law, where a company would be sanctioned for its anti-competitive behaviour. The impact of a practice on the market, the benefits or otherwise of the practice for the consumer, even if the practice endangers competition, are now considered.

It is this balance between objectives and competition policy that can be looked at with a keen eye in our case. The Authority carried out a long and tedious analysis in phase two of the merger control and identified three risks of infringement of competition law[liii] . These risks are not insignificant when we look at what they correspond to, in particular the potential abuse of economic dependence of which suppliers could be victims or the risk of a monopoly on the franchise market in the overseas departments and regions. However, despite the identification of these various risks of harm to competition, the authority authorised this merger. In concrete terms, one might have expected at least a request for a commitment from the companies, as was the case in the large-scale Fnac/Darty merger, which had to sell off some of its shops[liv] , in anticipation of the risks of harm to competition identified.

But the third criterion, and the one that has been looked at most closely in this application of the failing firm exception theory, is whether or not the disappearance of the company would be harmful to the consumer. This criterion fits concretely and

entirely into this vision of the confrontation between policy and competition objectives. It does not even take into account what would be the result for the physiognomy of competition and the market in case of the disappearance of the company, but only what would be the impact on the consumer. Why not consider a safe counterfactual analysis of what the market would be like if the company disappeared, rather than an analysis of whether it would be more or less harmful to the consumer if the company disappeared. This can be seen as a form of direct interventionism in the economic and competitive reality, if the rules of competition law are strictly applied and the primary objectives of competition law are met, this merger would not take place. But in the interests of the proper application of competition policies generally instigated by Community law, the desire is to apply a theory of a certain scarcity which could result in placing many other economic actors in delicate situations because of the risks for competition law. This theory is a form of right of way that should not be taken lightly, and although it is interesting and, above all, unprecedented, it should benefit from greater security after its application. It does not seem inappropriate to propose a procedure of commitment or at least of prevention towards the companies concerned with regard to the risks that the Authority has identified. It should be remembered that this theory is used for the first time by the Competition Authority and that even in other countries and antitrust agencies its application remains rare and exceptional.

In today's competitive climate, it seems necessary to bring a goal of safe market structures down to the same level as the pursuit of consumer welfare. Criteria that some authors criticise as "not having sufficiently defined meanings to determine policy"[lv] . However, although this political argument is open to criticism and is being rejected in the United States through the Neo-Brandeisian theory, as evidenced by Jonathan Kanter's speech[lvi] . In Europe, the opposite is true, most recently in the *Enel* judgment[lvii] , where the Court unequivocally stated that "*the welfare of consumers, both intermediate and final, must be regarded as constituting the ultimate purpose justifying the intervention of competition law to repress the abuse of a dominant position in the internal market or in a substantial part of it*"[lviii] . A change which some analyse as 'surreptitious', as until now the Court had refused to enshrine the term consumer welfare[lix] .

12. The competition authority's decision-making innovation, the positive touch. Although the above elements lead us to question the positive and negative aspects of this decision, we must nevertheless welcome an evolution in the decision-making practice of the Authority. The Authority has decided to refine its analysis in its decisions concerning the distribution of furniture

products. It no longer considers the furniture market as a whole, but has decided to divide the market into six major product families. But also to propose a segmentation in terms of price range. And finally, it decided to continue in the same vein as the Fnac-Darty case[lx] to consider that sales of furniture products in physical shops and online belonged to the same market. A logical evolution, but one that demonstrates a desire for continuity in the modernisation of the French Competition Authority's decision-making practices. This is something that should be welcomed, given the difficulties that our antitrust agencies have in adapting to the speed of change in the modern economy.

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[iii] ADLC, Press release, 'European Commission refers examination of the takeover of Conforama France by Mobilux (But) to the Authority', June 29, 2020.
[iv] ADLC, Decision No. 22-DCC-78, "Relative to the acquisition of sole control of the assets of conforama France by the Mobilux group", April 28, 2022.
[v] ADLC, Press release, "Takeover of Conforama France by the Mobilux group (BUT): the Authority opens an in-depth examination phase", September 15, 2021.
[vi] Ibid
[vii] ADLC, Press release, "Raché Conforama par le groupe But : l'Autorité identifie des risques concurrentiels mais autorise l'opération sans engagement en application de l'exception de l'entreprise défaillante", April 28, 2022.
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[ix] ADLC, Decision No. 22-DCC-78, "Relative to the acquisition of exclusive control of the assets of Conforama France by the Mobilux group", Op.cit, p.182.
[x] Infra, Pt.5 "Downstream market risks".
[xi] *Ibid*, Pt.151.
[xii] *Ibid,* Pt.154.
[xiii] *Ibid,* Pt.157.
[xiv] *Ibid,* Pt.183-321.
[xv]ADLC, Decision 16-DCC-111, July 27, 2016 on the acquisition of sole control of Darty by Fnac.
[xvi] ADLC, Decision No. 22-DCC-78, "Relative to the acquisition of exclusive control of the assets of Conforama France by the Mobilux group", Op.cit, p.284.
[xvii] *Ibid*, Pt.285.
[xviii] *Ibid,* Pt.286.
[xix] *Ibid*, Pt.287.
[xx] *Ibid,* Pt.288.
[xxi] *Ibid*, Pt.324.
[xxii] *Ibid*, Pt.325.
[xxiii] *Ibid*, Pt.331.
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[xxxi] ADLC, Decision n°22-DCC-78, "Relative to the acquisition of exclusive control of the assets of conforama France by the Mobilux group", Op.cit, Pt.362
[xxxii] *Ibid*, Pt.363.
[xxxiii] *Ibid*, Pt.367.
[xxxiv] *Ibid*, Pt.372
[xxxv] *Ibid,* Pt.376
[xxxvi] *Ibid,* Pt.385.
[xxxvii] *Ibid,* Pt.388.
[xxxviii] *Ibid*, Pt.396.
[xxxix] *Ibid*, Pt.397.
[xl] *Ibid,* Pt.402.
[xli] *Ibid,* Pt.405.
[xlii] *Ibid,* Pt.412.
[xliii] CJUE, Kali & Salz of March 31, 1998, C-68/94, ECR I-1375.
[xliv] ADLC, Decision n°22-DCC-78, "Relative to the acquisition of exclusive control of the assets of conforama France by the Mobilux group", Op.cit, Pt. 415
[xlv] *Ibid,* Pt.421-446.
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