



Authorization from the French Competition Authority for the acquisition of exclusive control in the predominantly food retail sector

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Resume: *In its decision 24-DCC-02 of January 11, 2024, the French Competition Authority granted Intermarché authorization to carry out a merger. The transaction involved the acquisition of 61 predominantly food retail outlets under the Casino Group banner. In fact, a waiver of the suspensive effect has been granted, and the authority's authorization is subject to ITM's compliance with commitments to sell three stores in specific territories.*

In decision 24-DCC-02, issued on January 11, 2024, the French competition authority dealt with a merger case involving ITM Entreprise's acquisition of exclusive control of 61 stores formerly operated by Casino.

On July 13, 2023, a file concerning this takeover was sent to the merger department. Following this, the French competition authority will carry out an in-depth analysis of the effects of competition on the upstream and downstream markets.

In this case, the company in question is ITM Entreprise, Intermarché, which operates various banners in the predominantly food retail sector. Intermarché's aim is to acquire 61 stores formerly owned by the Casino France group.

A sale agreement was signed on September 21, 2023, enabling Intermarché to acquire all the target stores.

Nevertheless, this decision was innovative in that the transaction was exempted from the suspensive effect pursuant to article L430-4 of the French Commercial Code, following a letter of decision dated August 9, 2023. As a result, the transaction was completed on September 30, 2023, subject to compliance with the acquiring company's commitments. It is therefore necessary to analyze all the characteristics and consequences of a merger (I), which may nevertheless be validated by the competition authority according to certain criteria (II).

I. Assessing the acquisition of sole control through market analysis

When one company acquires another, this has consequences for the market. We therefore need to define the scope of the relevant markets (A), and observe the risks

present upstream and downstream on the market (B).

B. The subtleties of defining the relevant markets

In order to analyze the consequences of a merger on the market, it is imperative to define the relevant market for its upstream and downstream activities.

The relevant market makes it possible to identify the territory within which companies compete. It establishes the framework within which the Commission applies competition law.

Recently, the European Commission has clarified the definition of the relevant market, offering greater predictability and transparency for businesses¹. It also takes into account the development of digital markets.

In its decision 24-DCC-02 the French Competition Authority drew a distinction between the relevant provincial market and the Paris market. From a geographical market point of view, it considers that the relevant market in Paris includes all forms of general retailing, such as small shops, supermarkets, hypermarkets and popular stores.

¹ Comm. UE, Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645), OJUE 22 feb. 2024.

As far as downstream provincial towns are concerned, it is not necessary to make a final decision on the exact delimitation of the relevant markets, as this has no bearing on the competitive analysis.

Furthermore, the Authority remains sceptical about the inclusion of single drives in the downstream market. Nevertheless, if the competitive analysis remains unchanged, it will not be taken into account.

In this case, the competition authorities have examined the effects of mergers in the food retailing sector. However, the Authority points out that these delimitations are likely to change on a case-by-case basis, depending on the characteristics of the local area, since other criteria may be taken into account to assess the impact of a merger on the competitive situation in the retail distribution markets.

The same applies to the case E. Leclerc concerning the acquisition of joint control of a predominantly food retail store and a drive by the company Mavidis². As in our case, the Authority takes into account the geographic market concerned and the impact on it.

In fact, it focuses primarily on the market's surface area, with hypermarket structures in the provinces and Paris suburbs.

² Decision E. Leclerc no. 15- DCC-114 of September 17, 2015.

In fact, the question of the geographic market delimitation can be left open, as the competitive analysis remains unchanged.

Consequently, in order to delimit the market, the Court has demonstrated in various decisions the criteria of market area and store category.

In this case, it found that the transaction had the effect of significantly strengthening market power. This situation was likely to lead to price rises and a reduction in the diversity of supply, to the detriment of consumers in the areas concerned.

As a result, French competition authority carefully analyzes the delimitation of the relevant market and catchment area in order to examine the effect of the merger. This analysis has been carried out in several decisions.

B. Risks arising from mergers on the competitive market

Merger law is governed by Articles L430-1 et seq. of the French Commercial Code and Regulation 139/2004 as regards European law. Article 3 of the regulation defines a merger.

The French competition authority bases its assessment on a number of criteria, such as the parties' market share, the degree of market concentration, competitive pressure,

customer purchasing power and potential new entrants.

In the present case, the analysis covers both the upstream and downstream markets. The Authority considered that the transaction was not likely to significantly strengthen Intermarché's purchasing power on the upstream markets for the supply of everyday consumer goods, given the low purchasing share of the 61 target stores.

Therefore, as in the present case, the Authority has authorized this transaction, subject to undertakings that will enable a balanced competitive situation to be maintained.

Nevertheless, the Authority notes that the new entity will remain in competition with other groups such as Leclerc and Carrefour, which are alternative suppliers.

The merger also takes into account the economic dependence of suppliers. To analyze this dependence, the threshold in the food retail sector has been set at 22%, depending on the company's financial situation and structure.

In this case, it is argued that the merger is not likely to harm competition by strengthening purchasing power on upstream markets. In fact, no competitive risk is retained for 52 stores targeted by the operation.

On the other hand, the Authority concludes that the transaction could hinder competition in 3 catchment areas, strengthening Intermarché's market power.

II. Merger authorized by article 430-4 of the French Commercial Code and the company's commitment to the merger

In a letter dated August 9, 2023, the Authority waived the suspensive effect (A). By the present decision, the Authority authorized the transaction, taking into account the company's commitments (B).

B. Waiver of suspensive effect under article L430-4 of the French Commercial Code

The sale of stores as part of a merger does not mean closing them down, but only taking them over under a new name.

To ensure that the transaction does not harm competition, the Authority carries out an in-depth examination prior to the decision authorizing the transaction.

The principle is that the merger can only go ahead after the Competition Authority has given its approval. However, it is possible for the Authority to grant a waiver allowing all or

part of the transaction to be carried out without waiting for the clearance decision, in order to allow the business to continue³.

This waiver is possible only in exceptional cases, such as where the company is experiencing financial difficulties that would jeopardize its business.

By letter dated August 9 2023, the Authority granted Intermarché a waiver of the suspensive effect, enabling it to complete the transaction without waiting for the Authority decision, which was given on January 11, 2024. However, this waiver is not final, and the Authority may reverse its decision and prohibit the transaction if it is prejudicial to competition.

B. ITM's commitments led to authorization

On January 9, 2024, ITM presented a final version of its commitments and completed the merger, in order to remedy the risks of harm to competition on the predominantly food retailing market as a result of the merger.

ITM undertook to sell three stores in specific areas within nine months of the decision. In addition, to ensure compliance with the previous commitment, Intermarché has undertaken not to reacquire the stores sold,

³ Article L430-4 of the French Commercial Code

nor to acquire any direct or indirect influence over them, for a period of ten years.

These commitments ensure that the businesses do not overlap in areas where a risk of competition has been identified.

These areas of overlap are also referred to in decision 20-DCC-164 of November 17, 2020 concerning Aldi's acquisition of exclusive control of the assets of Franprix leader Price Holding. In this decision, the Authority ruled that if the parties' market shares in the area where their activities overlap are below 15%, there is no risk of any harm to competition.

In addition, the Authority has identified areas where there is a risk of harm.

In fact, as in our decision, the acquiring company entered into commitments following authorization by the Authority.

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⁴ Decision 20-DCC-164 of November 17, 2020 concerning Aldi's acquisition of exclusive control of the assets of Franprix leader Price Holding.