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French Competition Law Newsletter

Highlights

— The French Competition Authority clears the acquisition of Kindred Group by La Française des Jeux, subject to brand separation and other commitments to address conglomerate concerns.

— The French Competition Authority clears the takeover of La Poste Telecom by Bouygues Telecom unconditionally.

The French Competition Authority clears the acquisition of Kindred Group by La Française des Jeux, subject to brand separation and other commitments to address conglomerate concerns

On September 13, 2024, the French Competition Authority ("***FCA***") approved the acquisition of Kindred Group ("***Kindred***") by La Française des Jeux ("***FDJ***", the "***Transaction***") in the gambling sector, subject to behavioural commitments, including brand separation, to address conglomerate concerns.[1]

Background

FDJ holds exclusive rights for lottery games (both online and at points of sale) and sports betting at points-of-sale under the "*Parions Sport Point de Vente*" brand. It also operates in online sports betting, poker and, more recently, online horse race betting, all of which are regulated by the *Autorité nationale des jeux* ("**ANJ**"), the French national gaming authority. Additionally, FDJ manages a pool that consolidates stakes from several online horse race betting operators and provides services to point-of-sale and international gambling operators.

Kindred, based in Switzerland, operates mainly in Europe and offers online horse race betting, sports betting, and poker games in France under the brand "*Unibet*".

Before the Transaction, FDJ and Kindred's activities overlapped in three online gaming markets in France: (i) online horse race betting, (ii) online sports betting, and (iii) online poker.

FDJ's previous acquisition of ZEturf

This decision comes nearly a year after the FCA

[1] FCA, Decision 24-DCC-197 of September 13, 2024 on the acquisition of exclusive control of Kindred Group by La Française des jeux (the "**Kindred Decision**").

cleared FDJ's acquisition of ZEturf,[2] which allowed FDJ to enter the online horse race betting market. The FCA cleared the transaction in September 2023, subject to various behavioural commitments to address potential conglomerate effects between FDJ's monopoly position in French lottery and sports betting and ZEturf's online horse race and sports betting services, as well as potential foreclosure risks.

Notably, these commitments include restrictions preventing FDJ from leveraging its monopoly position to expand in the online horse race and sports betting markets. For example, FDJ must: (i) manage these activities (*i.e.*, online and point-of-sale lottery, and point-of-sale sports betting on the one hand, and online horse race and sports betting on the other hand) through separate websites, (ii) promote them via separate social media accounts, (iii) maintain separate player accounts for each activity, (iv) refrain from combining customer databases for these activities, and (v) implement a training program for teams promoting both monopoly and competitive activities to ensure compliance with the commitments.

Additionally, in order to address potential foreclosure risks on the horse race betting market, (vi) FDJ must grant access to its shared pool of online horse race betting stakes to any operator licensed in France to offer online horse race betting that requests it. With the transaction, FDJ would become the only operator offering pooled stakes in online horse race betting which allow it to potentially offer higher winnings, making it a key operator for those unable to pool stakes on their own (*i.e.* all operators except PMU). The FCA found that the FDJ would have had the capacity and incentive to foreclose competitors by removing their access to its shared pool: given its financial strength, its reputation and its wide range of gambling services, the FDJ would be able to capture new online horse race betting players, significantly increasing its pool of online horse betting stakes and allowing it to operate its pool alone. According to the FCA, FDJ would therefore have had significantly less interest in continuing to pool its bets with its competitors.

The FCA's analysis of the Transaction

Market definition

In line with its past decisional practice,[3] the FCA segmented the gambling markets by type of gambling activities (*i.e.*, distinguishing games of chance, such as lotteries, from skill-based games, which were further sub-segmented into sports betting, horse race betting and poker) and by distribution channel (*i.e.*, distinguishing services offered online from those offered at points of sale). The FCA considered the gambling markets to be national in scope, due to the national scope of exclusive rights and the ANJ's regulation.[4]

Absence of horizontal effects

The FCA concluded that the Transaction would not result in unilateral effects, as the combined market share of the new entity would be below 25% in all relevant markets, which is below the threshold where market power is presumed absent.[5] Although the Transaction would strengthen FDJ's position in the various overlapping markets, enabling it to become the second or third largest player in each market, the new entity would still lag behind the leading players, namely, Winamax and Betclic in online sports betting and poker, and PMU, the by-far leader in horse race betting.

The FCA also found no evidence of coordinated effects on any of the markets analysed. In particular, in the online sports betting market, the FCA set aside the risk of coordinated effects in light of (i) the lack of homogeneity in the market, given the diverse betting strategies and formulas offered daily by various operators for each sporting event, and (ii) the absence of entry barriers, as evidenced

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[2] FCA, Decision 23-DCC-191 of September 15, 2023 on the acquisition of exclusive control of the ZEturf group by La Française des jeux (the "**ZEturf Decision**").

[3] *See* ZEturf Decision, paras. 7 to 23. *See also* FCA, Opinion No. 11-A-02 of January 20, 2011, concerning the online gambling and betting sector, paras. 67 to 69; FCA, Decision No. 14-D-04 of February 25, 2014, concerning practices implemented in the online horse race betting sector by PMU, para. 41.

[4] *See* Kindred Decision, paras. 8 to 14. *See also* FCA, Decision No. 22-DCC-219 of November 14, 2022, regarding the exclusive control of Aleda by Française des Jeux, para. 24.

[5] FCA, Merger Control Guidelines, para. 624.

by recent new entrants licensed by the ANJ.

Potential conglomerate effects

Given Kindred's activities in online horse race betting, online sports betting and online poker, the FCA identified potential conglomerate effects similar to those found in the ZEturf Decision.[6] It found that the new entity could have both the ability and the incentive to link FDJ's monopoly activities (online and point-of-sale lottery and point-of-sale sports betting services) with Kindred's online horse race betting, sports betting, and poker services. This could involve (i) merging of customer bases, for example by offering a single player account for all games, (ii) launching promotional offers to encourage monopoly game players to try online horse race betting, sports betting, and poker, or (iii) creating confusion between the customer journeys of monopoly game players and those of online horse race betting, sports betting, and poker players. According to the FCA, the leveraging of FDJ's monopoly position could hinder its competitors' access and development on the online horse race and sports betting markets, potentially significantly reducing their sales and leading to fewer available competitive offers. The FCA also raised concerns about the potential foreclosure of competitors in horse race betting, either by limiting or denying their access to the shared pool of horse race betting stakes or by withdrawing stakes collected by the new entity from the pool.

The commitments: expanding previous commitments and adding brand separation

The FCA considered that the commitments imposed in the ZEturf Decision were insufficient to address the present concerns, as they would not prevent FDJ from leveraging its monopoly position in relation to Kindred's activities.

As a result, FDJ agreed to broaden the scope of all existing ZEturf commitments to encompass Kindred's online horse race betting, sports betting, and poker activities and to extend some of the implementation timelines. The commitments include the following:

— Maintaining pooling agreements with third-party online horse race betting operators (*i.e.*, providing other licensed horse race betting operators with non-discriminatory access to FDJ's pool of online bets) for five years starting from the closing of the Transaction,[7] with an option for one renewal;

— Committing not to leverage FDJ's monopoly in lottery games (both online and at points of sale) and sports betting (at points of sale) to expand in competitive markets, *i.e.*, online horse race betting, sports betting, and poker activities by: (i) refraining from promoting these competitive activities by targeting players of its monopoly activities (and *vice versa*); (ii) maintaining distinct customer journeys by offering its competitive activities on separate websites and applications from its monopoly activities; and (iii) ensuring separate player accounts for its monopoly activities and competitive activities.

— Spinning off of all competitive activities (including Kindred's competitive activities) into one or more dedicated subsidiaries (separate from FDJ's monopoly activities) by June 30, 2025; and

— Training FDJ's commercial teams within three months of the Transaction's closure to ensure compliance with the other commitments, notably in relation to the promotion of competitive activities and monopoly activities.[8]

Additionally, in response to comments made by third parties during the market tests, FDJ committed to marketing its competitive gambling activities under separate brands, distinct from its monopoly activities' brands like "*Parions Sport Point de Vente*". This commitment must be fully

6 *See* Kindred Decision, paras. 30 to 32, referring to the ZEturf Decision.

7 The Transaction closed on 18 October 2024. *See* FDJ, Press Release, October 21, 2024, available at: www.groupefdj.com/presse/a-lissue-de-lextension-de-son-offre-publique-dachat-fdj-detiendra-9860-du-capital-de-kindred/.

8 *See* Kindred Decision, paras. 46 et seq.

implemented by March 31, 2026, allowing time for the launch of new brands and migration processes.

Takeaways

This decision confirms the FCA's openness to accept behavioural commitments, at least in response to non-horizontal concerns.

The FCA's decision is currently under appeal before the *Conseil d'État* (the French Council of State).[9]

The French Competition Authority clears the takeover of La Poste Telecom by Bouygues Telecom unconditionally.

On August 19, 2024, the French Competition Authority ("**FCA**") unconditionally cleared Bouygues Telecom's acquisition of sole control of La Poste Telecom (together "**the Parties**") through the acquisition of La Poste Group's 51% stake. SFR owned the remaining 49% of La Poste Telecom and had a right of first refusal on La Poste Group's shares that were for sale, as well as a right of approval over the buyer of those shares.[10] The acquisition was completed on November 15, 2024.[11]

Background

Bouygues Telecom, a subsidiary of Bouygues SA (the parent company of the Bouygues group), is a mobile network operator ("**MNO**").[12] It provides fixed and mobile telephony, as well as broadband and ultra-broadband Internet services. Bouygues Telecom also offers wholesale services through Lycamobile, a mobile virtual network operator ("**MVNO**").

La Poste Telecom, jointly controlled by the La Poste group (51% of the voting rights) and SFR (49%), is active in the electronic communications sector. As a "light" MVNO,[13] La Poste Telecom purchases access to mobile network services from SFR. It currently has a network access supply contract with SFR that runs until 2026.

On July 12, 2024, Bouygues Telecom notified the FCA of its intention to acquire sole control of La Poste Telecom through the acquisition of all the shares, from La Poste Group and SFR.

The proposed acquisition raised horizontal concerns due to a horizontal overlap between the Parties on the downstream mobile telephony retail market as they both offer mobile telephony services to private and professional end-users. This includes the offer of mobile packages and pre-paid cards on the one hand, and the offer of "global", "premium" and "Sim-only Web-Only" services on the other. It also created a vertical link between Bouygues Telecom – an MNO operating in the upstream wholesale market, selling access and call origination service on mobiles networks – and La Poste Telecom – an MVNO operating in the downstream market for the retail and distribution of telephony products and services.

The FCA's Decision

Relevant markets. The FCA defined the relevant markets as (i) the upstream wholesale market for access and call origination on mobile telephone

[9] *See* FCA Press Release of September 13, 2024 on Kindred Decision, available at: https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-de-la-distribution-des-jeux-de.

[10] FCA Decision No. 24-DCC-185 of August 9, 2024 regarding the acquisition of sole control of La Poste Telecom by Bouygues Telecom.

[11] See LaPosteGroupe's website, "*Finalisation de la cession de La Poste Telecom*", available here.

[12] An MNO is a mobile operator that owns the frequencies and the mobile telephony network infrastructures.

[13] Unlike a "full" MVNO, a "light" MVNO does not own core network elements such as routing and relaying communication between different network nodes. Instead, a light MVNO manages few technical platforms and buys access services and end-to-end calls from its host operator, including call origination, routing, and termination.

networks,[14] and (ii) the downstream mobile telephony market, which includes both the retail (business-to-consumer sales) and the distribution (business-to-business sales) of mobile telephony products and services. The FCA departed from its previous approach[15] by considering the retail and distribution aspect as part of a single downstream market. The FCA found that recent market developments do not warrant distinguishing retail from distribution anymore because (i) most players in the mobile telephony retail segment now also act as distributors; (ii) MNOs propose uniform mobile telephony offers with identical rates across all of their distribution channels, a trend which has been reinforced with the rise of distance sales (*i.e.*, sales of telephony products and services *via* the internet and the phone); and (iii) this approach aligns with the European Commission (the "**Commission**"), which no longer distinguishes between the two markets.[16]

Minimal impact on the competitive landscape due to limited market shares. In the downstream mobile telephony retail market, where the Parties' activities overlap, the FCA concluded that the transaction would result in a minimal change in the competitive landscape, because La Poste Telecom holds a negligible market share (less than 5%) while Bouygues Telecom hods a share of 20-30%. In addition, the new entity will continue to face competition from the three main MNOs, namely Orange, SFR, and Free, which together control nearly 70% of the mobile telephony market in mainland France. The FCA thus found that consumers will continue to have credible alternatives to the new entity's services.

Limited importance of physical distribution network. La Poste Groupe owns a vast network of post offices and banking agencies across France which distribute La Poste's mobile telephony services. The FCA noted that the transaction would give Bouygues Telecom access to this large physical distribution network, while Bouygues Telecom already owns exclusive distribution channels, including CIC and Crédit Mutuel bank branches and Bouygues Telecom boutiques, all of which already sell Bouygues Telecom's mobile offers. The FCA found that, as a result, the new entity would have an extensive physical network throughout the country, particularly in rural areas.

However, the FCA considered that this would not raise a significant competitive concern. The FCA found that an extensive physical network was not essential to compete in the market, because of the importance of distance sales. Indeed, distance sales account for 65% to 75% of MNOs' sales and up to 95% of MVNOs' sales. The FCA thus found that distance sales would remain a viable and growing alternative to the new entity's services post-transaction, including in rural areas where Bouygues Telecom's competitors do not have physical presence.

Absence of anticompetitive vertical effects. The transaction creates a vertical link between Bouygues Telecom and La Poste Telecom, since Bouygues, as an MNO, supplies airtime to MVNOs that compete with La Poste Telecom. The FCA examined whether this vertical integration could raise potential input foreclosure concerns, with Bouygues Telecom denying or worsening access to its network to MVNOs competing with La Poste Telecom compared to the conditions offered to La Poste Telecom.

However, the FCA concluded that the transaction would not lead to such input foreclosure because Bouygues Telecom would not have the ability or incentive to engage in such strategy and in any event such strategy would not affect the current access conditions of other MVNOs: (i) existing regulatory obligations, *i.e.* Arcep's frequency-licensing decisions impose a series of commitments on MNOs, mainly concerning contracts between MNOs and MVNOs, including

[14] FCA Decision No. 20-DCC-191 of December 22, 2020 regarding the exclusive control acquisition of Euro Information Telecom (EIT) by Bouygues Telecom group, *Liberty Global/Fluvius/Netco* (Case COMP/M.10994), Commission decision of May 30, 2023, and *Tele2/Com Hem Holding* (Case COMP/M8842), Commission decision of October 8, 2018.

[15] FCA Decision No. 06-D-10 of May 12, 2006, concerning practices implemented by Bouygues Télécom against the wholesaler Stock-Com, and FCA Decision No. 20-DCC-191 of December 22, 2020 regarding the exclusive control acquisition of Euro Information Telecom (EIT) by Bouygues Telecom group.

[16] FCA Decision No. 24-DCC-185 of August 9, 2024 regarding the acquisition of sole control of La Poste Telecom by Bouygues Telecom, paras. 22-25, and *Orange/VOO/Brutélé* (Case COMP/M.10663), Commission decision of March 20, 2023.

obligations relating to the reasonableness of pricing conditions, (ii) other MNOs, such as Orange and SFR, will continue to offer wholesale market alternatives; and (iii) Bouygues Telecom has no incentive to adopt such a strategy, as it would result in a loss of revenue from MVNOs that would not be offset by the potential additional revenues generated by La Poste Telecom.

Takeaways

The decision reflects the FCA's acknowledgement of the need to update its market definition in the telecoms sector to account for the increasing importance of distance sales in the retail/distribution of telephony mobile products and services. The FCA thereby aligned its decisional practice with that of the Commission. The decision also serves as yet another example of consolidation in the telecoms sector, following transactions like *Swisscom-Vodafone*,[17] *Orange/Voo*,[18] and the proposed *Orange-MasMovil* merger.[19] By authorizing the acquisition of La Poste Telecom by Bouygues Telecom, the FCA has facilitated the vertical integration of an MNO and an MVNO, in line with the European Union's objective of creating a single digital telecommunications market through economies of scale and consolidation of telecoms operators.[20]

17 Swisscom Press Release, "EU Commission clears transaction under the Foreign Subsidies Regulation," September 24, 2024.

18 *Orange/VOO/Brutélé* (Case COMP/M.10663), Commission decision of March 20, 2023.

19 *Orange/MásMóvil/JV* (Case COMP/M.10896), Commission decision of February 20, 2024.

20 Draghi Report, *The future of European competitiveness*, Part B. Section 1. Chapter 3, High-speed/capacity broadband networks, September 2024, p. 75 and Part A. Chapter 2. A competitiveness strategy for Europe, p. 27.

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