

## The New French Competition Authority And Competition Law Regime

Paris  
March 30, 2009

On March 2, 2009, the new French Competition Authority formally began discharging its regulatory functions, bringing into force a new French competition law regime.

This new institutional and legal framework results from the Law on the modernization of the economy of August 4, 2008<sup>1</sup> and the Order of November 13, 2008 relating to the modernization of competition regulation.<sup>2</sup> The new legislation is part of a trend towards the modernization of French competition law which began in 2001 and is being pursued under the growing influence of EC law.

The reform is intended to improve the efficiency of French competition law, notably through the creation of the Competition Authority. Its main provisions are:

- The allocation of extended powers and resources to the new Competition Authority;
- The transfer of merger control jurisdiction from the Ministry of Economy to the Competition Authority;
- The strengthening of investigatory powers, notably by allowing investigators to ask questions that are not limited to factual clarification requests; on the other hand, the right to due process is also strengthened by the express acknowledgement of the right to outside counsel during an inspection.

However, the reform does not end the French institutional dualism with respect to the application of competition law. The Ministry of Economy retains the power to request an in-depth investigation of a merger – a request that the Authority may in theory

<sup>1</sup> Law no. 2008-776 of modernization of economy of August 4, 2008, JORF no.181 of August 5, 2008, p. 12471.

<sup>2</sup> Order no. 2008-1161 of November 13, 2008 relating to the modernization of the regulation of competition, JORF no. 265 of November 14, 2008, p. 17391. This order is still to be ratified by Parliament.

reject – and the power to enforce settlements in response to anti-competitive practices affecting “a market of a local dimension” in France.

## **I. A NEW AUTHORITY WITH STRENGTHENED POWERS**

The French Competition Authority (hereinafter, “the Authority”) is the cornerstone of the reform and replaces the Competition Council. It has extended powers, notably with respect to merger control, and strengthened investigation resources.

### **A. PRESENTATION OF THE AUTHORITY**

**Board.** The Authority has independent decision-making powers (*i.e.*, it is not subject to the authority of the Government, subject to limited exceptions outlined below). It has a board of 17 Members, including a Chairman and four Vice-Chairmen<sup>3</sup>, who are appointed by the President of the Republic upon the proposal of the Minister of Economy. The list of the Authority’s current members is provided in the table attached as Annex 1. The Economic Affairs Commissions of both the National Assembly and the Senate give an opinion on the proposed Chairman nomination.

Bruno Lasserre, who had been Chairman of the Competition Council since 2004, chairs the Authority. The following nominees have been appointed as Vice-Chairmen: Patrick Spilliaert, Member of the Auditor-General’s Department, former Secretary general and member of the Executive Committee of Véolia Eau; Anne Perrot, Economics Professor at the University of Paris-I; Françoise Aubert, Judge of the Supreme Court; and Elisabeth Flüry-Hérard, former Member of the *Conseil supérieur de l’audiovisuel*.

The Members of the Authority have collective jurisdiction over merger transactions, and over cartel, abuse of dominant position, or economic dependency cases.

However, the Chairman of the Authority, or a Vice-Chairman appointed by him, has significant decision powers that he may exercise alone:

- authorization of a merger transaction in stage I, which may include authorization subject to conditions, or opening of a stage II in-depth investigation;

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<sup>3</sup> The Commercial Code provides that the Board includes six members or former members of the *Conseil d’Etat*, of the Supreme Court, of the Auditor-General’s Department (*Cour des Comptes*) or of other administrative or judicial courts; five individuals chosen for their expertise with respect to economic, competition or consumer matters; and five individuals practicing or having practiced within a company or a liberal profession.

- dismissal of a claim relating to a cartel or abuse of dominant market position<sup>4</sup> in a case where there is lack of standing or evidence (however, the Authority or its Chairman may not, unlike the European Commission, dismiss a claim for “lack of interest” of the issue raised);
- acceptance of remedies or imposition of sanctions in cases referred to the Authority by the Minister of the Economy.

**Chief Case-Handler.** The investigation and prosecution functions of the Authority are under the sole supervision of the Chief Case-Handler, appointed by the Minister of Economy with the approval of the Authority’s Board. Virginie Beaumeunier, former deputy director at the general competition directorate of the Ministry of Economy (DGCCRF), has been appointed Chief Case-Handler.

The Chief Case-Handler has significant powers. She may suggest to the Members of the Authority to investigate facts likely to constitute a cartel or an abuse of dominant position.

Mrs. Beaumeunier has appointed the following individuals as Deputy Chief Case-Handlers:

- Jean-Marc Belorgey, former Deputy Chief Case-Handler of the Competition Council;
- Eric Cuziat, former head of the DGCCRF merger control division;
- Pierre Debrock, former case-handler of the Competition Council;
- Nadine Mouy, former Deputy Chief Case-Handler of the Council, who has also been appointed as head of the merger department.

Jean Ravoire, former head of the DGCCRF National Division of Inquiries, was appointed director of the new investigations department, which now employs about one hundred investigators.

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<sup>4</sup> The Chairman of the Authority may also rule on matters relating to cartels or to abuses of dominant position of “a local dimension” referred by the Minister of Economy.

**B. EXTENSION OF POWERS AND STRENGTHENING OF THE RESOURCES OF THE AUTHORITY**

Most of the powers and resources that were previously shared by the Competition Council and the Minister of Economy are now centralized within the Authority.

*Power of the Authority with respect to merger control.* Merger transactions are now notified to the Authority, rather than to the DGCCRF.

The Authority rules alone on merger transactions, whether within the framework of a stage I procedure or of a stage II in-depth investigation.

The Minister of Economy nonetheless retains certain powers:

- The Minister may request the opening of an in-depth stage II investigation, which the Authority may in principle refuse;
- The Minister may reverse a decision authorizing or prohibiting a merger transaction from the Authority on grounds of general interest other than the maintenance of competition, notably industrial development, the competitiveness of companies with regard to international competition, or the preservation of employment.

*Creation of an investigation service within the Authority.* Unlike the Competition Council, which had to rely on DGCCRF investigators, the Authority has its own investigators. This should improve the efficiency of investigations and reduce the time period in which cases are handled.

*Opinions and recommendations.* The Authority may, on its own initiative, give its opinion on any competition issue and formulate recommendations to the Government in order to improve “the competitive functioning of the markets.” This new provision will allow the Authority to analyze the functioning of entire economic areas, and can be compared to the European Commission’s power to conduct sector-wide inquiries on competition grounds (*See* the recent EC investigations into pharmaceuticals, financial services, energy and telecommunications industries). The Chairman of the Authority may also testify before the Economic Affairs Commissions of the National Assembly and the Senate.

**II. TRANSFER OF MERGER CONTROL TO THE COMPETITION AUTHORITY**

The transfer of merger control from the Minister of Economy to the Authority constitutes one of the main provisions of the reform. This fundamental change, which

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replaces the former system of double jurisdiction of the Minister of Economy and of the Competition Council by a more efficient mechanism, also features new turnover thresholds applicable in two specific cases, and new procedural time limits.

**A. THE POWERS OF THE AUTHORITY**

*Authorization or prohibition of merger transactions – repeal of the reference to social progress.* Merger transactions are henceforth notified to the Authority.

The Authority examines alone the impact of a merger transaction on competition, whether within the framework of a stage I procedure or an in-depth stage II investigation. With respect to substantive assessment criteria, references to the creation or to the maintenance of employment (stage I) and to the contribution to social progress (stage II) are repealed.

At the end of the procedure, and subject to the exercise by the Minister of the Economy of the powers mentioned below, the Authority may either authorize the merger, authorize it subject to commitments, or prohibit it.

*Possibility to order a demerger.* Like the Minister of Economy before it, the Authority may, in the case of an abuse of dominant position or a state of economic dependency, impose a transfer of assets or the cancellation of joint control that contributed to the emergence of market power, even if the acquisition of these assets or joint control had previously been authorized in the context of a merger control review.<sup>5</sup>

*Appeals.* Appeals against decisions of the Authority with respect to merger control are filed before the *Conseil d'Etat*, the French highest administrative court.<sup>6</sup>

**B. THE POWERS OF THE MINISTER OF ECONOMY**

The Minister of Economy retains the power to request a new examination or to reverse certain decisions of the Authority:<sup>7</sup>

*Opening of a stage II in-depth investigation.* The Minister of Economy may, within five days of the receipt of the Authority's decision, request the opening of an in-depth stage II investigation. The Authority may accept or refuse this request.

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<sup>5</sup> Article L. 430-9 of the Commercial Code.

<sup>6</sup> Decisions of the Authority in non-merger matters are subject to the review of the Paris Court of Appeals.

<sup>7</sup> Article L. 430-7-1. of the Commercial Code

*Ability to reverse, on grounds other than competition, the decisions adopted by the Authority at the outcome of a stage II procedure.* The Minister of Economy may, at the outcome of a stage II in-depth investigation, reverse a decision authorizing or prohibiting a merger transaction on grounds of general interest other than the maintenance of competition, notably (but not exclusively) industrial development, the competitiveness of companies with respect to international competition, or the maintenance of employment.

The Minister of Economy has 25 business days from the receipt of the Authority's final decision to exercise this power. If he does, he shall render a decision that may be subject to the implementation of commitments, after having heard the parties to the transaction. The Minister is not bound by time limits to issue this decision.

### **C. NEW NOTIFICATION THRESHOLDS AND NEW PROCEDURAL TIME LIMITS**

The reform does not modify general notification thresholds but introduces specific thresholds for certain transactions. Moreover, procedural time limits are modified:

#### *a. New series of notification thresholds for retail trade and overseas departments and territories*

The €50 million threshold of total turnover achieved by all parties to the merger transaction and the €50 million threshold of turnover achieved in France by at least two of the parties in the transaction are maintained.

However, new notification thresholds of €75 million and €15 million are applicable instead of the general thresholds in cases where the parties are active in retail distribution or in French overseas territories.<sup>8</sup> In particular, when at least two parties in the merger transaction operate one or several retail stores, the transaction is subject to a filing requirement if:

- All parties to the transaction achieve a total turnover exceeding €75 million; and
- At least two parties to the transaction each achieve in France a total turnover exceeding €15 million in retail trade.

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<sup>8</sup> Article L. 430-2, II. and III. of the Commercial Code.

As drafted, these thresholds appear applicable to any merger transaction involving at least two parties operating retail stores, even if those only represent a marginal share of the parties' business.<sup>9</sup>

***b. New procedural time limits<sup>10</sup>***

***Stage I.*** The stage I procedural limits are the following:

- the normal term of a stage I investigation is 25 business days;
- if commitments are proposed, the stage I is extended for 15 business days;
- these time limits may be suspended for 15 days, at the initiative of the parties, "*in case of specific need, such as the finalization of commitments.*"

***Stage II.*** The stage II procedural time limits are the following:

- the normal term of a stage II investigation is 65 business days;
- if commitments are submitted less than 20 business days before the end of the 65 day period, the stage II is extended for 20 business days;
- these time limits may be suspended for 20 days, at the initiative of the parties, "*in case of specific need, such as the finalization of commitments.*"

***Period for examination by the Minister of Economy.*** As indicated above, the Minister of Economy may:

- at the end of stage I, within five business days from the receipt of the Authority's decision, request the opening of a stage II in-depth investigation;
- at the end of stage II, within 25 business days of the receipt of the Authority's final decision, review it on grounds other than competition.

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<sup>9</sup> In addition, when at least one of the parties in the merger transaction exercises all or part of its business in an overseas department or in the overseas territories of Mayotte, Saint Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy, a transaction is subject to a filing requirement if all parties to the transaction achieve a total turnover exceeding €75 million; and at least two parties to the transaction achieve a turnover exceeding €15 million in at least one overseas department or territory.

<sup>10</sup> Article L. 430-5 of the Commercial Code.

### **III. REFORM OF INVESTIGATION PROCEDURES WITH RESPECT TO CARTEL AND ABUSE OF DOMINANT POSITION MATTERS**

#### **A. STRENGTHENING OF THE AUTHORITY'S INVESTIGATORY POWERS**

*Investigation service.* The Authority now has its own investigators, whereas the Competition Council had to request the assistance of the Ministry's inspection services.

However, the Ministry retains investigations services at a regional level that may conduct simple investigations as well as visits and seizures relating to anticompetitive practices allegedly of "a local dimension."<sup>11</sup>

*Hearings during visits and seizures.* The reform introduces the possibility for the investigators of the Authority and of the Ministry to collect testimony from the occupant during the visits and seizures.<sup>12</sup> This power is extensive since it covers "information or explanations useful for the purposes of the investigation" and is not limited to requests relating to facts or documents, as is the case in European law.<sup>13</sup>

*Sanctions for obstruction of an investigation.* The Authority may, at the request of the Chief Case-Handler, issue an injunction, along with a daily penalty, against companies that do not answer to notice to appear or do not answer in a timely manner an information request of the investigators of the Authority or of the Ministry.

The Authority may also, at the request of the Chief Case-Handler, impose a fine for providing incomplete or inaccurate information or incomplete or altered exhibits.<sup>14</sup> The fine may not exceed 1 % of the turnover of companies allegedly obstructing the investigation or inquiry.

Criminal sanctions that were already in force prior to the reform, have been maintained: in the case of obstruction, individuals may be sentenced to 6 months in prison and a €7,500 fine, and legal entities to a €37,500 fine.<sup>15</sup>

*Withdrawal of complaint.* The Commercial Code formalizes the Paris Court of Appeals' precedent according to which the withdrawal of a complaint does not result in

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<sup>11</sup> Ministry investigators may also assist the Authority's investigators with visits and seizures initiated by them.

<sup>12</sup> Article L. 450-4, paragraph 8, of the Commercial Code.

<sup>13</sup> Article 20(1) (e) of Regulation 1/2003.

<sup>14</sup> Article L. 464-2, V. of the Commercial Code.

<sup>15</sup> Article L. 450-8 of the Commercial Code.



the removal of the case from the jurisdiction of the Authority, which retains the power to continue the case.<sup>16</sup>

**B. STRENGTHENING OF THE RIGHTS OF THE DEFENSE**

***Right to be assisted by an attorney (outside counsel) during visits and seizures.*** During visits and seizures, investigators are bound to inform occupants that they may be assisted by an attorney.<sup>17</sup> While the presence of an attorney used to be “tolerated” by competition investigators, it is now a legal right. However, inspections need not be suspended to wait for the arrival of an attorney.

***Appealing the order authorizing the visits and seizures.*** Until now, orders authorizing visits and seizures could only be the object of a special appeal before the Supreme Court, which limited the review only to questions of law. This has been challenged in the European Court on Human Rights,<sup>18</sup> and companies may now submit an appeal against inspection orders<sup>19</sup> to the Chief Justice of the Court of Appeals. The ruling of the Chief Justice may itself be the object of a special appeal on questions of law before the Supreme Court.

***Appeal relating to visit and seizure procedures.*** Appeals relating to the actions of investigators in the course of visits and seizures are now to be submitted before the Chief Justice of the Court of Appeals, and no longer before the judge who authorized the inspection.<sup>20</sup> The order of the Chief justice of the Court of Appeals may be the object of an appeal on questions of law.

***Hearing Officer.*** The Authority will have a Hearing Officer appointed by the Minister of Economy, with the consent of the Members of the Authority. Once a statement of objections is sent, she will collect the parties’ comments concerning the manner in which the proceedings affecting them are being carried out, and may suggest to the Chairman any measure likely to improve the exercise of the parties’ rights.<sup>21</sup> However, the hearing officer does not participate in the Authority’s hearings, unlike the hearing officers of the European Commission. The Hearing Officer, who must be a judge, has not been appointed yet.

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<sup>16</sup> Article L. 462-8, paragraph 6, of the Commercial Code.

<sup>17</sup> Article L. 450-4, paragraph 5, of the Commercial Code.

<sup>18</sup> ECHR, February 21, 2008, 3<sup>rd</sup> section, *Ravon and A v. France*, Req. 18497/03.

<sup>19</sup> Article L. 450-4, paragraph 6, of the Commercial Code.

<sup>20</sup> Article L. 450-4, paragraph 12, of the Commercial Code.

<sup>21</sup> Article L. 461-4, paragraph 4, of the Commercial Code.

*Absolute ten-year time statute of limitations.* In addition to the five-year time limit, which prevents the Authority from investigating facts dating back to more than five years if no investigation has previously been carried out, a ten-year statute of limitations applies in all cases, as from the date on which the practices in question have ceased.<sup>22</sup>

### C. **“RESIDUAL” POWERS OF THE MINISTER OF ECONOMY**

*Power to initiate investigations.* The Minister of Economy may, on his own initiative, initiate investigations relating to allegedly anticompetitive practices. However, he must previously inform the Chief Case-Handler of the Authority who may decide to lead the investigation. The Chief Case-Handler must be informed of the results of the investigation in order to be able to suggest that the Authority examine the case on its own initiative.

The Minister of Economy may also refer any alleged anticompetitive practice to the Authority.<sup>23</sup>

*Injunction and settlement power relating to local size anticompetitive practices.* The Minister of Economy now has the power to end anticompetitive practices deemed to be of “a local dimension”, defined as involving companies with a combined turnover in France of less than €100 million and an individual turnover of less than €50 million.

The Minister’s power only applies if the matter has not been referred to the Authority.

The Minister may:

- Instruct the companies to put an end to a cartel, to an abuse of dominant position or of economic dependency; and/or
- Propose that they conclude a settlement, pursuant to which the relevant company pays the Treasury a maximum amount of €75,000.<sup>24</sup>

The Minister of Economy is bound to refer the matter to the Authority if a company refuses to comply with an injunction or to settle. In contrast, the acceptance by

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<sup>22</sup> Article L. 462-7, paragraph 3, of the Commercial Code.

<sup>23</sup> Article L. 462-5 of the Commercial Code.

<sup>24</sup> Or 5 % of the last turnover achieved in France, if it was less than €75,000.

a company of the injunction or settlement procedure bars any proceedings before the Authority based on the same facts.<sup>25</sup>

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For more information concerning the matters discussed above, do not hesitate to contact Antoine Winckler, François Brunet or Stéphanie Hallouët in the Paris and Brussels offices.

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<sup>25</sup> Article R. 464-9-3 of the Commercial Code.

**France – Members of the Competition Council and of the Competition Authority – March 2009**  
*(The names of the new members appear in italics)*

Name	Position in the Authority	Position in the Council	Title
<b><i>Chairman and Vice-Chairmen</i></b>			
1. Bruno Lasserre	Chairman	Chairman	Co-Presiding Judge of the litigation section of the <i>Conseil d'Etat</i>
2. Françoise Aubert	Vice-Chairman	Vice-Chairman	Judge of the Supreme Court
3. Anne Perrot	Vice-Chairman	Vice-Chairman	Professor of Economic Science at the University Paris I
<b><i>4. Elisabeth Flüry-Hérard</i></b>	<b><i>Vice-Chairman</i></b>	-	<b><i>Former member of the Conseil supérieur de l'audiovisuel</i></b>
<b><i>5. Patrick Spilliaert</i></b>	<b><i>Vice-Chairman</i></b>	-	<b><i>Member of the Auditor-General's Department</i></b>
<b><i>Judges and former judges</i></b>			
<b><i>6. Noël Dirieq</i></b>	<b><i>Member</i></b>	-	<b><i>Senior member of the Auditor-General's Department</i></b>
<b><i>7. Jean-Bertrand Drummen</i></b>	<b><i>Member</i></b>	-	<b><i>Presiding judge of the Nanterre Commercial Court</i></b>
8. Pierrette Pinot	Member	Member	Judge of the Supreme Court
<b><i>9. Thierry Tuot</i></b>	<b><i>Member</i></b>	-	<b><i>Member of the Conseil d'Etat</i></b>
<b><i>Members chosen based on their expertise in economic, competition or consumer matters</i></b>			
<b><i>10. Yves Brissy</i></b>	<b><i>Member</i></b>	-	<b><i>Attorney at law</i></b>
11. Emmanuel Combe	Member	Member	Professor of Economic Science at University Paris I, Professor affiliated to ESCP-EAP
<b><i>12. Laurence Idot</i></b>	<b><i>Member</i></b>	-	<b><i>Professor of Competition law at the University Paris II</i></b>
<b><i>Members chosen based on their professional experience</i></b>			
<b><i>13. Pierre Godé</i></b>	<b><i>Member</i></b>	-	<b><i>Director of the LVMH group</i></b>
<b><i>14. Jean-Vincent Boussiquet</i></b>	<b><i>Member</i></b>	-	<b><i>Chairman of the Union nationale artisanale Charpente, menuiserie, agencement</i></b>
15. Reine-Claude Mader-Saussaye	Member	-	Chairman of the <i>Confédération de la consommation, du logement et du cadre de vie</i>
<b><i>16. Denis Payre</i></b>	<b><i>Member</i></b>	-	<b><i>Deputy Director of Kiala SA</i></b>
17. Carol Xueref	Member	Member	Head of the development and legal affairs department of Essilor International SA

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