LES
ESSENTIELS

# LES ENGAGEMENTS COMPORTEMENTAUX
# BEHAVIOURAL REMEDIES

La documentation Française

Autorité de la concurrence

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# SUMMARY

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*This study has the dual aim of taking stock of the decision-making practice of the Autorité de la concurrence in terms of behavioural remedies, and providing material for broader reflection on the subject. The Autorité is particularly well placed in this respect as it has made significant use of this tool, which it uses both to put a stop to anticompetitive practices, and in its task of reviewing mergers. By presenting and providing a summary analysis of decision-making practice in terms of behavioural remedies, the Autorité aims to provide companies preparing for a merger or procedures related to anticompetitive practices with tools to understand the methodology it applies in this area, and the objectives. It therefore aims to clarify the matter for the companies concerned and all stakeholders. In addition, the study forms part of a broader reflection carried out by the Autorité on the adaptation of its intervention methods and its application of behavioural remedies in case law.*

*The assessment of the decision-making practice of the Autorité in terms of behavioural remedies is notably made by comparing these commitments to structural commitments according to three criteria*: *the speed of implementation, their irreversible or temporary nature and the difficulties associated with monitoring their execution.*

*The study is divided into five parts. Firstly, it provides a general overview of the principles that companies should take as a guide when drawing up these* «taylor-made» *commitments. Proportionality in terms of content and duration, their verifiable nature and monitoring are the three key criteria that the study identifies as making it possible to guarantee the effectiveness of commitments.*

*Commitments undertaken in relation to merger control and anticompetitive practices, those accepted before any notice of breach and, lastly, commitments presented in the context of a settlement procedure are then described and discussed in succession. In each case, the study covers the diverse range of forms that they can take and analyses the particular features specific to each procedure. It formulates, notably based on the rich decision-making practice of the Autorité, recommendations to guarantee the effectiveness of commitments, as well as detailing the physiognomy of commitments, the context in which they were made and their scope.*

*The effectiveness of commitments cannot be analysed without paying particular attention to their monitoring, which makes it possible to ensure that they achieve the desired objective and are applied effectively by companies. In order to be guaranteed, this effectiveness must also be combined with the possibility of revising the commitments when de jure or de facto circumstances are likely to affect the competition data on which they were based. This is why the Autorité has decided to dedicate a section to the procedure for monitoring and revising commitments, which details the various monitoring processes used by the Autorité, as well as the powers it has to ensure that commitments are respected. The study then looks at the various forms that the revision procedure can take, and the Autorité's decision-making practice in this area.*

*Here, the study reports on the particular difficulties encountered in monitoring compliance with behavioural remedies, which in certain cases may reduce the benefits of their flexibility and rapidity, and compromise their capacity to re-establish or maintain the competitive dynamic. At this point, the comparison with structural commitments is particularly useful, as it makes it possible to identify the nature of the difficulties and lay the foundations for reflection on changes to the Autorité's decision-making practice.*

*In this respect, the study concludes that it is necessary to limit the use of behavioural remedies by favouring, as far as possible, quasistructural commitments in anticompetitive practice law and structural commitments in merger law.*

*The last part of the study focuses on commitment litigation before civil and administrative courts and covers, this time, all commitments – both structural and behavioural. Here, it takes a practical look at the actions likely to be contested, the conditions under which third parties may see an interest in taking such a step and the powers of the courts to which such cases are referred, according to their administrative or judicial nature and the type of decision being contested.*

*Lastly, the study draws a conclusion on the Autorité's view of behavioural remedies.*

*As demonstrated by the retrospective analysis of decision-making practice, commitments constitute a particularly useful intervention tool for competition authorities, as they are flexible and adaptable, and make it possible to maintain or rapidly re-establish public economic order, whether in anticompetitive practice law or merger law.*

*The effectiveness of commitments lies notably in the special way in which they are developed, namely that they are proposed themselves that must apply them and developed jointly with other stakeholders on the market concerned. Commitments may take a highly diverse range of forms, particularly in the case of behavioural remedies, which illustrates their great flexibility.*

*However, the latter are not completely without inconveniences, which principally come to light during their monitoring and review. A monitoring system that is too complex and time-consuming can eliminate any procedural advantages gained by the initial acceptance of the commitments.*

*In addition, the introduction of certain complex remedies, particularly in the telecommunications and audiovisual fields, is likely to lead the Autorité to act like a sector-specific regulator. It also risks preventing the market from functioning by itself, without leaning on the "crutch" provided by the commitments.*

*This is why the Autorité, alongside other competition authorities, is currently considering the more stringent use of behavioural remedies, favouring quasi-structural commitments in anticompetitive practice law and structural commitments in merger law whenever they provide a better response to the competition issues.*

# FOREWORD

The *Autorité de la concurrence* (hereafter "the *Autorité*" ) "*is responsible for ensuring fair competition. It assists in the competitive operation of markets at the European and international levels*."[1] As the guardian of public economic order, it has various tools available to achieve its mission.

Behavioural remedies, the subject of the present study, are one of the powers available to the *Autorité* to correct, in the context of anticompetitive practices, or prevent, in the context of merger control, threats to competition law. They currently constitute, on an international scale, a vital tool for competition authorities, lying at the heart of the way in which the latter exercise their prerogatives in these two domains. A rich decision-making practice has been developed, notably in France, where the French authority's more frequent recourse to behavioural remedies causes it to stand out at European level. The flexible way in which they are built and the speed with which they can remedy competition issues makes them a seemingly effective solution.

However, designing them can sometimes be an arduous task. Furthermore, monitoring compliance with behavioural remedies can often be a complex task, for both the companies undertaking them and the *Autorité*, which must check that they are correctly implemented. This monitoring is all the more difficult given the rapidly changing nature of the markets, which requires swift reaction from the authorities to maintain the utility of the commitments offered. These

1 Article L. 461-1 of the French Commercial Code (*Code de commerce*).

difficulties have led to questions regarding the best way for competition authorities to use behavioural remedies.

A debate is developing at an international level based on two main themes. The first concerns the effectiveness of behavioural remedies; it questions the capacity of competition authorities to evaluate them and ensure that they are applied correctly, notably due to the constant monitoring – which involves the mobilization of significant resources – such commitments compel the authorities. The second focuses on the consequences of the use of behavioural remedies. Has the too-frequent acceptance of this type of remedy led competition authorities to behave like regulators and prevent, in certain cases, the emergence of a truly competitive dynamic? This is the conclusion reached on the other side of the Atlantic by Makan Delrahim, Assistant Attorney General for the Antitrust Division at the United States Department of Justice, who has declared firm support for limiting recourse to behavioural remedies in merger control, in favour of structural remedies, or even a prohibition on certain mergers. On its side, the European Commission (hereafter: «the Commission») also believes that behavioural remedies should only be used on an exceptional basis.[2]

In contrast, certain analysts highlight the importance of behavioural remedies in the domain of merger control; they allow a better response to market changes that are difficult to anticipate, and better adaptability and proportionality. As a result, in a recent report on European Union competition policy, the French Inspectorate-General for Finance (*Inspection générale des finances*) notably proposed modifying the Commission

2 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

notice[3] on remedies to "*facilitate recourse to behavioural remedies, by favouring them or, as a minimum, placing them on an equal footing with structural remedies*."[4]

This study, which takes stock of current practices with regard to behavioural remedies by the *Autorité*, demonstrates the desire of the latter to lay the foundations for an analysis framework and classification of the difficulties such commitments raise, in order to inform future reflections on this subject.

3 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

4 French Inspectorate-General for Finance (*Inspection générale des finances*), *La politique de la concurrence et les intérêts stratégiques de l'UE* [Competition policy and the strategic interests of the EU], April 2019, p. 27.

# INTRODUCTION

Commitments are a hybrid tool for administrative action. They are a promise, formulated by the target of this action, to act in a given way. This promise, which must then be accepted by the competent administrative authority that receives it, is similar to a contract. However, it differs from a contract in that the commitments are made obligatory through the decision of the administrative authority alone. Commitments therefore take the form of a unilateral instrument with negotiated content.

These measures respond to the need, which is particularly notable in economic law, to involve operators in establishing the rules that govern the functioning of markets. This joint development of rules is not a new practice, as demonstrated by the commitments by professionals to stabilise prices likely to be annexed to the regulations setting the price regime enacted in application of French Order 45-1483 of 30 June 1945.[5] However, it has become more widespread with the liberalisation of the economy, which, by modifying the modes of market intervention, has led to the development of the regulations in their current form. This is why commitments currently play an important role in the work of the *Autorité*, which is able to accept them to address any

5 French Order 45-1483 of 30 June 1945 on Prices; French Administrative Supreme Court (*Conseil d'Etat*), *Section*, 2 March 1973, French National Trade Association for Wholesale Equipment, Vehicle Parts and Tools (*Syndicat national du commerce en gros des équipements, pièces pour véhicules et outillages*) in *Recueil* and, more generally, French Administrative Supreme Court (*Conseil d'Etat*) study and documents: *Le contrat, mode d'action publique et de production de normes* [The contract, a public and standard-generating mode of action], 2007, p. 59.

concerns regarding competition that may arise from mergers or potentially anticompetitive practices.

This tool has gradually undergone development in competition law internationally, as in France. The Commission is thereby permitted to make decisions regarding commitments under Article 9 of Regulation 1/2003 on the Implementation of the Rules on Competition and Article 8 of Regulation 139/2004 on the Control of Concentrations. American bodies have had similar powers since the Tunney Act was passed in 1974.[6] Initially oriented towards anticompetitive practices, this law enabled the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to also adopt amicable regulations based on commitments made in the implementation of merger control, based on Section 7 of the Clayton Act.[7] Guidelines inform the action taken by the FTC in this area.[8]

The international community has also taken an interest in this tool. Charged with promoting cooperation and the convergence of the decision-making practices of national competition authorities, the International Competition Network (ICN) has recognised the advantages of commitments in merger control. In this context, it has shown that structural commitments, which are relatively easy to introduce and administer, and which are directly applicable, may be favoured over

6 Antitrust Procedures and Penalties Act (1974, 15 US Code §16, "APPA" or Tunney Act).

7 https: //www.justice.gov/atr/file/873491/download: Commitment Decisions in Antitrust Cases, note by the United States for the 125th meeting of the OECD Competition Committee, June 2016, pp. 3 and 4, §6 and §13.

8 FTC Rules of Practice, 16 CFR.

behavioural remedies.[9] The ICN's Merger Working Group has however found that in cases where no credible purchaser can be identified by the competent authorities, or in the case of vertical mergers, behavioural remedies such as supply obligations may be more appropriate if they are time-limited.

In competition law, commitments are sometimes referred to by the general terms «remedies» or «corrective measures», which cover in this case the requirements or injunctions imposed unilaterally by the *Autorité*. However, a distinction may be drawn in terms of both their origin and the procedure through which they are adopted. Indeed, when voluntarily proposed by the concerned parties, they break away from the top-down nature of coercive measures imposed by the *Autorité*, which explains why they have been qualified as «*self-prescribed remedies*».[10]

## COMMITMENTS IN MERGER LAW

In French merger law, the right of notifying parties to include commitments in their notification was introduced at the same time as merger control by French Law 77-806 of 19 July 1977,[11] although control was still the responsibility of the French Minister for the Economy until its transfer to

9 https: //www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf: ICN Merger Working Group, Merger Remedies Guide, Section 3.2.1: Structural and Non-structural Considerations, 2016.

10 A. Mouzon, *Le respect des engagements. Un point de vue de l'Autorité de la concurrence* [Respecting commitments: A view from the *Autorité de la concurrence*], *Concurrences*, n° 12012, p. 13.

11 French Law 77-806 of 19 July 1977 on Economic Merger Control and the Prevention of Illegal Agreements and Abuses of Dominant Positions.

the *Autorité* as part of the 2008 reform.[12] Under current law, these commitments can be undertaken by the notifying companies at any point of the procedure under Article L. 430-5 of the French Commercial Code (*Code de commerce*). This applies to both the first phase of examination of the transaction (referred to as "phase 1" ) and the in-depth examination phase (referred to as "phase 2" ) if opened, in accordance with paragraph II of Article L. 430-7 of the same code. The situation is different for injunctions or requirements, which, on the other hand, are imposed unilaterally by the *Autorité* following *inter partes* proceedings under paragraph III of Article L. 4307 of the French Commercial Code, in phase 2 only. The examination of practices reveals that almost all commitments are submitted in phase 1, the majority of which are accepted by the *Autorité*. Parties have an interest in ensuring that the transaction is compatible with competition law and avoiding a phase 2 examination, which is much more restrictive for all parties to the merger. However, it remains the case that if phase 2 is opened, parties retain the right to propose commitments until the end of that phase, as demonstrated by certain decisions regarding large-scale transactions (see for example Decisions 14-DCC-160 of 30 October 2014 regarding the acquisition of sole control of SFR by the Altice group; 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac; and 18-DCC-95 of 14 June 2018 regarding the acquisition of sole control of part of the Agripole group's non-chilled ready meals division by Financière Cofigeo[13]).

12 French Law 2008-776 of 4 August 2008 on the Modernisation of the Economy.

13 Although injunctions were ultimately imposed by the *Autorité* in this case, the notifying party had proposed, at the end of phase 2, commitments that were considered insufficient to remedy the competition issues identified.

The purpose of commitments is to maintain sufficient competition on the markets concerned by the proposed transaction. In addition, although this is not their primary objective, they contribute to preventing potential anticompetitive practices. An integral part of the transaction clearance decision, these measures are comparable to the commitments likely to be accepted by industry regulators applying a prior clearance system.[14]

## COMMITMENTS IN ANTICOMPETITIVE PRACTICE LAW

It was not until French Law 2001-420 of 15 May 2001[15] that the «no contest of objections" procedure was created, which has since been transformed into a settlement procedure[16] and codified in paragraph III of Article L. 464-2 of the aforementioned code, so that this tool can also be used in the context of sanctions for anticompetitive practices. At the time, commitments constituted one of the conditions necessary for the implementation of this new procedure, until French Order 2008-1161 of 13 November 2008[17] made them optional in the event of no contest of objections.

14 In this way, they proceed, for example, from the same reasoning as the commitments associated with the clearance decisions regarding the use of frequencies issued by the French Broadcasting Regulator (CSA). See for example French Administrative Supreme Court (*Conseil d'Etat*) 31 January 1997, Pied-Noir Union (*Union Pieds Noirs*), nº. 14234, 150778, in *Recueil*.

15 French Law 2001-420 of 15 May 2001 on the New Economic Regulations.

16 French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

17 French Order 2008-1161 of 13 November 2008 on the Modernisation of Competition Regulations.

However, it is above all since the creation of the commitment procedure, based on the European model and arising from French Order 2004-1173 of 4 November 2004,[18] that commitments became a vital instrument in the control of anticompetitive practices. Codified in paragraph I of Article L. 464-2 mentioned above, the "commitment procedure" constitutes a procedure in its own right, distinct from that leading to a notice of breach as it is quicker and more flexible. Its aim is to ensure that "*the company voluntarily ceases or modifies, for the future, behaviour that has raised concerns regarding competition*".[19] It also makes it possible to put an end to litigation proceedings before the *Autorité*, but only before any notice of breach is issued. This is why it cannot be implemented once the objections have been raised.

Of a remedial nature, the commitments undertaken to respond to potentially anticompetitive practices are intended to re-establish the smooth functioning of the market. They do not prevent infringements, but rectify them. This innovative use of commitments is specific to competition authorities. However, it is not completely alien to other authorities, notably the French Broadcasting Regulator (CSA), which the French Administrative Supreme Court (*Conseil d'Etat*) has recognised as having, without a text, the right to accept commitments instead of issuing a sanction.[20]

18 French Order 2004-1173 of 4 November 2004 on the Adaptation of Certain Provisions in the Commercial Code to Community Competition Law.

19 Notice on Competition Commitments issued on 2 March 2009.

20 On this point, see French Administrative Supreme Court (*Conseil d'Etat*), 6 April 1998, French Audiovisual Production Union (*Union syndicale de la production audiovisuelle*), n°. 173291, unpublished in *Recueil*.

These remedies therefore respond to different requirements according to whether they have been taken to respond to a change in market structure following a merger, or to re-establish competition after a practice has raised concerns regarding competition. However, on a highly exceptional basis, it may occur that competition concerns arising from a merger notified by an operator are the same as those resulting from its current behaviour on the market, examined on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce)*. In this case, these concerns can lead to the acceptance of similar commitments in these two procedures, as was the case in the two decisions issued by the *Autorité* regarding La Poste on 21 December 2017.[21]

## DEVELOPMENT OF THE USE TO COMMITMENTS

The progressive development of the use of commitments through various *Autorité* procedures can be explained by their multiple advantages.

By involving economic operators in maintaining or re-establishing the public economic order, this participative regulatory tool enables them to actively collaborate in developing the solutions needed to preserve the competitive operation of the markets. Thanks to their good knowledge of these markets, operators can propose remedies suited to the competition concerns identified by the *Autorité*. The fact that they draw up these remedies themselves is also a guarantee of their correct implementation. In return, these remedies allow companies to save themselves an onerous procedure that

21 Decision 17-DCC-209 of 21 December 2017 regarding the creation of a joint venture by La Poste and Suez RV France, and Decision 17-D-26 of 21 December 2017 regarding practices implemented in the collection and recovery of non-hazardous office waste sector.

can result in the issuing of coercive measures and, in anticompetitive practice law, to obtain a reduction in the penalty or avoid it altogether. It remains the case that recourse to commitments must always be carefully weighed and adapted to the data of the case, to avoid calling into question the deterrent effect of the sanction procedure. In anticompetitive practice law, the fact of reducing or eliminating a sanction in association with commitments may increase the incentive for companies to engage in anticompetitive practices.[22] In the context of merger control, the possibility of using commitments to avoid potential anticompetitive risks increases the incentive to envisage large-scale transactions that are likely, at first sight, to lead to reduced competition on the markets.[23] Commitments therefore facilitate mergers that are generally a source of market efficiencies. Lastly, the design and monitoring of commitments incurs administrative costs for competition authorities,[24] as well as for the companies, during commitment preparation and acceptance, as well as throughout the monitoring of implementation. Yet if these costs are anticipated and controlled, commitments allow the *Autorité* to ensure fair competition through rapid, tailored intervention.

22 For an analysis of the choice between limited deterrents and the rapid restoration of competitive conditions, see Choné P., Souam S., Vialfont A., (2014), On the optimal use of commitment decisions under European competition law, *International Review of Law and Economics*, vol. 37, pp. 169-179.

23 See Cosnita-Langlais A. and L. Sorgard (2018), Enforcement vs deterrence in merger control: Can remedies lead to lower welfare?, *Review of Law and Economics* (forthcoming).

24 See Joskow, P. (2002), Transaction Cost Economics, Antitrust Rules and Remedies, *Journal of Law, Economics & Organization* 18 (1), pp. 95-116, on the importance of taking into account settlement costs when developing a competition policy that incorporates the possibility of commitments.

These shared interests, which are based on a "win-win" approach, explain why commitments have an important place in the *Autorité*'s decision-making practice.

In the context of merger control and all other things being equal – remedies are therefore used relatively frequently in France, in comparison to the practices of other global competition authorities. Between 1 January 2003 and 31 December 2018, 116 clearance decisions were associated with commitments, 68 of which were taken by the *Autorité*, in comparison to just three clearance decisions associated with injunctions or requirements.[25] The *Autorité* has also frequently accepted commitments under anticompetitive practice law. Indeed, of the 42 decisions issued between 2009 and 2018 in application of the "no contest of objections" procedure (which was replaced by the settlement procedure in 2015[26]) more than 70% were associated with commitments. In addition, over the same period, the *Autorité* issued on average four commitment decisions a year, in comparison to just over 10 sanction decisions.

The importance of commitments in competition law applied by the *Autorité* can also be seen through the effects of certain representative decisions, in relation to both the stakeholders in the sectors concerned and consumers.

25 French Regulation of 25 May 2005 on several warehouse acquisitions by the Sogebra-Heineken group in the hospitality industry beer distribution sector; Decision 12-DCC-100 of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi and Groupe Canal Plus; Decision 18-DCC-95 of 14 June 2018 regarding the acquisition of sole control of part of the Agripole group's non-chilled ready meals division by Financière Cofigeo.

26 French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

For example, this is the case for Decision 14-DCC-50 of 2 April 2014[27] on the acquisition, by the Canal+ group, of the companies broadcasting the Direct 8 and Direct Star channels, which allowed it to invest in the free-to-air television market. The *Autorité* accepted commitments that notably aimed to ensure that the buyer power of the Canal+ group did not allow it to exclude competing free channels from rights acquisition markets, without however preventing GCP from supplying the channels acquired with attractive programmes to the benefit of viewers. These commitments were either maintained, lifted or adapted in 2017 to take into account developments in the audiovisual sector, in particular the new and growing competitive pressure exerted by Altice. Decision 15-D-06 of 21 April 2015[28] is another good illustration of this. The *Autorité* accepted commitments proposed by Booking.com that aimed, from 1 July 2015, to amend the price parity and availability clauses they applied to hotels, in order to give the latter more freedom in commercial and pricing matters.

The predominant role played by commitments in the smooth functioning of the market is no French exception. Indeed, on 7 February 2018,[29] the Spanish competition authority accepted the commitments proposed by Mediapro, the main holder and operator of football rights in Spain, to put an end to proceedings against the company for the abuse of a dominant position. This is a good example of the advantage for

**27** Decision 14-DCC-50 of 2 April 2014 on the acquisition of sole control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Canal Plus Group.

**28** Decision 15-D-06 of 21 April 2015 on the practices used by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector.

**29** CNMC, 7 February 2018, S/DC/0604/17 Mediapro Fútbol.

national competition authorities and market stakeholders of working together on the necessary measures to maintain competition. The commitments presented by Mediapro and approved by the Spanish authority consisted of, on the one hand, an obligation to give access to the channels BeIN La Liga and BeIN Sports to all pay TV operators that requested it, and, on the other, the establishment of fair, non-discriminatory economic and trading conditions for access to these channels.[30]

The recent decision of 24 May 2018 in relation to Gazprom[31] issued by the Commission is another example. According to Margrethe Vestager, European Commissioner in charge of competition, the behavioural remedies made obligatory at this end of this procedure made it possible to remove "*obstacles created by* [this company]*, which stand in the way of the free flow of gas in Central and Eastern Europe*".[32] The remedies resolved concerns regarding the partitioning of the market, for which Gazprom proposed removing direct or indirect restrictions on the cross-border sale of gas and committing not to reintroduce any such restrictions in the future, including in the context of calls for tender.[33] The remedies also responded to concerns regarding the excessively high prices that Gazprom may have charged, with the company committing to offer current or future customers a price revision

**30** https: //www.concurrences.com/fr/revue/issues/no-2-2018/chroniques/chroniques-droits-europeens-et-87008.

**31** European Commission, 24 May 2018, Upstream gas supplies in Central and Eastern Europe, case number AT. 39816.

**32** AFP, 24 May 2018: *Abus de position dominante: Gazprom échappe à une amende de l'UE* [Abuse of a dominant position: Gazprom escapes EU fine].

**33** Note by Advisory Committee regarding case AT. 39816 (Gazprom), 2 May 2018, §36.

clause in any contracts concluded or to significantly improve any existing price revision clauses.[34]

## THE DIFFERENCE BETWEEN STRUCTURAL COMMITMENTS AND BEHAVIOURAL REMEDIES

Commitments therefore constitute a major tool for action, the flexibility of which makes it possible to address a wide range of competition issues. Practically speaking, they cover a huge variety of measures. Yet there is not currently a shared international classification system for the different types of commitment. A distinction is simply drawn between two main categories: structural commitments and behavioural remedies. This dichotomy is traditionally based on the effects generated by the commitments, the first directly modifying the structure of the markets (the number, quality or scope of operators active on a market) by themselves, and the second limited to regulating the behaviour of the parties undertaking them. As a result, when commitments impose the divestiture of assets or a breaking of contractual ties in order to maintain an independent offer on the market, they are considered to be "structural". If they restrict the commercial or strategic behaviour of a company, on the other hand, they are qualified as "behavioural".

While structural commitments generally make provision for the definitive transfer (or renunciation) of contractual or property rights, behavioural remedies impose restrictions on the competitive behaviour of the company concerned, over a period that must be determined. Although they do not deprive a company of the capacity to exercise market power,

34 Note by Advisory Committee regarding case AT. 39816 (Gazprom), 2 May 2018, §46.

behavioural remedies force them to adopt trade practices that favour the continuation or re-establishment of effective competition on markets threatened by anticompetitive risks.

However, the line between structural commitments and behavioural remedies can be blurred, and there is no fully accepted definition that allows all the commitments undertaken by companies to be classified into one or the other of these categories. For the purposes of this study, the *Autorité* therefore proposes drawing a distinction between behavioural remedies and structural commitments, by placing in the latter category those commitments that are rapidly (instantly) executed and irreversible in nature, and which only require monitoring by the *Autorité* for a short period, generally less than a year, i. e. the time it takes to implement them.

This means that, where a commitment makes provision, within a set but short period, for a company to sell an asset, break or conclude a franchise or procurement contract, or withdraw from the capital of a company, for example, this commitment is considered structural as, after a period of a few months, it should take full effect and, as a result, cease to require active monitoring by the *Autorité* or trustee responsible for its monitoring. Conversely, a behavioural remedy should take effect over the medium term, be the subject of rigorous and continuous monitoring, and be undertaken for a variable duration, generally between five and 10 years in merger law, and an average of five years in anticompetitive practice law.

However, it remains the case that in merger law, the criterion of commitment duration has also been used in the definition of the commitment concerned. Decision-making practice therefore considers that remedies consisting of statutory or contractual modifications, or the conclusion of franchise contracts, for example, may be considered quasi-structural if

they are taken without any time limit (as in Decision 11-DCC-150 of 10 October 2011 on the acquisition of sole control of the cooperative Elle-et-Vire by the cooperative group Agrial),[35] or behavioural if they are taken for a determined period (as in Decision 17-DCC-210 of 13 December 2017 on the merger by absorption of Coopérative des Agriculteurs de la Mayenne by the agricultural cooperative Terrena).

## THE USE OF BEHAVIOURAL REMEDIES

The distinction made regarding the type of commitments is the same throughout competition law. However, the frequency and mode of use of these remedies vary according to the legal basis under which they are accepted.

This means that, in merger law, behavioural remedies aim to momentarily preserve the competitive structure of the markets in which a competition concern has been identified, in order to give other operators time to engage in strategies to effectively compete with the new entity, or even to allow the launch of new operators. These strategies can take several forms: diversification of procurement or sale sources, gradual withdrawal in relation to the new entity, the building or development of production capacities or a brand, entry on the market, etc.

Behavioural remedies are therefore only intended to temporarily restrict the competitive behaviour of the parties to enable operators (competitors, customers or suppliers) to react to the structural modification of the market that has occurred

35 Actions contrary to the commitment (reintroducing the deleted clauses or breaking the franchise contract, for example) could be considered a failure to comply with the commitment if they occur in a period following which the competitive structure of the markets concerned remains unchanged.

as a result of a merger strengthening the market power of a stakeholder. They do not aim to fix the competitive structure of a market, and as such form part of a dynamic prospective analysis that incorporates the capacity of economic stakeholders to react to the changes. Although past decisions made by the French Minister for the Economy contain behavioural remedies undertaken for an indefinite period, it should be emphasised that these are isolated cases. Furthermore, no behavioural remedies of an indefinite duration have been accepted by the *Autorité* to date, as such a permanent commitment could be likened to a type of sector-specific regulation.

In addition, certain decisions sometimes contain mixed commitments, that is of both a behavioural and structural nature, which aim to respond to different competition concerns. The most common case is that of a merger likely to generate both horizontal and vertical effects. In such a case, the company is often persuaded to undertake structural commitments to address the risks associated with horizontal effects and, where these commitments are insufficient to reduce the market power of the new entity on upstream or downstream markets, to also undertake behavioural remedies intended to address the risk of vertical effects. Other decisions involve both types of commitment where – on several affected markets – the characteristics of the products or services concerned, the functioning of the markets as well as the positions of the entity resulting from the merger of its competitors have not made it possible to propose a global remedy (see for example Decision 15-DCC-53 of 15 May 2015 on the acquisition of sole control of Totalgaz SAS by UGI Bordeaux Holding SAS).

To date, in France, all decisions accepting commitments under anticompetitive practice law have related to reversible

commitments, which must rather be considered commitments of a behavioural type. Of a highly varied nature, some of these commitments are qualified as quasi-structural, as previously indicated by the *Conseil de la Concurrence* (hereafter "the *Conseil*" ) in its 2005 thematic study on competition law instruments.[36] Behavioural by nature, these remedies are generally accepted for an indefinite period. They may have an effect on the market structure (when they involve granting a licence to a competitor, for example) or modify the organisation of the company or body proposing them (notably when they result in the creation of a cost accounting system or a «Chinese wall»). In contrast, other commitments of a strictly behavioural nature – for example concerning the modification of contractual clauses governing the relations between a supplier and a distributor, the deletion of an exclusivity clause or access to a closed group – generally have a set duration.

However, the practice of only accepting behavioural remedies in anticompetitive practice law could change. The ECN+ Directive now explicitly gives the *Autorité* the possibility, arising implicitly from the letter of French law, of issuing structural injunctions to *"to bring the infringement effectively to an end"*. It is therefore possible that, in the future, the *Autorité* will accept structural commitments to address anticompetitive practices.

**36** *Conseil de la Concurrence*, thematic study: *Sanctions, injonctions, engagements, transaction et clémence: les instruments de la mise en œuvre du droit de la concurrence* [Sanctions, injunctions, commitments, settlements and leniency: The instruments for implementation of competition law], Annual Report p. 155.

## CRITICISM OF RECOURSE TO BEHAVIOURAL REMEDIES

More generally, behavioural remedies are regularly subjected to criticism, which chiefly concerns the challenges and costs involved in their systematic monitoring. This is also one of the reasons why certain competition authorities generally refuse to accept commitments of this type, instead favouring structural commitments or recourse to a sanction procedure.

This is notably the case in Germany, which, in the Booking.com case mentioned above,[37] refused to engage in a negotiated procedure, in contrast to France, Sweden and Italy. The inconvenience associated with the use of behavioural remedies has also been highlighted in the United States by the Assistant Attorney General for the Antitrust Division at the Department of Justice, Makan Delrahim, as demonstrated by his speech at a round table discussion on competition and deregulation in Washington, D.C., on 26 April 2018, where he defended an approach oriented towards structural remedies. In the same way, the Commission believes that "*commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances*".[38] To these criticisms regarding the monitoring of behavioural remedies can be added the fear that such remedies lead to distortion of competition.[39]

* * *

37 Decision 15-D-06 of 21 April 2015 on the practices used by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector.

38 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

39 *Ibid.*

The future of behavioural remedies is therefore relatively uncertain at this time. Popular in the past, these remedies have seen widespread use by the *Autorité*. However, the difficulties they raise, notably in terms of monitoring, seem to be making these remedies less attractive for certain authorities. This major debate justifies a review by the *Autorité*, through this study, of the place of behavioural remedies in its decision-making practice, both in merger law and in anticompetitive practice law. More broadly, this study also provides a chance for the *Autorité* to give an overview of the system applicable to commitments, in relation to both the general principles to be respected and their monitoring and revision, as well as in terms of the likely litigation cases arising as a result.

# 1/ GENERAL PRINCIPLES FOR DRAFTING COMMITMENTS

As part of its role in ensuring fair competition, as granted by the legislator, the *Autorité* frequently accepts commitments. These commitments are a set of heterogeneous remedies that vary according to the type of competition issue encountered and the circumstances of each case. They all, however, respond to a common objective: to maintain or re-establish the smooth functioning of the market. To this end, commitments are all subject to a set of general principles requiring them to be both useful and effective.

## Utility of commitments

In order to remedy the competition issues identified by the *Autorité*, commitments must meet several requirements. They must therefore be *"relevant and credible"*, as indicated in the Notice on Competition Commitments issued by the *Autorité* on 2 March 2009. However, their utility above all depends on their careful targeting, wich requiers that they are both proportionate and of a sufficient duration.

### PROPORTIONALITY OF COMMITMENTS

There are two sides to the proportionality of commitments undertaken by companies. The first requires these remedies to be sufficient to resolve the competition issues identified. The second demands that they do not go beyond what is strictly necessary to achieve this end.

To be accepted by the *Autorité*, commitments must first of all appear sufficient (as was not deemed to be the case under the following merger law rulings: French Administrative Supreme Court (*Conseil d'Etat*), *Section*, 9 April 1999, The Coca-Cola Company, n°. 201853, in *Recueil*; French Administrative Supreme Court (*Conseil d'Etat*), *Assemblée*, 21 December 2012, Groupe Canal Plus and others, n°. 362347, in *Recueil*).

The proportionality of the solution proposed to remedy the distortion of competition identified is evaluated as a whole, in light of all the commitments undertaken by the parties, whether under merger law (French Administrative Supreme Court (*Conseil d'Etat*), *Section*, 30 December 2010, Métropole Télévision (M6), n°. 338197, in *Recueil*; see also the conclusions of Vincent Daumas, p. 30, on the judgement of the French Administrative Supreme Court (*Conseil d'Etat*), *Assemblée*, 21 December 2012, Group Canal Plus, n°. 362347, in *Recueil*), or under anticompetitive practice law (Decision 14-D-09 of 4 September 2014 on the practices implemented by Nestlé, Nestec, Nestlé Nespresso, Nespresso France and Nestlé Entreprises in the sector of espresso coffee machines).

The scope of the requirements regarding the sufficient nature of the commitments varies depending on the legal basis for the remedies.

This means that, in merger law, commitments are adapted to allow sufficient competition to be maintained on the market concerned. As ruled by the French Administrative Supreme Court (*Conseil d'Etat*), "*it is for the Autorité de la concurrence alone to establish whether a commitment is relevant and sufficient, and find out whether it will resolve the anticompetitive effects of the proposed transaction and thereby maintain sufficient competition*" (French Administrative Supreme Court (*Conseil d'Etat*), 5 November 2014, Wienerberger, n°. 373065, in *Recueil*). A commitment is not therefore intended to increase the level of competition that existed on the market before the merger (see the 2015 public report of the French Administrative Supreme Court, p. 94). It aims only to maintain sufficient space to allow fair competition. Otherwise, requiring the parties to a merger to undertake commitments beyond what is necessary to maintain the level of competition prior to the merger could deter them from completing

mergers likely to bring efficiency gains, for example by reducing production costs.[40]

In anticompetitive practice law, the reasoning is different. As indicated in paragraph 34 of the Notice on Competition Commitments issued on 2 March 2009, commitments must be both *"necessary and sufficient to put an end to all competition concerns identified"*. This difference in approach arises from the fact that the commitments are used in this case as a tool intended to correct deviant behaviour, unlike in competition law. In the context of the commitment procedure, commitments allow the party undertaking them to avoid a sanction procedure, while in the context of a settlement procedure,[41] they can allow it to reduce the financial penalty it receives. In both cases, the recourse to commitments is not neutral in terms of deterring anticompetitive behaviour.[42] Consequently, commitments that solely involve complying with competition law in the future (Decision 06-D-09 of 11 April 2006 relative to practices implemented in the door manufacturing sector) or putting an end to behaviour likely to constitute an infringement – and therefore to respect the law (Decision 12-D-17 of 5 July 2012 relating to practices observed in the sector of non-cash means of payment (direct debits, interbank payment orders, online payments, transfers

40 See Farrell J. (2003), Negotiation and Merger Remedies: Some Problems, in Merger Remedies in *American and European Union Competition Law*, F. Lévêque and H. Shelanski.

41 The "no contest of objections" procedure became the settlement procedure under French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

42 See Choné Philippe, Souam Saïd, Vialfont Arnold, (2014), On the optimal use of commitment decisions under European competition law, *International Review of Law and Economics*, vol. 37, pp. 169-179.

and bills of exchange) – do not justify closing a case. The same goes for commitments undertaken in the context of a settlement procedure, with the *Autorité* ensuring that they are of a substantial, credible and verifiable nature (see for example Decision 14-D-19 of 18 December 2014 regarding practices implemented in the home care and insecticide product sector and in the hygiene and personal care product sector).

Lastly, in general terms, the commitments undertaken are neutral. They are not intended to favour one economic stakeholder over another, or to satisfy the demands of a complainant. Their sole aim is to maintain or re-establish the public economic order. The *Autorité*'s guidelines regarding merger control from 2013 and the Notice on Competition Commitments issued on 2 March 2009 state this in paragraphs 574 and 8 respectively.

The other side of the principle of proportionality regards the protection of third parties (see notably Tribunal, 12 December 2018, Groupe Canal+ SA, T873/16) as well as the freedom to conduct business of the companies proposing commitments, which should not find themselves restricted by commitments that go beyond what is required to address the competition issues identified.

Paragraph 39 of the aforementioned notice expressly indicates this, stating that, by principle, "*the Autorité does not accept binding commitments going beyond the resolution of competition concerns*." In addition, the *Autorité* has already refused to accept a binding commitment in such a case (see for example, in anticompetitive practice law, Decisions 05-D-16 of 26 April 2005 on the practices of the Society of Dramatic Authors and Composers (*Société des auteurs et compositeurs dramatiques*) and 12-D-17 of 5 July 2012 relating to practices observed in the sector of non-cash means

of payment (direct debits, interbank payment orders, online payments, transfers and bills of exchange)).

As commitments are based on a voluntary approach by companies, any risk that they are excessively restrictive in relation to the requirements of the competitive context remains fairly theoretical. Furthermore, the *Autorité*'s guidelines regarding merger control from 2013 specify that it is principally in the context of injunctions – imposed remedies – that it is necessary to ensure that commitments are not disproportionate (paragraph 574). However, it is permissible for the *Autorité* to note of its own motion, if it considers it useful, that the commitments proposed go beyond what appears to be strictly justified in terms of preserving or maintaining the competitive context.

**The principle of proportionality thereby requires the identification of the remedy best adapted to the competition issue encountered. This quest for proportionality also informs the determination of the duration of commitments.**

## DURATION OF COMMITMENTS

Determining the duration of commitments is an important step in effectively adapting remedies to competition issues. This concerns all the commitments likely to be accepted by the *Autorité*.

In merger law, structural commitments chiefly involve the divestiture of businesses or certain assets of the parties to the transaction, or the elimination of capital links between competitors. The duration of these types of commitment

corresponds to the period during which they must be implemented. It is fixed and may not be unilaterally modified by the company, which – if it considers such action necessary – may only request an extension.

This period must not be confused with the duration of additional behavioural remedies accepted by the *Autorité*, which are intended, once the divestiture has taken place, to prevent the company from circumventing its effects. Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac is a good illustration of this. The structural commitment taken by Fnac to divest itself of assets was combined with a clause lasting 10 years, during which period this company could not acquire any direct or indirect influence over all or part of the divested assets.

In the case of behavioural remedies, the duration corresponds to the period during which they must be executed. This period must be defined. If it is insufficient, the commitments will not produce their effects for a long enough period, to the detriment of the re-establishment or maintenance of the public economic order. Conversely, if it is too long, it will burden companies undertaking the commitments with a useless obligation. In such a case, it would also force the *Autorité* to dedicate resources to ensure the correct implementation of the applicable remedies.

On this point, the *Autorité* guidelines regarding merger control from 2013 state that to remedy the anticompetitive effects of a merger, "*behavioural remedies are always introduced for a determined period. Barring exceptional circumstances, a minimum duration of five years, potentially renewable, is generally considered to be necessary to compensate for the effects of a merger on the market structure*" (paragraph 617).

The duration of commitments can, however, be longer where that seems necessary to maintain sufficient competition

on the markets concerned. One example of this is Decision 16-DCC-167 of 31 October 2016 regarding the acquisition of sole control of Aéroports de Lyon by Vinci Airports, which involved behavioural remedies designed to eliminate the risk of Aéroports de Lyon favouring the Vinci group when awarding contracts. These commitments were undertaken for a period of 41 years, i. e. the duration of the management and operating concession for Lyon airport.

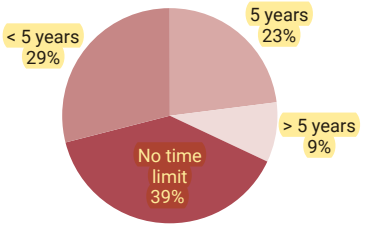
Nevertheless, due to the evolving nature of the markets, the prospective analysis performed by the *Autorité* based on a plausible economic scenario generally leads it to decide that the effects directly generated by the transaction are not without a time limit. In this respect, experience shows that the five-year duration indicated in the *Autorité*'s guidelines, that may only be renewed for another term of five-years is generally long enough to preserve competition and encourage competing companies to invest in the market.

For its part, the Notice on Competition Commitments issued on 2 March 2009 outlines a very flexible framework for setting the duration of commitments. It specifies that "*the commitment decision may remain in force for an indefinite period of time when the competition concerns must be remedied on a long-term basis or, on the contrary, it may be enforced for a limited period of time when the return to a competitive environment is anticipated, in which case the Autorité may set a term in the commitment decision*" (paragraph 45).

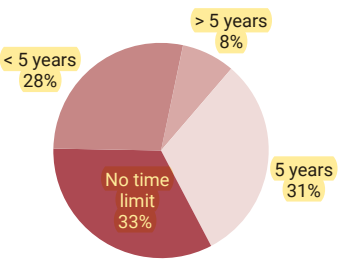
Originally, commitment decisions rarely contained provisions regarding their duration. The analysis of the past decisions of the *Conseil* and later the *Autorité* shows that it was from 2012, that a time limit began to be associated almost systematically with the commitments accepted by the *Autorité*. in relation to commitments undertaken in accordance with paragraph III of Article L. 464-2 of the French

Commercial Code (*Code de commerce*), and from 2013, in relation to those undertaken in accordance with paragraph I of the aforementioned Article.

**Breakdown of number of commitment decisions undertaken in accordance with paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*) by commitment duration (2008-2018)**




**Breakdown of number of commitment decisions undertaken in accordance with paragraph III of Article L. 464-2 of the French Commercial Code (*Code de commerce*) by commitment duration (2008-2018)**




The most common duration is between three and 11 years, and the average is five years (see for example cases with

a five-year time limit: Decisions 17-D-12 of 26 July 2017 on practices regarding the sugar beet procurement sector; 17-D-16 of 7 September 2017 regarding the practices implemented by Engie in the energy sector (in relation to commitments to residential customers); and 18-D-04 of 20 February 2018 regarding practices implemented in the sector of meat production and sale in Martinique).

This development is based on the experience gained by the *Autorité* since the commitment procedure was introduced. It expresses its desire to adapt remedies as closely as possible to the competition issues identified and the specific circumstances of each case (see for example Decision 12-D-17 of 5 July 2012 relating to practices observed in the sector of non-cash means of payment (direct debits, interbank payment orders, online payments, transfers and bills of exchange), which states that commitments "*with regard to systematic fees should not be limited in time in view of the regulatory framework, which provides that they will be completely phased out on 1 February 2017. For that reason, the commitments should be entered into for a period to expire on 1 February 2017, which is the final end-date provided in Regulation 260/2012, which will enter into full legal force on that date*").

**In practice, the examination strives, as part of a dialogue with the parties and market stakeholders, to achieve the right level regarding the commitments accepted, their design and their duration.**

## Effectiveness of commitments

Remedies, no matter how well-designed, only produce effects if they are effectively applied. Their effectiveness is therefore a key issue for the *Autorité,* which scrupulously monitors their execution. The Autorité ensures, before accepting commitments, that they are verifiable and that it will be possible to apply them. After they have been made obligatory, it manages their monitoring.

### THE VERIFIABILITY OF COMMITMENTS

The verifiability of commitments is, similarly to their utility, a condition of their acceptance.

Paragraph 21 of the Notice on Competition Commitments issued on 2 March 2009 expressly states this requirement, as do past decisions regarding the "no contest of objections" and settlement procedures (see for example Decision 14-D-19 of 18 December 2014 regarding practices implemented in the home care and insecticide product sector and in the hygiene and personal care product sector).

Although the *Autorité* automatically checks that commitments have been respected, it is not uncommon for third parties to inform it of any failures in this respect.

In relation to anticompetitive practices, Article R. 464-2 of the French Commercial Code (*Code de commerce*) provides for procedures that, by informing third parties and complainants of the proposed commitments, allow the *Autorité* to gather valuable information on their validity or applicability. This therefore requires the General Rapporteur to communicate the content of the proposed commitments to the person making the referral and the representative of the French Minister for the Economy, as well as to publish a summary of

the case and commitments, in order to allow interested third parties to present their observations on the issue.

After examining the proposed commitments, the complainant or interested third parties may critique the utility of the commitments proposed and report any doubts raised by their application.

Such doubts may notably lead the *Autorité* to check that the proposed remedies can be implemented without ambiguity. In this way, in Decision 12-D-16 of 12 July 2012 on practices in the press distribution sector, the *Autorité* had to ensure that the commitment whereby Presstalis undertook to extend the notice given for the termination of supplier contracts from 48 hours to three months was effectively verifiable. It decided that that was indeed the case, as the first paragraph of Article 3 of this contract stipulated that it could only be terminated by registered letter with acknowledgement of receipt, which would make it possible to determine the start point of the notice period mentioned above.

Doubts may also lead to checks being performed regarding the internal systems proposed by companies to monitor commitments, as in Decision 12-D-18 of 20 September 2012 relating to practices concerning reciprocal interconnection services in the area of internet connectivity. In this case, France Telecom undertook to draw up a formal internal protocol between Orange and Open Transit specifying the technical, operational and financial conditions governing the provision of connectivity services. To ensure that this commitment was effective, France Telecom also committed to introduce an internal monitoring system. In view of modifications made to this monitoring system, notably in relation to the time frame for introducing and applying it, the *Autorité* decided that the initial commitment accepted by the *Autorité* was indeed verifiable.

In merger law, the *Autorité*'s guidelines aforementioned also refer to the verifiable nature of commitments proposed by parties to a transaction as an essential element. As such, paragraph 232 states that "*in the case of behavioural remedies, parties shall demonstrate their operational feasibility and the means proposed to verify them*."

The guidelines allow the *Autorité* to test the remedies proposed by the parties to the transaction among stakeholders on the markets concerned, while respecting parties' business secrecy. However, unlike the procedure applicable to commitments undertaken in anticompetitive practice law, this is merely a right, not an obligation.

Indeed, there are no texts or principles that require the *Autorité* to consult third parties regarding the remedies to be included in the merger decision. The French Administrative Supreme Court (*Conseil d'Etat*) considers the matter to be covered by legislation giving the French Minister for the Economy the power to clear mergers (see French Administrative Supreme Court (*Conseil d'Etat*) Decision of 27 June 2007, Société Métropole Télévision, nº. 278652, in *Recueil*: "*Although the aforementioned provisions require the Minister for the Economy, Finances and Industry to make public the proposed merger, notably in order to gather any observations from interested third parties, no text or principle requires inter partes proceedings with the interested third parties to take place prior to the Minister's decision*" ). This case law was confirmed following the legislative reform of 2008[43] entrusting the *Autorité* with the power to authorise mergers (see French Administrative Supreme Court (*Conseil d'Etat*) Decision of 6 July 2016, Compagnie des

43 French Law 2008-776 of 4 August 2008 on the Modernisation of the Economy.

Gaz de Pétrole Primagaz, Vitogaz France, n°. 390457, in the tables of the *Recueil*: "*Neither Article L. 430-5 of the French Commercial Code (Code de commerce) nor any other provisions or principles require the Autorité de la concurrence to submit a draft decision to a third party to a merger for the purpose of allowing that party to present its observations*" ). In addition, point 233 of the guidelines specifies that "*the Mergers Unit assesses the admissibility of the commitments proposed according to the threats to competition that the transaction is likely to generate. These commitments may be tested among stakeholders on the markets concerned, while respecting parties'business secrecy*".

Once the verifiable nature of the commitments has been established, the *Autorité* must still ensure their correct implementation after making them obligatory.

## MONITORING COMPLIANCE WITH COMMITMENTS

The aim of ensuring the effectiveness of the commitments accepted and made obligatory by the *Autorité* justifies its monitoring of their correct implementation.

The monitoring of compliance with commitments allows the *Autorité* to check that the company is respecting its obligations, and to sanction it if it fails to do so. Indirectly, this monitoring operation lets it check that the remedies undertaken are fulfilling their objective, and expand its knowledge and practical expertise regarding remedies to resolve competition issues.

Monitoring may be entrusted to a trustee independent of the companies – proposed by the parties and approved by the *Autorité* – who reports on the mission to the *Autorité*.

Recourse to this type of monitoring is relatively rare in the case of commitments accepted under anticompetitive practice law. However, it is more frequent in merger law.

The most common case, when commitments are undertaken regarding anticompetitive practices and are easily verifiable, is for monitoring to be performed directly by the *Autorité* (see for example Decisions 17-D-12 of 26 July 2017 on practices regarding the sugar beet procurement sector and 18-D-04 of 20 February 2018 regarding practices implemented in the sector of meat production and sale in Martinique). In such scenarios, the *Autorité* asks the company or body that has undertaken the commitments to send it a periodic report summarising its actions.

In all cases, a lack of compliance with the commitments can lead the *Autorité* to issue sanctions, in application of Article L. 464-3 of the French Commercial Code (*Code de commerce*) in the case of a failure to respect remedies taken under anticompetitive practice law, and in accordance with the provisions of paragraph IV of Article L. 430-8 of the same code for merger law.

However, the monitoring of compliance with commitments must also be regarded as an opportunity to engage in a dialogue with the companies concerned, which may seize this opportunity to share any difficulties they encounter in correctly implementing the prescribed remedies with the Autorité. Monitoring may lead to the commitments being re-examined in practice, this always takes place on request of the company concerned by the commitments.

* * *

In this way, the general principles described above consistently apply to all commitments made obligatory by the *Autorité*. They allow a tailored, effective and practical response to the previously identified competition concerns. It is in accordance with these key principles that the *Autorité*'s decision-making practice has developed with regard to commitments, in both merger law and anticompetitive practice law.

# 2/ COMMITMENTS IN RELATION TO MERGER CONTROL

The *Autorité*, when notified of a merger within the scope of Articles L. 430-1 and L. 430-2 of the French Commercial Code (*Code de commerce*), may, in virtue of Article 430-5 of the same code, either clear the transaction subject to the effective implementation of commitments undertaken by the parties, or, if it believes that there is a serious risk to competition, initiate an in-depth examination, after which it issues a clearance decision – subject to commitments, requirements or injunctions where necessary – or a prohibition decision, under the conditions provided for by Articles L. 430-6 and L. 430-7 of the same code.

Based on criteria relating to the swiftness of implementation of the commitment, its irreversible nature and its active monitoring by the *Autorité*, the following classification system has been established for the purposes of this study. It covers the main types of commitment that the French Minister for the Economy and the *Autorité* have accepted in order to clear a merger likely to raise concerns regarding competition.[44] As these commitments were accepted in the context of the analysis of a specific case, this list should not therefore be interpreted as a commitment framework relevant to every case. Commitments may be structural or behavioural, or the *Autorité* may accept commitments of both types, which are referred to as mixed commitments.

44 There are also certain atypical commitments, which will be covered below.

## TYPE OF COMMITMENT

| **Structural commitments** *(do not require long-term monitoring by the* Autorité*, rapidly implemented, irreversible effects)* | **Behavioural remedies** *(require long-term monitoring by the* Autorité*, most often with the assistance of a trustee, limited duration)* |
|---|---|
| – Divestiture of tangible assets: subsidiaries, stores, plants, warehouses, branches<br>– Divestiture of intangible assets: contracts, brands, operating licences<br>– Breaking or termination of franchise agreement<br>– Non-acquisition of an asset included in the initial scope<br>– Definitive modification of statutory or contractual clauses<br>– Breaking of ties with a competitor<br>– Divestiture of minority capital stake | – Procurement agreement<br>– Licensing a brand to a competitor<br>– "Chinese wall"*<br>– Access to essential infrastructure (network, good or service, technology, patent, know-how, intellectual property rights)<br>– Temporary modification of statutory or contractual clauses<br>– Non-discrimination in a competitive bidding procedure<br>– Non-opposition to entry on the market<br>– Prohibition on bundling several services or products<br>– Arrangement of pricing relations (prohibition on modifying agreed financial conditions, price controls**, prohibition on product range discounts)<br>– Renunciation of certain customers or activities<br>– Limitation of quota shares*** |

* Type of commitment that involves preventing the passing of information between structures.

** When negotiating commitments, the *Autorité* has been presented with behavioural commitment proposals of a regulatory nature, the company undertaking, for example, not to raise the price of the products or services it offers. This type of commitment is not acceptable, as the *Autorité* is not a regulatory authority. In addition to its advisory activity, its resources are chiefly dedicated to the examination and repression of anticompetitive behaviour by companies, and to the prospective analysis of the effects of mergers submitted to it for clearance. Furthermore, the monitoring of commitments undertaken by a company should not be compared to market regulation.

*** For sectors subject to quota systems for tax purposes, such as rum for example.

This classification of the main commitments undertaken between 2001 and 2018 in France illustrates the wide range of behavioural remedies, which may take many forms depending on the sector, product or service concerned by the market on which competition concerns have been identified.

After assessing the *Autorité*'s practice regarding behavioural remedies, the study will examine the type of competition concerns that can be addressed by such commitments. The difficulties associated with this type of commitment are generally greater than those associated with structural commitments. The *Autorité* therefore recommends anticipating the phase in which behavioural remedies are discussed.

## Assessment of practice regarding merger control commitments (2009-2018)

Commitments undertaken before the *Autorité* regarding anticompetitive practices have been, by definition, discussed then accepted by the same institution. However, in relation to merger control, the *Autorité* has had to take over from the previous practice of the French Minister for the Economy. This practice (2001-2009) is almost as long as the experience of the *Autorité*, as the latter took on responsibility for merger control under the French Law on the Modernisation of the Economy in 2009.[45]

Indeed, the experience of the French Minister for the Economy has not been without influence on the *Autorité*'s practice.

45 French Law 2008-776 of 4 August 2008 on the Modernisation of the Economy ( "LME" ).

The *Autorité* has had to monitor compliance with commitments undertaken by companies before the French Minister for the Economy, which include commitments accepted by the Minister in spite of a negative opinion, or an opinion subject to many reservations, issued by the *Conseil de la Concurrence*. Nevertheless, all the commitments in force undertaken before the French Minister for the Economy were monitored by the *Autorité* in the context of the transfer of jurisdiction of merger control. Only three such cases remained as at 31 December 2018.[46]

Between 2 March 2009 and 31 December 2018, the *Autorité* adopted 68 clearance decisions subject to commitments, as well as two decisions subject to injunctions. Its past decisions to accept behavioural remedies where these are appropriate are both consistent – characterised by the adoption of numerous clearance decisions subject to commitments each year – and atypical in Europe, the *Autorité* standing out due to the large proportion and number of decisions that were cleared subject to behavioural remedies.

## CONSISTENT ACCEPTANCE OF BEHAVIOURAL REMEDIES BY THE AUTORITÉ

The examination of clearance decisions made by the *Autorité* subject to commitments shows a rich tradition.

**46** Letter from the French Minister for the Economy, Finance and Employment of 22 May 2007, to Unibail's advisers regarding a merger in the property services sector; letter from the French Minister for the Economy, Finance and Industry of 28 October 2005 to SIPA's advisers regarding a merger in the publishing sector; and letter from the French Minister for the Economy, Finance and Industry of 21 February 2005 to Boiron's advisers regarding a merger in the homoeopathic medicinal product sector.

## DÉCISIONS D'AUTORISATION SOUS RÉSERVE D'ENGAGEMENTS

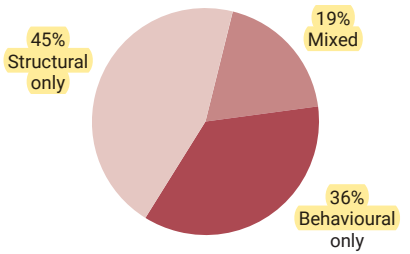
| Year | 2009 * | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|---|---|---|---|---|
| Clearance decision | 88 | 192 | 214 | 184 | 201 | 200 | 192 | 230 | 233 | 235 |
| Decisions subject to commitments | 3 | 7 | 7 | 10 | 7 | 10 | 6 | 6 | 8 | 4 |
| As % | 3.4% | 3.6% | 3.3% | 5.4% | 3.5% | 5% | 3.1% | 2.6% | 3.4% | 1.7% |
| *Of which decisions subject to behavioural remedies* | *2* | *2* | *2* | *3* | *2* | *3* | *3* | *3* | *3* | *3* |
| *Share of behavioural remedies in relation to total commitments accepted* | *67%* | *29%* | *29%* | *30%* | *29%* | *30%* | *50%* | *50%* | *38%* | *75%* |

* As jurisdiction of merger control was transferred to the *Autorité* on 2 March 2009, only the decisions issued after this date have been analysed.

Since 2 March 2009, the *Autorité* has issued 1969 clearance decisions under merger control, 68 of which were subject to commitments (as at 31 December 2018). The *Autorité* has performed, for the purposes of the present study, a retrospective analysis in order to classify these commitments into the following categories: structural only, behavioural only or mixed.

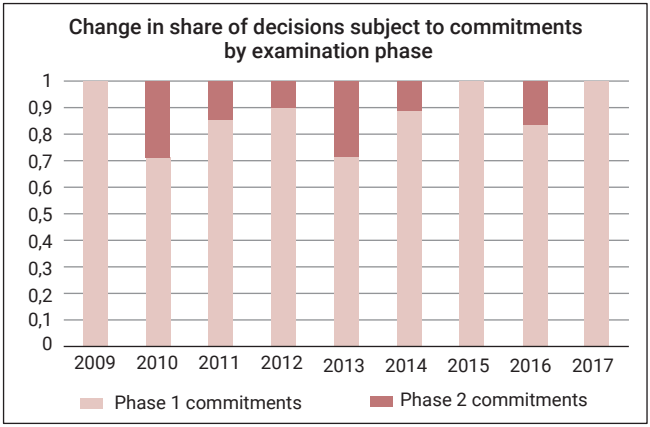
Following this analysis, clearance decisions subject to commitments were broken down as follows:

**Breakdown of number of decisions by commitment type**




The results of this analysis show that behavioural remedies were accepted in 55% of clearance decisions in which competition concerns were identified[47] since 2009.

**47** These decisions do not include the clearance decisions subject to injunctions taken by the *Autorité de la concurrence* in 2012 and 2018.




Almost all remedies were submitted and accepted in phase 1 (87.5%). Of these, nearly half (47%) were behavioural or mixed commitments. Out of the eight mergers cleared subject to remedies at the end of phase 2, the majority were subject to behavioural or mixed commitments (62.5%).

**These general data illustrate the significant role played by behavioural remedies in decisions taken by the *Autorité* since 2009, making the French authority relatively atypical in Europe.**

## INTERNATIONAL BENCHMARK

Each year since it was created, the *Autorité* has issued several decisions subject to commitments (between five and 10), a large proportion of which involved behavioural remedies. In addition, it should be noted that the *Autorité* has never, to date, issued a prohibition decision, although several

transactions are abandoned each year during the notification process. In this respect, the French situation is relatively atypical in Europe, as other competition authorities, such as the German competition authority (Bundeskartellamt), the British competition authority (CMA) and the Commission regularly issue prohibition decisions.

The *Autorité* does, however, have an intervention rate[48] in line with the European average, which indicates – given the number of decisions it takes every year – that it does not examine the competitive effects of mergers any more strictly than its counterparts.

After the British CMA, the *Autorité* is the national authority in Europe that adopts the greatest number of clearance decisions subject to commitments.

The annual average stands at 7.2 (2010-2018), which represents 3.4% of total clearance decisions, namely twice as many as the Spanish (3.7) and Italian (3) authorities, and a long way ahead of the German competition authority, which has cleared an average of one transaction subject to commitments per year since 2011 (2 in 2013, 0 in 2017).

Relative to the total clearance decisions issued by each authority, an "intervention rate"[49] can be estimated.

48 For the purposes of the present study, the intervention rate is defined as the ratio between the number of clearance decisions subject to commitments and the total number of clearance decisions. It does not take into account injunction or prohibition decisions, or abandoned transactions.

49 See the definition proposed above for the purposes of the present study.

● ANALYSIS OF THE INTERVENTION RATES OF COMPETITION AUTHORITIES, AND BREAKDOWN OF DECISIONS BY EUROPEAN COMPETITION AUTHORITIES (2015–2017)

| Competition authority | Share of decisions subject to commitments |
|---|---|
| United Kingdom | 18%* |
| Greece | 15% |
| Belgium | 7.1% |
| European Commission | 6.2% |
| Italy | 6.1% |
| Croatia | 5.1% |
| Latvia | 4.8% |
| Slovenia | 4.6% |
| Ireland | 3.9% |
| Spain | 3.8% |
| Cyprus | 3.7% |
| Romania | 3.7% |
| **France**** | **3.1%** |
| Denmark | 3% |
| Estonia | 2.1% |
| Lithuania | 2.1% |
| Portugal | 1.7% |
| Netherlands | 1.3% |
| Hungary | 1.3% |
| Slovakia | 1.2% |
| Czech Republic | 0.8% |

| Competition authority | Share of decisions subject to commitments |
|---|---|
| Poland | 0.6% |
| Austria | 0.6% |
| Germany | 0.1% |
| Bulgaria | 0% |
| Malta | 0% |

* The *ex ante* regime of the United Kingdom results in a focus on the transactions likely to be most problematic in terms of competition, which leads to a bias that explains its higher rate in comparison to the other countries.

** The intervention rate of the *Autorité de la concurrence* was 3.4% during the period 2009–2018.

*Source*: Internal document of the Merger Working Group, European Competition Network, analysed by the Autorité de la concurrence.

The *Autorité*'s intervention rate is therefore in line with the average for competition authorities in Europe.

It is interesting to note that in the decision-making practices of competition authorities that involve the greatest number of decisions subject to commitments (European Union, United Kingdom, France and Spain), the overwhelming majority of commitments are accepted in phase 1.

**The proportion of behavioural remedies out of the commitments accepted by the *Autorité* is among the highest in Europe. For comparison, while the rate is 36% in France (55% if mixed commitments are included), it is less than 20% for the Commission and 16% for the United Kingdom).**

Between 2014 and 2017, the CMA accepted behavioural remedies on six occasions in order to clear a merger.

In Germany, the Bundeskartellamt only accepts behavioural remedies on an exceptional basis, as it recalls in its guide on merger control remedies.[50] It expresses a preference for structural commitments, which "*have proved their effectiveness in many cases*".[51] This means that, since 2011, the Bundeskartellamt has not taken any clearance decisions subject to behavioural remedies, while in the same period the *Autorité* took 22 such decisions.

The *Autorité* is therefore the national competition authority in Europe that has accepted the greatest number of mergers subject to behavioural remedies.

## The type of commitment accepted depends significantly on the type of anticompetitive effect identified

Competition authorities, including the *Autorité*, have always expressed a marked preference for structural commitments. In the section of its decisions where it assesses commitments offered by the parties, assessment of commitments, the *Autorité* consistently recalls that "*where possible, structural commitments are generally considered by competition authorities to be particularly appropriate when the aim is to remedy a threat to competition due to the accumulation of significant market shares (horizontal effects). They are preferable to behavioural remedies, which are necessarily time-limited and which can be difficult to monitor given the major asymmetries in information between the competition*

50 Guidance on Remedies in Merger Control, May 2017, para. 24.

51 *Ibid*., para. 23.

*authorities and the companies undertaking commitments, and between these companies and the market".*[52]

Indeed, structural commitments have two advantages. On the one hand, they provide an immediate and effective response to an increase in market power by removing, or limiting, overlaps resulting from the merger. On the other hand, they do not require the mobilization of significant resources from competition authorities that are generally necessary to execute and monitor behavioural remedies. Yet, it is clear that the execution of structural commitments may also carry a certain number of issues and an "execution risk" that is not negligible. This may be due to the imperfect information available to competition authorities regarding the quality of the divested assets, the possible degradation of these assets in the interval between the divestiture decision and its execution, the lack of competitiveness of the purchaser or the possibility of tacit collusion between the new entity and the purchaser.[53]

Even though they are not favoured by companies, which see the scope of their original project called into question, structural commitments have the advantage, including for the parties, of being "clear & cut", and they also save the company from an obligation that could, over the long term, be more costly than the divestiture of the targeted assets, both for the company and the competition authorities themselves, who must monitor such commitments.

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**52** Decision 09-DCC-16 of 22 June 2009 regarding the Caisse d'Épargne and Banque Populaire merger, para. 402.

**53** Motta M., Polo M. and H. Vasconcelos (2003), Merger Remedies in the EU: An Overview, in *Merger Remedies in American and European Union Competition Law*, F. Lévêque and H. Shelanski, eds. or Papandropoulos, P., and Tajana, A., (2006), The merger remedies study – In divestiture we trust?, *European Competition Law Review*, 8, 443-454.

**Behavioural remedies are, however, generally accepted by competition authorities in the absence of horizontal effects. They are likely to provide a response, just like structural commitments for that matter, to concerns regarding competition linked to vertical or conglomerate effects. Of course, there are exceptions, and using a case-by-case approach the *Autorité* has thereby been able to accept behavioural remedies to eliminate the risk of horizontal effects.**

## BEHAVIOURAL REMEDIES AND NON-HORIZONTAL EFFECTS

Since 2009, behavioural remedies have principally aimed to respond to risks associated with vertical or conglomerate effects: out of 68 clearance decisions subject to commitments taken by the *Autorité*, 22 were in response to risks with non-horizontal effects. Out of these 22 decisions, 18 involved behavioural or mixed commitments, equal to 82% of the decisions taken with commitments in response to risks with non-horizontal effects.

Mergers that lead to vertical or conglomerate effects are generally likely to generate larger efficiency gains than mergers between competing companies.[54] This is why behavioural remedies may appear better suited to them than structural commitments, as they preserve all or part of the efficiency gains generated by the merger and maintain sufficient competition on the market concerned for the time necessary for

54 See, for example, the report presented by France at the OECD Round Table on Dynamic Efficiencies in Merger Analysis, 2007, http://www.autoritedelaconcurrence.fr/doc/ocde_cp_efficiences_dyna_06_2007.pdf.

operators to develop counter-strategies while profiting from the restricted behaviour of the entity mergered.

The types of behavioural commitment undertaken since 2009 in response to non-horizontal competition concerns vary a great deal, making it difficult to establish a suitable classification system. By using the same classification system as that applied to behavioural remedies above, it can be seen that the behavioural remedies most frequently undertaken involve access to essential infrastructure or an input that only the new entity can provide, a prohibition on product range discounts or tied selling and the organisation of open, non-discriminatory private calls for tender. All the other behavioural remedies involve restrictions undertaken by the notifying company with respect to their commercial policy, whether through abstention or prohibition, or the functional and organisational separation of its activities.

## Access commitments

These commitments are generally undertaken in the context of vertical transactions, which generate the risk of excluding active competitors on upstream markets and/or the downstream market/s on which one or the other of the parties is based. Indeed, a vertical merger may restrict competition by making it harder for competitors to access the markets on which of the mergered entity will be active, or even potentially excluding competitors or penalising them by increasing their costs. By increasing the market power of the new entity, the transaction also allows it to increase its prices (or reduce the quantities offered).

As highlighted by the aforementioned guidelines, "[...] *where it is necessary to remedy the risk of foreclosure of markets upstream or downstream, behavioural remedies aiming to guarantee competitors' access to inputs or customers may be*

*sufficient, while preserving the efficiency gains linked to vertical integration*".[55]

This means that the conclusion of a long-term procurement agreement may constitute, in the absence of an appropriate structural commitment, an effective remedy to maintain competition on the market on which the new entity has a too strong position.

This type of commitment is subject to special monitoring by the *Autorité*, to which regular reports are sent, via a trustee where relevant. This monitoring aims to prevent any inappropriate application of the commitment.

Decision 10-DCC-51 of 28 May 2010 regarding the acquisition of sole control of Quartier Français by Tereos provides an example of a behavioural commitment that involves concluding a long-term procurement agreement with the purchaser of a divested asset. The transaction was such that it was notably likely to affect sugarcane production markets and, downstream, the cane sugar production market.

The *Autorité* found that the transaction would give Tereos control of all cane sugar production on Reunion Island, a market on which the cooperative group was already present via several subsidiaries (including Sucrerie du Bois Rouge) and several minority stakes in companies controlled by Quartier Français.

It considered that the monopoly situation resulting from the merging of the two companies (Eurocanne and Mascarin) within the same group marketing the sugar produced on for

55 Aforementioned guidelines, para. 576.

local retailers and manufacturers risked increasing sugar prices for consumers on the Réunion island.

The commitments accepted were of a mixed nature. In order to solve the concerns linked to the horizontal effects of the transaction, Tereos committed to sell the assets of the distributor it was acquiring (Mascarin) to an independent third party. These assets included not only those related to the marketing of sugar (notably the Mascarin brand), but also the sugar storage and packaging unit at the port. This commitment made it possible to maintain a competitive offer on the wholesale sugar distribution market on Reunion Island, to the advantage of consumers.

In order to address the concerns linked to the vertical effects of the transaction, due to the fact that Tereos would become the only sugar producer on the island, the behavioural commitment involved signing a 20-year procurement contract with the purchaser, under which Tereos committed to supply the purchaser with sugar in bulk (white and brown sugar) and packaged sugar (industrial and table sugar) according to the price conditions and volumes specified in the commitment, which prevents it exercising its market power. Similarly to the divestiture agreement, the procurement contract was subject to prior approval by the *Autorité*.

This commitment includes an annual clause related to the price conditions, and several rendez-vous clauses to take into account the regulatory characteristics of the sugar sector, which are covered by Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector, until 2015.

## Commitments prohibiting product range discounts or tied sales

These commitments are generally undertaken in the context of conglomerate transactions. A merger has conglomerate effects where the new entity extends or strengthens its presence on several markets, the related nature of which may allow it to take advantage of a leverage effect, excluding the case of markets located upstream or downstream from one another, or where the existence of brands generates a certain degree of differentiation between the parties' products. The related nature of the markets concerned may notably arise from products belonging to a single range.

Certain conglomerate mergers can raise competition concerns where they serve to tie, whether technically or commercially, the sale or purchase of products or services in such a way that forecloses the market and excludes competitors. Several strategies may be implemented by the new entity: (i) pure bundling, namely offers marketed together by the seller (without any price advantage); (ii) technical bundling, namely offers linked by the technical integration of the products; and (iii) mixed bundling, namely selling or buying several products together under more favourable conditions (notably related to price) than those offered if the products are bought or sold separately.

Decision 16-DCC-55 of 22 April 2016 regarding the acquisition of joint control of Aqualande by Labeyrie Fine Foods and Les Aquaculteurs Landais, an agricultural cooperative, offers an example of commitments prohibiting product range discounts or tied selling.

The *Autorité* notably ruled that the transaction carried anti-competitive risks with conglomerate effects, given the strong position that Labeyrie held on the smoked salmon

market. This market is a market related to the smoked trout market, on which Aqualande is active. The *Autorité* decided that the new entity could be encouraged to bundle sales of smoked trout and smoked salmon to mass retailers, in order to favour the smoked trout produced by Aqualande and thereby potentially exclude its competitors from this market.

The notifying parties therefore committed – for a duration of five years, renewable once – to undertake independent, separate trade negotiations with mass retailers in relation to their smoked trout products and their smoked salmon products.

In addition, the parties undertook not to carry out any form of bundling, subordination, advantaging or consideration linking sales of smoked trout to mass retailers by any part of the Aqualande group to sales of smoked salmon to mass retailers by any part of the Labeyrie group. These commitments are monitored by a trustee.

### Commitments linked to the organisation of private calls for tender

These commitments are generally undertaken in the context of vertical transactions where a company holds a strong position on a market located upstream or downstream of the market on which the target, or the buyer, is active through a public contract concession. These contracts work in such a way as to require the organisation of competitive calls for tender over a certain amount. Below that threshold, the procuring company is not required to open competitive bidding for its suppliers. After the transaction, the company may favour the entity acquired, to the detriment of its competitors, which – if they do not have credible, sufficient alternatives – could be excluded from the markets.

Decision 16-DCC-167 of 31 October 2016 regarding the acquisition of sole control of Aéroports de Lyon by Vinci Airports offers an example of commitments associated with the organisation of private calls for tender that must be of a competitive nature.

After the merger, the management and operation of Aéroports de Lyon was due to be entrusted to Vinci Airports, a subsidiary of the Vinci public works and concessions group, which, among other things, responds to invitations to tender issued by airport companies. The *Autorité* thus identified the risk that Aéroports de Lyon – which remains a procurement authority under public procurement rules – could be tempted to favour bids from Vinci group subsidiaries when awarding contracts for works, supplies and services, to the detriment of its competitors.

The implementation of such a strategy could have been particularly harmful to small and medium-sized construction and public works enterprises, especially in the Rhône *département* and the Rhône-Alpes region; these enterprises represented, prior to the transaction, a significant share of Aéroports de Lyon's suppliers. This would have undermined the intensity of competition during the invitations to tender concerned, to the ultimate detriment of the customers of Aéroports de Lyon, who would have had to face the consequences of the increased prices for works, supplies and services.

To avoid this risk, Vinci undertook the following commitments:

firstly, to ensure greater transparency in contract award procedures initiated by Aéroports de Lyon by inviting representatives of the Lyon Métropole Chamber of Commerce and Industry *(CCI de Lyon Métropole)* and the French Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) to attend its purchasing committee meetings;

secondly, to meet procedural obligations aimed at ensuring a clear separation between members of the purchasing committee and other Vinci group entities responding to invitations to tender or involved in competitive bidding;

thirdly, to provide an independent trustee, approved by the *Autorité*, with a list of invitations to tender issued and selected bidders. This procedure concerns all contracts for works, supplies and services worth more than 90,000 euros before tax, while contracts below this amount remain subject to advertising rules.

The timeframe for the application of the commitments is notable in this case: Vinci has made these commitments for the entire duration of the Lyon airport management and operating concession, i. e. until 2047, thereby guaranteeing conditions for effective competition for the award of airport contracts.

## BEHAVIOURAL REMEDIES AND HORIZONTAL EFFECTS

Since 2009, behavioural remedies alone have provided a way of addressing the risk of horizontal effects identified in 12 mergers cleared by the *Autorité* (i. e. 17.6% of the clearance decisions subject to commitments).

These commitments may be categorised in the following way:

| Référence | Secteur | Nature de l'engagement comportemental |
|---|---|---|
| Decision 09-DCC-16 of 22 June 2009 regarding the Caisse d'Épargne and Banque Populaire merger | Banking | "Chinese wall" |
| Decision 10-DCC-11 of 26 January 2010 regarding the acquisition of sole control of NT1 and Monte-Carlo Participations by TF1 (AB group) | TV/media | • Modification of contractual clauses<br>• Limitation of rights of first refusal<br>• Prohibition on cross-promotion<br>• Prohibition on bundling<br>• "Chinese wall" |
| Decision 11-DCC-114 of 12 July 2011 regarding the acquisition of sole control of L'Est Républicain by Banque Fédérative du Crédit Mutuel | Press/media | "Chinese wall" |
| Decision 13-DCC-101 of 26 July 2013 regarding the acquisition of sole control of Imerys TC "structural material" assets by Bouyer-Leroux | Manufacturing production | Procurement contract |
| Decision 13-DCC-46 of 16 April 2013 regarding the acquisition of sole control by Rossel of the companies in the "Champagne Ardennes Picardie" division belonging to Hersant Média | Press/media | "Chinese wall" |

| Référence | Secteur | Nature de l'engagement comportemental |
|---|---|---|
| Decision 15-DCC-63 of 4 June 2015 regarding the acquisition of sole control of Société du Journal Midi Libre by La Dépêche du Midi | Press/media | "Chinese wall" |
| Decision 16-DCC-208 of 9 December 2016 regarding the merger by absorption of Sicavyl by Sicarev | Agriculture | • Guarantee not to restrict the commercial policy of its partners<br>• Non-opposition to entry on the market (approval) |
| Decision 16-DCC-55 of 22 April 2016 regarding the acquisition of joint control of Aqualande by Labeyrie Fine Foods and Les Aquaculteurs Landais, an agricultural cooperative | Agri-foodstuffs | Procurement contract |
| Decision 17-DCC-210 of 13 December 2017 regarding the merger by absorption of Coopérative des Agriculteurs de la Mayenne by Terrena | Agriculture | Statutory modification |
| Decision 18-DCC-65 of 27 April 2018 regarding the acquisition of sole control of Zormat, Les Chênes and Puech Eco by Carrefour Supermarchés France | Retail distribution | Retail contract |
| Decision 18-DCC-142 of 23 August 2018 regarding the acquisition of sole control of SDRO and Robert II by Groupe Bernard Hayot | Retail distribution | Retail contract |
| Decision 18-DCC-235 of 28 December 2018 regarding the creation of a joint venture by Global Blue and Planet Payment | Finance | "Chinese wall" |

It can be seen that, of these 12 mergers, three involve the regional daily press sector, in which the merging of competing titles gave rise to similar commitments taking the form of "Chinese walls", namely a set of provisions to guarantee the operational, administrative and managerial separation of the activities of two entities belonging to the same group.

In the three mergers examined by the *Autorité*[56], the risk of horizontal effects identified consisted of the homogenisation of newspaper content likely to reduce the quality and diversity of regional daily newspapers for readers. This analysis demonstrates that merger control takes into account all the effects on competition: those on prices as well as those on the quantity, diversity and quality of the products and services on offer.

To maintain the quality of their titles, the new regional daily press groups resulting from these mergers committed to refrain from harmonising the content of their newspapers, which would continue to have dedicated editorial boards. Only information that by nature is undifferentiated (weather, horse racing, television programmes, etc.), namely factual information that does not have any personal editorial input and is passed on to the reader as-is, could be harmonised in this way. These commitments were undertaken for a period of five years, renewable once.

To date, the commitments have been lifted in two of the three cases, as the *Autorité* observed, at the end of the first

56 The French Minister for the Economy also examined several mergers in the regional daily press sector, which he cleared subject to similar behavioural remedies. See, for example, the letter from the French Minister for the Economy, Finance and Industry of 28 October 2005 to SIPA's advisers relating to a merger in the publishing sector, published in BOCCRF 2005-11.

commitment period, that the economic and competition conditions in the print media sector – notably characterised by a decline in circulation of the titles covered by the commitments – no longer justified their continuation.

The Caisse d'Épargne and Banque Populaire banks merger was also subject to a "Chinese wall" commitment.

In this case, the *Autorité* had identified threats to competition on the retail banking and commercial banking markets in the *département* of Reunion Island only.

However, the notifying parties highlighted that, if a share of the assets they held on Reunion Island was put up for sale, it would be difficult – if not impossible – to find purchasers in the banking sector, given the crisis in that sector and the economy as a whole, and given the particular severity of the crisis in French overseas territories and communities. The *Autorité* performed a market test, which confirmed that any credible candidates for the purchase of the assets were hesitant due to the situation. In addition, the notifying parties proposed commitments allowing a satisfactory result in terms of the market structure. They committed to (i) maintain separate legal operating structures for their three banking networks on Reunion Island, (ii) maintain distinct brands and logos, and (iii) manage the networks separately and independently. These commitments were undertaken for a period of five years dating from the clearance decision and were lifted following the end of their implementation period.[57]

The use of behavioural remedies in the context of this transaction, which made it possible to eliminate horizontal risks, was justified for four reasons.

**57** See paras. 403 and 404 of the decision.

Firstly, the competition concerns identified by the *Autorité* were limited to a single *département*. Elsewhere on national territory, the merger did not raise any anticompetitive risks, which meant that the behavioural commitment applied was proportional.

Secondly, the transaction took place in the unusual economic context of the financial and banking crisis of 2009, making any divestiture of assets to suitable purchasers difficult, as we saw above.

Thirdly, the structure of the stakeholders' networks allowed the operational implementation of a "Chinese wall", which lifted any doubts regarding the credibility of the proposed commitment. The *Autorité* thereby noted: "*The fact that, prior to the transaction, the three networks were already attached to separate, very different, legal structures, strengthens the credibility of these commitments. Indeed, Banque de La Réunion is a commercial bank, a subsidiary of CNCE and therefore of the new central body, via Financière OCEOR, while the Caisse d'Épargne network on Reunion is attached to CEPAC (Caisse d'Épargne Provence Alpes Corse) and BRED is a shareholder in the new central body.*"[58]

Fourthly, the behavioural remedies undertaken made provision for a "crown jewel" mechanism that would involve a later switch to a compulsory asset divestiture mechanism, notably in the event that the behavioural remedies proved to be ineffective. The decision thereby states that: "[...] *if it were to be observed that the measures provided to maintain the independence of the three networks had not been put in place or if, without being able to observe such a breach, the Autorité were*

58 Aforementioned guidelines, para. 406.

*to observe, given the degradation of the competitive positioning of the three networks, that this behavioural commitment was ineffective, the divestiture of* [confidential] *would be automatically implemented. This divestiture, which would doubtless take place in a more favourable context, would remedy the threats to competition identified on the retail banking and commercial banking markets on Reunion Island*."[59]

Lastly, the "Chinese wall" commitment made it possible to clear the creation of a joint venture by Global Blue and Planet Payment. While Cash Paris Tax Refund was active in VAT refund services in agencies located in the Parisian airports, its parent companies were each present upstream in VAT refund services, with large market shares. The *Autorité* identified a risk that Global Blue and Planet Payment could coordinate their competitive behaviour on VAT refund service markets in France. Indeed, Global Blue and Planet Payment are the two main operators for these services in France, and the setting up of this joint venture, which would have had access to information regarding their competitors, could have enabled the sharing of common knowledge regarding the functioning and structure of the market, thereby stifling or even eliminating any competition between them. The appropriate commitment involved erecting a "Chinese wall" between the joint venture so that these parent companies did not have access to information regarding their competitors. The parties notably committed to ensure that no representatives of the partners in the joint venture would be able to access specific information relating to refund forms dealt with by the joint venture. In addition, representatives of the partners would be bound by confidentiality agreements covering information regarding the activities of the joint venture

**59** Aforementioned guidelines, paras. 407 and 408.

to which they could have access as part of their duties. The commitments also concerned the appointment of directors of the joint venture, the retention of specific information by the joint venture and its IT systems. The *Autorité* therefore considered that this type of commitment would limit the joint venture's operation to its main activity, without allowing the parent companies to access strategic information regarding their competitors.

In practice, it is only on an exceptional basis that a "Chinese wall" commitment is accepted in response to horizontal competition concerns, as horizontal effects can be addressed more rapidly and more effectively by the sale of targeted assets where the merger so permits (acquisition of a network of stores, for example).

The same goes for commitments involving the conclusion of a procurement contract, which is most commonly used in response to competition concerns of a vertical nature, as seen above. This was used in response to the risk of horizontal effects in Decision 13-DCC-101 of 26 July 2013, which concerned the acquisition of sole control of Imerys TC "structural material" assets by Bouyer-Leroux. Once again, this was a special case.

The *Autorité* took the view that, after the transaction, Bouyer-Leroux would have a near-monopoly on the manufacture of partition bricks in western France and hold a very significant position in the manufacture of wall bricks in Aquitaine, without competing manufacturers or customers being in a position to counterbalance the market power of the new entity. When examining this transaction, the *Autorité* recalled that there were no alternatives to behavioural remedies to clear the merger.

On the one hand, the structural commitment initially proposed by the notifying party involving the divestiture of a shutdown production site was deemed to be an ineffective way to remedy the identified competition problem. Indeed, the *Autorité* decided that, following a market test, neither the viability nor the competitiveness of the production site had been established. Yet, "*in order for the divestiture of a business to provide an effective remedy for threats to competition, it is vital for the business divested to be viable and competitive. In order to achieve this, the scope of divestiture should include all assets and personnel required for its smooth operation*."[60]

On the other hand, the divestiture of another production site of the new entity would have been disproportionate in relation to the threats to competition identified, which, in this case, were limited to a regional market, namely the sale of wall bricks in Aquitaine.

The *Autorité* therefore ruled that "*in the absence of an appropriate structural remedy, the sale of wall bricks at cost price from the Gironde-sur-Dropt site, located in Aquitaine, should allow competitors to stimulate competition on the market and set out the milestones necessary for the development and sale of their own production in the region*".[61]

The temporary nature of the procurement commitment is important: the useful effect of the behavioural commitment was not only to allow the new entity's competitors to compete with also it on the downstream wall brick distribution markets, but also to enable them to establish themselves on the market in the medium term.

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**60** Aforementioned guidelines, paras. 579 onwards.

**61** Decision 13-DCC-101 of 26 July 2013 regarding the acquisition of sole control of Imerys TC "structural material" assets by Bouyer-Leroux, para. 233.

The *Autorité* said that the characteristics of the sector justified its recourse to this entirely new type of behavioural commitment. It explained that, "*to sustainably penetrate the wall brick market in Aquitaine, it is necessary, first of all, to be able to access a range of finished products at prices as competitive as those of the new entity. To do this, given the scale of the burden that high transport costs place on the competitiveness of the finished products, and therefore on market shares, it is necessary to both have a production plant in the region, and be able to supply it with raw materials. Secondly, it is also essential to have a distribution channel for selling the products manufactured, which requires significant commercial investment with regard to the various specifiers or purchasers of these products. In addition, the process to obtain the administrative licences required to open and run a quarry is slow (taking between three and five years)*".[62]

As a result, the behavioural commitment undertaken had to respond to two complementary objectives: ultimately, it needed to allow competitors to penetrate the market concerned by constructing their own production site, and, initially, it needed to enable them to exercise competitive pressure on the new entity in order to prevent any strategies aiming to increase prices or, conversely, to practise aggressive pricing to increase the barriers to market entry.

62 *Ibid*., para. 234.

## Difficulties associated with behavioural remedies

Structural commitments form part of ongoing, established practice – regardless of the type of asset concerned – that involves limiting the capacity of the entity resulting from the merger to exercise market power. The commitment undertaken must either (i) result in the elimination of overlapping activities between the parties to the transaction, (ii) bring the market share of the new entity below a certain threshold, or (iii) allow a new competitor to take the place of the acquired or absorbed party. Although there are various ways of executing this type of commitment (duration, involvement of a trustee, or substitution or "crown jewel" commitments, etc.), their development responds to criteria broadly shared by competition authorities in Europe and known to companies and their advisers. As a consequence, these commitments are easy to design and implement.

This is not the case for behavioural remedies, which take various forms, and which are developed according to the circumstances of the case. As a consequence, they are much more difficult to develop and require special attention from the *Autorité* before being accepted. In addition, they are maintained over a period of time and must therefore include a certain number of precautions to ensure that their smooth execution is guaranteed until they come to an end, taking into account their complexity.

### "TAYLOR-MADE" DESIGN

The classification of behavioural remedies illustrates the diverse range of remedies accepted by the *Autorité*. The difficulties associated with behavioural remedies lies firstly in their design, as they must respond to the competition concerns

identified in a sector, or for a product or service, taking into account foreseeable developments on the markets.

As a result, they generally – but not systematically – undergo in-depth checks among third parties on the markets concerned, through a consultation ( "test of market" ).

Indeed, the *Autorité* has the option of consulting the third parties concerned by a merger if it considers it useful to gather their opinions on the scope of the commitments submitted by a company – similarly to the way in which it implements market tests – in order to examine the suitability of the markets concerned and the potential effects of a merger on competition. Although they are not obligatory, such tests make it possible to anticipate any difficulties, whether in scope or implementation, and, above all, to better assess their effects on the third parties affected. Indeed, behavioural remedies have, by definition, an effect on the competitors, suppliers or customers of the companies concerned, as they generally aim to prevent their exclusion from the markets on which vertical or conglomerate effects have been identified.

No legislative or regulatory texts make this consultation procedure compulsory where commitments are proposed by company. The guidelines mentioned above only state that "*the Mergers Unit assesses the admissibility of the commitments proposed according to the threats to competition that the transaction is likely to generate. These commitments may be tested among stakeholders on the markets concerned, while respecting parties'business secrecy*".[63] However, in practice, a market test is often performed by the *Autorité* where behavioural remedies are proposed. Indeed, there may

**63** Aforementioned guidelines, para. 233.

be subtleties or technical considerations in the commitment draft that only operators active on the markets are able to identify, where relevant.

Such consultations occur most frequently following an initial market test, which makes it possible to confirm or, on the other hand, eliminate concerns regarding the delineation of a market or the effects of the merger. The same third parties are generally consulted regarding the proposed commitments: the main suppliers, competitors and customers of the parties.

A test of commitments requires the notifying parties to provide a version of the proposed commitments that is not confidential, namely a version that may be communicated to the third parties without any business secrecy or information likely to significantly harm the interests of the company. The *Autorité* does, however, ensure that the version provided allows third parties to respond to the issues raised in consultation and, where necessary, negotiate with the company concerned to amend the public version of the commitments.

In the context of merger control, the test of commitments does not generally give rise to a public consultation via publication on the *Autorité*'s website. The test is only performed among the third parties identified by the parties in their merger case and those that come forward spontaneously during the examination. However, although the information regarding a submission of commitments is not made public by the *Autorité*, the third parties affected by a notified merger will still benefit from initial information on the submission of a notification file and have sufficient notice to submit their observations to the Mergers Unit. The guidelines mentioned above specify: "*Companies active in the sector on which a merger is envisaged are strongly advised to communicate any information or comments they may have regarding the risks*

*to competition posed by the transaction."*[64] The deadline "*for third parties to present observations is specified on the Autorité's website when the notice regarding the submission of the notification is published. It is generally 15 working days from this date of publication."*[65]

In addition, it is not uncommon for companies to submit several versions of commitments. If the first set of commitments can be tested, additional consultations are not necessarily held for the amended versions, which take into account the observations gathered during the previous test. If the *Autorité* decides that the modifications to the initial commitments address the legitimate concerns expressed by the third parties concerned, and do not significantly modify the scope, it does not perform another test. The final version of the commitments submitted will be that taken into account in the examination of the transaction.

## MONITORED COMMITMENTS INVOLVING OBLIGATIONS

Behavioural remedies require significant human resources, both for the *Autorité de la concurrence*, which has to mobilise rapporteurs to monitor them, and the company that commits to them, which must where appropriate pay a trustee and mobilise employees to ensure the correct implementation of the commitments undertaken.

Behavioural remedies are also "living" commitments throughout their application; unlike structural commitments that disappear rapidly following the effective divestiture of the

64 Aforementioned guidelines, para. 220.

65 Aforementioned guidelines, para. 221.

assets concerned, behavioural remedies are intended to last and, where necessary, be adapted to market changes that occur after the examination of the merger. They therefore require regular monitoring. Without completely lifting the commitment, it is sometimes necessary to adapt them, on the request of the company, in the context of a rendez-vous clause, which is most often provided for in the text of the commitment.

Such adaptations may be advantageous, both for the companies, which may find themselves faced with an unexpected development in market conditions, and the *Autorité*, which may use them as an opportunity to update its competitive analysis by taking into account events that have occurred since its initial decision, and thereby improve the impact of its decision through this re-examination.

However, this re-examination (or "rendez-vous" ) clause may only be used in exceptional cases or following the end of the first full commitment implementation period (generally five years), as the competitive analysis performed by the *Autorité* is based on a time scale of three to five years, and takes into account sensibly foreseeable market developments. Requests for the revision of commitments that are made during this period, and which are not based on exceptional circumstances, must not call into question the commitments undertaken.

Of the 21 behavioural or mixed commitments by companies since 2 March 2009, six were re-examined on the basis of exceptional circumstances before they came to an end.

Several of them were adjusted, notably to take into account legislative or regulatory changes that had occurred after the clearance decision.

One example of this, from the mass retail distribution sector in French overseas territories and communities, is Decision 11-DCC-134 of 2 September 2011 relating to the acquisition of sole control of Louis Delhaize by Groupe Bernard Hayot. This included commitments regarding the exclusive rights held by the latter, which would have given it the means to favour its own shops to the detriment of its competitors. This aspect of the commitments became obsolete following the adoption of French law 2012-1270 of 21 November 2012 on Economic Regulations in French Overseas Territories and Communities (known as the "Lurel Law" ). This law required the deletion, in overseas *départements*, of exclusive import rights from contracts concluded between overseas retailers/importers and their suppliers based in mainland France or elsewhere in the world. More specifically, Article 5 of the law now states: "*It is prohibited* [...] *to implement joint agreements or practices that aim to, or have the effect of, granting exclusive distribution rights to a company or group of companies.*" The lifting of commitments therefore duly notes the expansion to all economic stakeholders in French overseas territories and communities of what were, until now, obligations solely applicable to the parties.

Another example is that of commitments lifted after the initial period of five years. This is the case for decisions taken in the regional daily press sector.

In Decision 13-DCC-46, the *Autorité* cleared, on 16 April 2013, the takeover of the "Champagne Ardennes Picardie" press division of Hersant Média by Rossel. However, the *Autorité* noted that the transaction was likely to harm competition due to horizontal effects on the regional daily press readership markets in the Aisne *département* (Saint-Quentin Chauny area). The following behavioural remedies lasting a period of five years, renewable once, were made by the Rossel group:

(i) to refrain from harmonising local content; (ii) to maintain dedicated editorial boards for each of the titles: "Courrier Picard", "L'Union" and "L'Aisne Nouvelle"; and (iii) to continue distributing "Courrier Picard", "L'Union" and "L'Aisne Nouvelle in the Saint-Quentin-Chauny area. After this period of five years, after examination and via a letter addressed on 6 March 2018 to Rossel's advisers, the *Autorité* decided not to renew the commitments, given the specific economic difficulties caused by the simultaneous decline in the circulation of regional daily newspapers and advertising income, and the fragile situation of the titles concerned by the commitments.

## Anticipating the negotiation of behavioural remedies

As the deadlines for examining a merger are more restrictive than those for litigation procedures, it is in the parties' interest to offer commitments sufficiently early in the merger examination process. Otherwise, if a proposal is made at the end of the examination, there is the risk that it might not be accepted, or that an in-depth examination will be required or that the transaction could be abandoned. It is therefore better to anticipate this crucial step in the merger control procedure.

The decision to propose commitments is the sole prerogative of the notifying parties; the *Autorité* cannot force them to do this, despite having powers to impose injunctions or requirements or, if there are no appropriate remedies, prohibit the transaction.

It is therefore the responsibility of companies to adopt a realistic time frame. In order to do that, the notifying party must firstly understand that in order to be able to perform the proposed merger, it must be ready – if the project raises concerns regarding competition – to review its initial

proposal or undertake restrictive commitments for a determined period, or otherwise renounce the transaction altogether.

As the decision-making practice of competition authorities is now sufficiently well-developed and predictable, it is rare for companies to uncover potential competition concerns related to a merger at a late stage.

In general, competition authorities encourage the companies concerned to submit commitments promptly to leave enough time to assess, discuss and accept them. Otherwise, the company leaves itself open to procedural risks and is likely to compromise the provisional timetable for its transaction, or even put itself in a delicate situation when executing the commitments undertaken.

## TIMING IS EVERYTHING: THE EARLIER THE BETTER!

In practice, the notifying party or parties often submit their proposed commitments at a very late stage of the examination.

Between 2009 and 2017, the *Autorité* received the initial commitment proposal on average 21 working days after receipt of a complete notification file. In 2018, this period was considerably shorter: out of the four clearance decisions subject to commitments, two involved behavioural remedies submitted the same day as notification of the file to the *Autorité* (see table below); one within a period of five working days (Decision 18-DCC-148 of 24 August 2018 on the acquisition of sole control of Jardiland by InVivo Retail: structural commitments); and the last within 20 working days (Decision 18-DCC-142 of 23 August 2018 on the acquisition of sole control of SDRO and Robert II by Groupe Bernard Hayot: behavioural remedies).

However, phase 1 of the examination of a merger starts on the working day following the date on which the complete

notification file is received by the *Autorité* and lasts for 25 working days (paragraph I of Article L. 430-5 of the *Code de commerce* (French Commercial Code)*Code de commerce*. This time limit is automatically extended by 15 working days if the *Autorité* receives commitments proposed by the parties (paragraph II of Article L. 430-5). Lastly, the deadline may be extended, upon the request of the notifying party, by suspending the examination time limit for up to 15 working days (paragraph II of Article L. 430-5). As explicitly provided for in this Article, such a request may arise "*in case of special need, such as the finalisation of the commitments*".

The vast majority of mergers cleared subject to commitments were done so without any requests for the suspension of examination time limits to allow their finalisation. Even though the submission of commitments extends the examination time limit by 15 days, the *Autorité* still only has a few days to examine, negotiate and test the commitments, which may, in certain cases, prove to be complex, especially if they are behavioural remedies. Companies should anticipate this delicate phase, especially if threats to competition are identified upstream of the examination phase.

The examination of 59 clearance decisions issued subject to commitments in phase 1 shows that in some cases the commitments were submitted very early in the procedure:

The rare examples in which an in-depth pre-notification phase allowed discussions between the parties and the *Autorité*

| Decision | Type of commitment | Working days between submission of file and submission of initial commitments |
|---|---|---|
| Decision 12-DCC-129 of 5 September 2012 regarding the acquisition of sole control of Keolis by SNCF-Participations* | Behavioural | 8 |
| Decision 13-DCC-137 of 1 October 2013 regarding the acquisition of sole control of Transdev Group (formerly Veolia Transdev) by Caisse des Dépôts et Consignations** | Structural and behavioural | 0 |
| Decision 14-DCC-50 of 2 April 2014 regarding the acquisition of sole control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Canal Plus | Structural and behavioural | 0 |
| Decision 16-DCC-167 of 31 October 2016 regarding the acquisition of sole control of Aéroports de Lyon by Vinci Airports | Behavioural | 10 |
| Decision 18-DCC-65 of 27 April 2018 regarding the acquisition of sole control of Zormat, Les Chênes and Puech Eco by Carrefour Supermarchés France | Behavioural | 0 |
| Decision 18-DCC-235 of 28 December 2018 regarding the creation of a joint venture by Global Blue and Planet Payment*** | Behavioural | 0 |

* Decision taken after referral by the European Commission on 23 July 2012, in application of Article 4, para. 4 of Council Regulation (EC) No 139/2004.
** *Ibid*.
*** Decision taken after referral by the European Commission on 23 July 2012, in application of Article 4, para. 4 of Council Regulation (EC) No 139/2004.

only represent 10% of the clearance decisions issued subject to commitments in phase 1.

Commitments submitted early in the procedure can take the form of "fix-it-first" commitments that solve the issue beforehand, where the divestiture of assets is involved. As specified by the aforementioned guidelines, "*the parties can notify the transaction by presenting, straight away, a buyer for the business or part of the business whose acquisition is generating problems regarding competition* [...]. *In such a case, the Autorité assesses the effects of the transaction taking into account the planned sale*."[66]

To date, a "fix-it-first" structural commitment has been submitted in three merger cases.

The competitive analysis performed for Decision 09-DCC-67 of 23 November 2009 on the acquisition of Arrivé by LDC Volailles therefore took into account that part of the assets would be sold to Fermiers Landais, a purchaser presented during the examination by the notifying party.

In Decision 15-DCC-53 of 15 May 2015 on the acquisition of sole control of Totalgaz SAS by UGI Bordeaux Holding SAS, the notifying party proposed transferring its stake in the capital of a depot located in Norgal to Butagaz, which would thereby become the third shareholder in the depot, alongside the new entity and Vitogaz, a minority shareholder. This solution made it possible to maintain the competitive context that existed prior to the transaction by retaining three competing LPG distributors at the Norgal site.

66 Aforementioned guidelines, para. 591.

On 29 January 2019, the *Autorité* also accepted a "fix-it-first" commitment in the context of the acquisition of sole control of Alsa France and intangible assets required for the manufacture and sale of food products under the Alsa and Moench brands by Dr. Oetker.[67] The notifying party committed to enter, with the company Sainte Lucie, a trademark licensing agreement for Ancel dessert mixes for a duration of five years, renewable once. The trademark licensing – the exclusive (as far as this case is concerned) use of the brand by a competitor – of Ancel dessert mixes will ensure the existence of a credible alternative for the distributors, and ultimately customers, of dessert mixes, thereby ensuring that sufficient competition is maintained in the market.

However, "fix-it-first" solutions, which involve submitting negotiated commitments with the notification file, are little-used in France, unlike what can be observed from the decision-making practice of the Commission or the Bundeskartellamt.

That said, "fix-it-first" solutions concern the sale of assets, and therefore potential structural commitments. It would be entirely possible to extend the scope of these commitments submitted together with the notification file to behavioural remedies, on the condition, however, that it had been possible to identify the competition issues raised by the merger beforehand. The reasoning is the same: they must allow the *Autorité* to examine a notification file, taking into account, from the very beginning, a legal element (a binding agreement in the case of divestiture of assets, for example) in the analysis of merger effects.

67 Decision 19-DCC-15 of 29 January 2019 on the acquisition of sole control of Alsa France SAS and intangible assets required for the manufacture and sale of food products under the Alsa and Moench brands by Dr. Oetker.

## RISKS OF A DELAYED SUBMISSION

Given the restrictions associated with the strict examination deadlines, the late submission of commitments is likely to generate undesirable effects. From the companies' point of view, two main risks may be identified.

Firstly, in the short term, the main risk is a lack of time to finalise commitments likely to respond to the competition concerns identified, making an in-depth examination necessary, which extends the examination deadlines by several months.

While the progression to phase 2 (or the opposite decision not to initiate phase 2) is not likely to adversely affect the notifying company or third parties,[68] such an event is still likely – if it has not been anticipated and incorporated into the merger timetable – to lead to practical difficulties for the notifying party, or even the abandonment of the proposed project. The *Autorité* regularly observes that companies prefer to put an end to the transaction – even if they have to compensate the seller – rather than engage in phase 2, the outcome of which seems to them too uncertain. This observation is valid at European level too.

The reasons for these failures are varied, but they all show a lack of forward planning and, ultimately, involve a lack of time to remedy the competition concerns identified.

68 See, for example, the judgement of 6 July 2016 of the French Administrative Supreme Court (*Conseil d'Etat*) n°. 390457, 390774 Compagnie des Gaz de Pétrole Primagaz/Vitogaz France, which recalled that "*third parties cannot usefully critique the lawfulness of the Autorité's choice to take a clearance decision associated with commitments undertaken by the parties, without recourse to an in-depth examination*

The *Autorité* therefore encourages companies not to wait until the state-of-play meeting, but rather to be proactive by initiating discussions regarding commitments at the pre-notification stage.

It has been established that the option of submitting commitments is integrated, where competition issues have been identified by companies, upstream of the merger control procedure. The too-frequent decision by companies to hide or minimise these risks until competition concerns are expressed formally by the *Autorité* – in order to avoid, where relevant, having to submit commitments or to limit their number or scope – involves a certain degree of risk. This risk is even larger where there are threats to competition for which there are no structural remedies.

Indeed, behavioural remedies take various forms, sometimes innovative, and are difficult to replicate from one transaction to the next. They are undertaken based on a specific case, and their mechanics, modalities, duration and monitoring system are proper to the risks identified and the market/s involved. Although there are broad categories of behavioural remedies, it is risky to initiate discussions, which may prove to be technical, at the very end of the phase 1 examination procedure.

Secondly, in the long term, there is a risk for both the *Autorité* and the company concerned that they will be confronted with ineffective commitments or commitments that are difficult to verify. A lack of time to negotiate behavioural remedies necessarily makes their assessment more difficult. In addition to the fact that, in the event of persistent doubts, the *Autorité* must take the decision to open an in-depth examination (see above), this may also lead to commitments that risk giving rise to differences of interpretation between the *Autorité* or its investigation services and the company, or

even expose the company to penalties that can be onerous in the event of failure to comply with the commitments.

* * *

Although behavioural remedies are not generally the remedies favoured by the *Autorité* in merger law, they nevertheless play no small role in its decision-making practice. Indeed, they are sometimes the only type of remedy that enables a transaction to be cleared while maintaining sufficient competition on the markets concerned. Yet they require careful handling, and all the more so given that they are examined within the very tight deadlines that are specific to merger law. These particular features of commitments adopted *ex ante* are not shared by those adopted *ex post* in anticompetitive practice law.

# 3/ COMMITMENTS IN RELATION TO ANTICOMPETITIVE PRACTICES

Unlike commitments undertaken in merger law, the *Autorité* has only ever accepted remedies of a behavioural nature in anticompetitive practice law. Nevertheless, some of these remedies, whose implementation is the result of a unique transaction and which are hard to reverse, could be qualified as quasi-structural.

Such behavioural remedies may be highly varied. The table below lists the main types, but without any claim to be exhaustive.

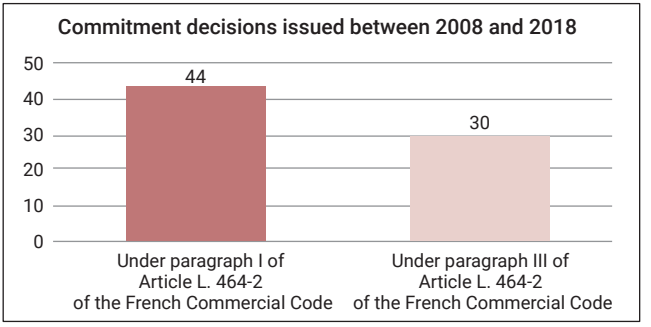
● BEHAVIOURAL REMEDIES

| Quasi-structural commitments | Purely behavioural remedies |
|---|---|
| – Licensing agreement (Decision 05-D-25) | – Modification or deletion of contractual clauses (Decisions 06-D-24, 11-D-08) |
| – Introduction or development of cost accounting (Decision 17-D-09) | – Access to essential infrastructure or a closed group (Decision 12-D-06) |
| – "Chinese wall" (Decision 08-D-34) | – Communication of information to competitors (Decision 14-D-09) |
| – Separation of activities inside and outside the market by a monopolist (Decision 12-D-04) | – Prohibition on two companies in the same group simultaneously bidding for public contracts (Decision 08-D-29) |
| | – Compliance programme (Decisions 14-D-19, 15-D-19) |

In anticompetitive practice law, the *Autorité* may accept commitments from a company or body whose behaviour raises, in its view, concerns regarding competition. Accepted on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*), these remedies result in the conclusion of the procedure before any notice of breach. They therefore allow the company or body in question to avoid a penalty, possibly combined with an injunction.

Once the objections have been notified, the commitment procedure provided for in paragraph I of Article L. 464-2 is closed. However, the *Autorité* may still accept commitments where it issues a ruling in the specific framework of the settlement procedure in application of paragraph III of Article L. 464-2 of the French Commercial Code (procedural notice of 21 December 2018 on the settlement procedure). In such a case, a company or body that does not contest the objections made against it is likely to receive a reduced penalty. The acceptance of commitments to put an end to the competition concerns identified may cause the fine to be reduced still further.

Undertaken in application of paragraphs I or III of Article L. 464-2 of the code de commerce (in the latter case, this figure covers "no contest of objections" and settlement decisions), the commitments accepted in anticompetitive practice law represent a non-negligible share of the decisions issued by the *Autorité*.



The differences between these procedures justifies examining the resulting commitments successively, looking firstly at the commitments taken in application of paragraph I of Article L. 464-2 of the French Commercial Code, followed by those accepted in application of paragraph III of the same Article.

## Commitments resulting from a "commitment procedure"

The "commitment procedure" makes it possible to address a wide range of potentially anticompetitive practices, which represent so many competition concerns for the *Autorité*. Previously, Council Regulation 1/2003[69] had already made provision for the European Commission to impose compulsory commitments – as an alternative to a penalty – to rapidly restore effective competition on the market. Article 9 specifies that "*where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings*". It can be noted that the importance of this approach to resolving competition concerns was confirmed by the ECN+ Directive,[70] which requires Member States, under Article 12, to grant

69 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

70 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

this power to all competition authorities in the European Union. French practice, which has already been developed on the basis of national law, shows the advantages of this procedure. Different remedies can be used to put an end to competition concerns, with the *Autorité* currently favouring, as a general rule, recourse to commitments requiring simple monitoring. Their acceptance results from a procedure that differs a great deal from that applicable in relation to penalties, in which third parties play an important role. These commitment decisions, if they are imposed on the parties, are clearly different to sanction decisions in that they put an end to the procedure without prior qualification of the practices challenged.

## CLASSIFICATION OF PRACTICES LIKELY TO BE THE SUBJECT OF COMMITMENTS

Paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*) states that commitments may be accepted in relation to all the anticompetitive practices mentioned in Articles L. 420-1 to L. 420-2-2 and L. 420-5. It also grants broad discretionary powers to the *Autorité* in deciding whether or not to implement this procedure (see for example Decision 17-D-16 of 7 September 2017 regarding the practices implemented by Engie in the energy sector). Indeed, this power has been described as "*discretionary*" by the Paris Court of Appeal (Paris Court of Appeal, 17 May 2018, Umicore, n°. 2016/16621). It is therefore possible to classify the practices likely to be the subject of commitments in the light of past decisions made by the *Autorité*.

Summarising this practice, the Notice on Competition Commitments issued on 2 March 2009 sets out the behaviour covered by this procedure.

The characteristics common to these practices are given in paragraph 9 of this document. Firstly, the competition concerns raised by the behaviour in question must be "*ongoing* [...] *In other words, the practices must have persisted or their impact on competition must continue to be felt on the day the undertakings at issue propose commitments and on the day on which the Autorité determines whether the commitments procedure is appropriate*" (Decision 12-D-17 of 5 July 2012 relating to practices observed in the sector of non-cash means of payment (direct debits, interbank payment orders, online payments, transfers and bills of exchange)). Secondly, "*the nature and conditions of the practices at issue must be such that commitments guaranteeing that competition in the marketplace will be maintained or restored can satisfy concerns that need to be remedied on a long-term basis*", (also Decision 12-D-17 of 5 July 2012).

Paragraph 12 of the notice then details the behaviour or situations in which recourse to this procedure is particularly suitable. It specifies that "*the practices involved in the commitment decisions rendered to date are essentially certain unilateral or vertical practices restricting market access*".

However, it is above all the definition of practices unlikely to be addressed through the commitment procedure that is of interest. Paragraph 11 of the notice states that "*the Autorité does not use the commitment procedure in cases where, in any event, the harm to economic public order calls for the imposition of a fine, which precludes a priori particularly serious forms of collusion such as cartels and certain types of abuse of dominant position having already caused significant damage to the economy*". It is on this basis that the *Autorité* expressly decided not to implement the commitment procedure in relation to practices implemented at least between 1999 and 2007 and prohibited under Articles 101 and 102 of

the Treaty on the Functioning of the European Union (TFEU), L. 420-1 and L. 420-2 of the French Commercial Code (see Decision 16-D-14 of 23 June 2016 regarding practices in the sector of laminated zinc and manufactured zinc products for the building industry, confirmed by the Paris Court of Appeal, 17 May 2018, Umicore, n° 2016/16621).

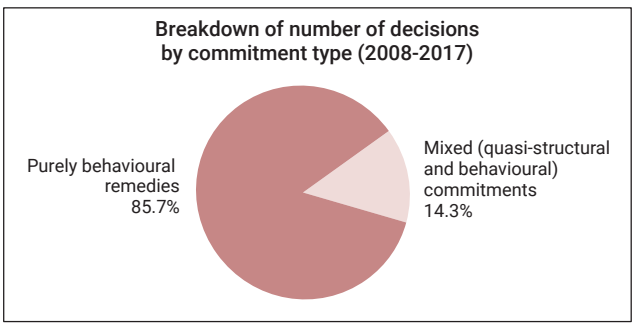
However, in accordance with paragraph 6 of the notice, the *Autorité* may still, in appropriate circumstances, "*focus on the voluntary maintaining or restoring of competition in the marketplace*". This option expresses the broad discretionary powers entrusted to the *Autorité* by the legislator regarding commitments. Decision 12-D-17 of 5 July 2012 relating to practices observed in the sector of non-cash means of payment (direct debits, interbank payment orders, online payments, transfers and bills of exchange), mentioned above, gives a good illustration of this.

In this case, the practices implemented involved horizontal agreements likely to be anticompetitive due to both their purpose and their effect. At first sight, they were not included in the types of behaviour described as likely to be corrected by commitments under paragraph 11 of the notice. However, the *Autorité* took into account several specific elements in the case to decide otherwise. It principally based this decision on the need to rapidly restore competition on the relevant market, without awaiting the application of a European regulation likely to bring it to an end within five years, and on the fact that the commitments came from a large proportion of the companies, representing the bulk of the market.

In this way, although the competition concerns likely to result in commitments essentially arise from unilateral, vertical practices, they are not limited to such practices. They may be diverse, just like the commitments intended to bring them to an end.

## PHYSIOGNOMY OF COMMITMENTS

To date, the *Autorité* has never accepted structural commitments in anticompetitive practice law. This is explained by the fact that the competition concerns generally identified do not arise from the structure of the market itself, but rather from the deviant behaviour of the companies or bodies active on that market. Behavioural remedies have proven to be the best way of directly responding to them. As the *Conseil de la Concurrence* had already observed in 2005,[71] such commitments can be purely behavioural remedies or quasi-structural remedies.




### Purely behavioural remedies

These remedies may, for example, involve the modification of contractual clauses, notably concerning the relations between suppliers and distributors.

71 *Conseil de la Concurrence*, thematic study: *Sanctions, injonctions, engagements, transaction et clémence: les instruments de la mise en œuvre du droit de la concurrence* [Sanctions, injunctions, commitments, settlements and leniency: the instruments for implementation of competition law], Annual Report 2005, p. 155.

The Festina case (Decision 06-D-24 of 24 July 2006 regarding the distribution of watches marketed by Festina France) provides a topical example of this. The case involved a company called Bijourama, specialising in the online sale of watches, jewellery and silversmith's pieces, which submitted a referral to the *Conseil de la Concurrence* regarding the practices implemented by Festina France. Bijourama, a "pure play" company, complained that Festina France had refused to grant approval allowing it to join the latter's selective distribution network for watches. In particular, it considered that this refusal was discriminatory towards sellers operating solely on the internet, and that Festina France's selective distribution agreement was not lawful since it excluded a certain form of distribution. During the preliminary assessment, the case officer (*rapporteur*) expressed concerns regarding the lawfulness of the distribution contract used by Festina France, indicating that there were no provisions governing the sale of the company's products on the internet. In response to these competition concerns, Festina proposed commitments consisting in amending and extending its selective distribution agreement to include clauses regarding online sales.

Such modifications may also focus on the implementation of clauses or regulations linked to the contract and likely to be modified unilaterally.

In the Navx case (Decision 10-D-30 of 28 October 2010 relating to practices employed in the internet advertising sector), this company, specialising in the sale of databases for indicating the location of fixed and mobile speed cameras, accused Google of excluding it from its online advertising service, AdWords. Google justified this decision by claiming that Navx had misread the regulations governing AdWords content, particularly in relation to devices for evading speed cameras in France. The *Autorité* considered that Google remained,

in principle, free to define its AdWords content policy, but noted that, in practice, this policy had been implemented in a non-objective, non-transparent and discriminatory way, to the detriment of suppliers of speed camera databases, and the complainant company in particular. Google then undertook, for a period of three years, to make the operation of its AdWords service in relation to systems for evading speed cameras in France more transparent and predictable for advertisers, in particular by specifying the navigation devices for which advertising is authorised or prohibited; by specifying the scope of the prohibition, notably whether it applies solely to advert content or if it also applies to the advertiser's destination pages or cross-referenced pages and the use of keywords; by introducing a targeted procedure to inform and notify companies regarding modifications to AdWords content policy; and by clarifying the procedure likely to lead to the suspension of an advertiser's account in the event of a breach of AdWords content policy.

Contractual modifications may also concern the deletion of an exclusivity clause.

In the Accentiv'Kadéos decision (Decision 11-D-08 of 27 April 2011 relative to the practices implemented by Accentiv'Kadéos), the company was accused of creating entry barriers and a foreclosure effect within the multi-brand gift card markets, due to the cumulative effect of the various exclusivity clauses included in the contracts signed with partner brands, notably as a result of the scope and duration of the exclusivity clauses. The company therefore committed to remove barriers to entry for new players on the multi-brand gift cards acceptance market, thereby allowing them to negotiate with the brands of their choice. To do this, Accentiv'Kadéos agreed to delete, promptly and by 1 May 2011 at the latest, the acceptance exclusivity clause in the contracts signed with

all its affiliated brands for multi-brand gift cards. In addition, it committed to allow the entry of new players on the multi-brand gift cards acceptance and distribution markets. To this end, it committed to refrain from concluding new exclusivity agreements, whether regarding acceptance or distribution to consumers, with brands that did not yet have exclusivity agreements with it, throughout 2011.

More broadly, behavioural remedies may lead economic operators to change their behaviour, independently of any contractual modifications.

In the Nespresso decision (Decision 14-D-09 of 4 September 2014 on the practices implemented by Nestlé, Nestec, Nestlé Nespresso, Nespresso France and Nestlé Entreprises in the sector of espresso coffee machines), the *Autorité* considered that several practices implemented by this company excluded competing capsule manufacturers and were likely to constitute abuse of a dominant position. Nespresso then committed to provide its competitors with information regarding technical modifications at the point at which it issues the order to launch production of the modified machines, without waiting for their commercial launch. It also committed to appoint a "*trusted third party*" to play the role of intermediary in order to avoid any transfer of confidential information between the competitors and itself when the technical information was communicated. Nespresso undertook to provide competitors, via the trusted third party, with prototypes of the new machines – a minimum of 15 so that they could carry out compatibility tests with their capsules, although only three prototypes had initially been offered. Finally, it made the commitment to be more transparent with regard to the origin of technical modifications made to the machines and the new technical specifications, in particular by submitting a

file to the *Autorité* setting out the reasons behind each technical change.

Lastly, behavioural remedies may also involve control of companies' pricing policy.

In the Engie decision (Decision 17-D-16 of 7 September 2017 regarding the practices implemented by Engie in the energy sector), the services of the *Autorité* considered that it could not be ruled out that the prices of many offers for both consumers and businesses were set too low to allow Engie, which leads the market, to cover its costs. Furthermore, they also concluded that Engie was not reliably determining its costs, and therefore its prices, nor was it performing reliable monitoring of the profitability of its offers. To resolve these competition concerns, Engie notably committed to introducing a cost definition method and a reliable profitability analysis of market offers to ensure that the company implements an internal process to determine and verify the profitability of its market offers, using a relevant and verifiable cost structure, in accordance with the established principles of competition law.

In the La Poste decision (Decision 17-D-26 of 21 December 2017 regarding practices implemented in the collection and recovery of non-hazardous office waste sector), the investigation services identified several competition issues, some of which concerned pricing practices in relation to collection offers. To remedy these issues, Groupe La Poste committed to develop a methodology for cost assignment that guarantees compliance with competition law, use this methodology to determine prices and implement profitability monitoring.

Behavioural remedies are therefore highly diverse. They make it possible to find an appropriate solution to a problem

arising from the behaviour of market stakeholders. This is why they are used so frequently in anticompetitive practice law, in contrast to structural commitments. Yet this does not imply that the *Autorité* never accepts commitments that may modify the structure of markets, as is shown by the large number of "structuring" or "quasi-structural" commitments.

## Quasi-structural commitments

These remedies are preferred by the *Autorité* as they allow rapid re-establishment of public economic order through clear, large-scale measures that are easy to check and which do not require too great a mobilisation of resources for monitoring. As a result, the resources saved upstream by using the commitment procedure are not spent downstream on checking that the commitments have been executed.

They can take many forms. First of all, they may involve a compulsory licensing agreement. As Patricia Kipiani explains, "*granting a licence, notably for a brand or patent, is considered to be the standard example of a quasi-structural commitment. This type of commitment modifies the structure of the market by introducing new competitors. Licensing will allow the dealer to enter the market, or strengthen its position on the market. Unlike divestiture in its strict sense, the licensor retains ownership of its intellectual rights. The dealer is therefore only the temporary holder of these rights*".[72]

In the Yvert & Tellier case (Decision 05-D-25 of 31 May 2005 relative to practices by Yvert & Tellier on the market for

72 Patricia Kipiani, *Les engagements en matière de pratiques anticoncurrentielles – Analyse des droits français, européen et américain* [Commitments in relation to anticompetitive practices – Analysis of French, European and American law], LGDJ, 2014.

postage stamp valuation catalogues), the company Dallay accused Yvert & Tellier of hindering the development of the market for collector postage stamp valuation catalogues by refusing to give its direct competitors access to their numbering system, which would have allowed competitors to establish a correspondence with their own numbering systems or use it as a common system. The *Conseil de la Concurrence* took the view that the profile of Yvert & Tellier, which has been present on the market for postage stamp valuation catalogues for more than a century, was such that its numbering system acted as a *de facto* standard for valuing and dealing stamps. It noted that it was reasonable to assume that Yvert & Tellier held a dominant position on the market for catalogues listing French postage stamps and their values. It therefore accepted Yvert & Tellier's commitments, under which it proposed granting valuation catalogue publishers a licence to create correspondence tables between their own numbering systems and that used by Yvert & Tellier, in exchange for payment of reasonable royalties and provided that Yvert & Tellier's intellectual property rights concerning its numbering system and brand were respected.

The case of online discount coupons (or e-coupons) also provides a good illustration of a quasi-structural commitment (Decision 10-D-20 of 25 June 2010 relative to the practices implemented in the discount coupons sector). These e-coupons are printed by consumers from manufacturers' websites or specialised sites and handed in at the cash register in stores. The stores advance the sums shown on the coupons to the customer, before going to the coupon processing centres for reimbursement. To prevent fraud, distributors wanted the process for issuing e-coupons to be made secure. The association Perifem, which includes the biggest names in French retail, approached two discount coupon processing centres, HighCo and Sogec. These

centres jointly developed a standardised, secure e-coupon known as the Webcoupon. The Webcoupon was presented as the reference standard in France, and as the only coupon that guaranteed reimbursement by processing centres. Perifem, HighCo and Sogec further agreed not to develop, during the term of the agreement, any standard other than the Webcoupon. In addition, certain HighCo and Sogec competitors on the e-coupon issuing market were refused the option of offering the Webcoupon under conditions that they considered to be acceptable. In response to the *Autorité*'s competition concerns, HighCo and Sogec committed to provide free access to the "proprietary" elements of the Webcoupons (brand and visuals) to any operator that so requested, provided that the security specifications were respected and reimbursement of the Webcoupons guaranteed under certain circumstances by the licence applicant.

Quasi-structural commitments may also arise from the substantial modification of the organisational and operating rules of a company.

This is notably the case for former public monopolies that are now running their businesses on markets open to competition, or which have diversified their activities on these markets. In this case, quasi-structural commitments generally involve the company concerned creating an impermeable barrier between their activities on the market, and those outside the market.

In Decision 12-D-04 concerning practices in the sector of meteorological information for businesses, the *Autorité* took the view that, notwithstanding Météo-France's positive mark-up, the risk of cross-subsidies between its public service activities (under monopoly) and its business activities (in competition) could not be ruled out, given the lack of a detailed cost accounting system for its costs and

income. These cross-subsidies could lead to the practice of predatory pricing, which consists in selling services at a lower price than their full cost with a view to driving competitors out of the market. The commitments proposed by Météo-France, made compulsory by the *Autorité*, aimed to guarantee healthy, fair competition on the meteorological service market. The company thereby committed to make changes in its cost accounting system with a view to clearly separating its public services from its business activities, by precisely identifying the costs and income (including public service subsidies) allocated to each of these two divisions, for an unlimited period.

Similarly, in Decision 17-D-09 of 1 June 2017 regarding practices implemented by Inrap – the French National Institute for Preventive Archaeological Research (*Institut national de recherches archéologiques préventives*) – in the commercial archaeology sector, Inrap notably committed to implement a cost accounting system to guarantee clear (reliable and watertight) separation in terms of accounts and finances between its non-profit and for-profit activities. The aim was to ensure that the resources allocated to each mission could be tracked in order to eliminate any risk of predatory pricing.

In the case relating to online betting on horse racing (Decision 14-D-04 of 25 February 2014 concerning the practices implemented in the online horse racing betting sector), Betclic notably complained about the fact that PMU, the holder of a legal monopoly over horse racing bets placed in physical outlets (tobacconists, newsagents, etc.), pooled those bets with those it took at its online horse racing site Pmu.fr. This pooling practice, which risked excluding online competitors of PMU and acting as a barrier to entry into the online horse racing betting market, was generating competition concerns. However, the *Autorité* decided that PMU's

commitments – including the one that consisted in having achieved complete separation by 30 September 2015 and for all bets offered on Pmu.fr, of the pool of bets registered online from those registered at physical outlets – were sufficient to put an end to those concerns.

More broadly, quasi-structural commitments may include modifications to the internal organisation of stakeholders present on the market. The "Chinese wall" remedy is a good example of this. Such a measure was notably implemented in the case concerning funeral services in Marseille (Decision 08-D-34 of 22 December 2008 regarding the practices of the municipal funeral services company in Marseille). In this case, one of the concerns regarding competition lay in how city funeral services were managed. There was a "municipal funeral services company" division and a "cemeteries" division, within which the legal services and regulations department was based. The latter was responsible for drawing up statistics on the proportion of funerals for people who had died while in residential care establishments that were organised by the municipal company and competing operators. These statistics were included in letters that were sent to these establishments with a view to increasing, or at least maintaining, the market share of the municipal company To put an end to these competition concerns, the *Conseil* notably accepted a commitment under which the legal services and regulations department for the city of Marseille, which was responsible for drawing up statistics on funeral services, would report directly to the funerals department rather than the cemeteries division.

In conclusion, the characteristics of commitments essentially depend on the competition concerns encountered and the remedies proposed by the company undertaking them. Until now, these remedies have remained strictly behavioural or

quasi-structural. In addition, their use may be combined with other measures, on the condition that they provide an appropriate response to competition concerns (see for example decision 17-D-26 of 21 December 2017 regarding practices implemented in the collection and recovery of non-hazardous office waste sector). However, there is nothing preventing the *Autorité* from accepting structural commitments like the Commission, 25% of whose commitment decisions are based on structural remedies[73] (see for example the following European Commission cases: COMP/AT. 39767-BEH Electricity, 10 December 2015; COMP/39.402-RWE, 18 March 2009; COMP/38.388 and 38.389, 26 June 2008).

Regardless of their nature, the adoption of commitments invariably results from the same procedure.

## PROCEDURE

Companies whose behaviour is the subject of a referral by the *Autorité* may, as soon as they become aware of the referral, approach the investigation services to explore the possibility of recourse to commitments. This approach may be taken where the *Autorité* receives a referral on the merits of a case, but also in the case of urgent interim measures (see for example Decision 18-D-04 of 20 February 2018 regarding practices implemented in the sector of meat production and sale in Martinique). The parties to the commitment procedure are, after it has been launched, bound by rules that differ from those applied under the sanction procedure and which give third parties an important role.

**73** Seminar organised by the review *Concurrences* in partnership with Fréget Tasso de Panafieu lawfirm, 2 May 2018, entitled *Les engagements comportementaux (non-respect, interprétation, mesures conservatoires…)* [Behavioural remedies (non-compliance, interpretation, urgent interim measures, etc.)].

## A procedure offering greater flexibility than the sanction procedure

The commitment procedure is characterised by a certain flexibility, which is notably demonstrated by the possibility of in-depth discussions with the parties. It can also be noted that the principle of functional separation between the investigation services and the Board, applicable to sanction procedures, is not applied to this type of procedure (on this point, see French Supreme Court (*Cour de cassation*), Commercial Chamber, 5 October 1999, SNC Campenon Bernard n°. 97-15.617).

Initiation of the commitment procedure, prior to any statement of objections being issued, does not therefore prevent the Board from holding discussions with the investigation services and the parties concerned by the case. Furthermore, the legal application framework is characterised by the *Autorité* having greater discretionary scope to identify "competition concerns", taking into account the purpose of the procedure.

The French Supreme Court (*Cour de cassation*) has settled these two points in relation to the preliminary assessment through which the case officer (*rapporteur*) informs the bodies or companies in question of the *Autorité*'s competition concerns. This assessment is intended to specify how the threats identified at this stage of the procedure are likely to constitute a prohibited practice. However, it is not intended to qualify the practices in question and does not therefore constitute an indictment in the sense of paragraph I of Article 6 of the aforementioned ruling, as "*it is not intended to demonstrate the existence and attribution of infringements of competition law with a view to sanctioning them*" (French Supreme Court, Commercial Chamber, 4 November 2008, Canal 9, n°. 07-21275).

The aim of the preliminary assessment of practices is to identify the competition concerns in play, which the *Autorité* is free to assess. The preliminary assessment, as recalled by the Paris Court of Appeal in the Bijourama case, is therefore intended to identify "*competition concerns, without it being necessary to proceed with the qualification of behaviour in accordance with Articles L. 410-1 or L. 410-2 of the commercial code, nor a fortiori with the observation of an infringement of these provisions, and consequently without the need to precisely determine the relevant market*" (Paris Court of Appeal, 16 October 2007, RG, nº. 2006/17900, p. 6).

Furthermore, the *Conseil* clarifies that "*the acceptance by a company of the opening of a commitment procedure in response to a competition concern expressed by the Conseil bears no resemblance to recognition of anticompetitive practices by the company proposing commitments*" (Decision 06-D-20 of 13 July 2006 relative to practices implemented by France Télécom, PagesJaunes Group and PagesJaunes SA in the sector for the provision of directory assistance via telephone and internet).

It therefore follows that if the case officer (*rapporteur*) decides that only certain practices criticised by a complainant raise competition concerns, the *Autorité* does not dismiss the others. The specific procedural arrangements provided for in Article L. 464-6 of the French Commercial Code (*Code de commerce*) are not therefore applicable (French Supreme Court, Commercial Chamber, 12 May 2015, Cogent, nº. V14-10.792).

## The role of third parties in the procedure

The role of third parties is precisely set out in the commitment procedure, which draws a distinction between a third party making a referral and "interested third parties".

To this end, Article R. 464-2 of the French Commercial Code (*Code de commerce*) specifies that on "*receipt of commitments proposed by the companies or bodies concerned by the end of the period mentioned in the second paragraph, the General Rapporteur communicates their content to the issuer/s of the referral as well as the representative of the Minister for the Economy*. *The General Rapporteur also publishes, by any means, a summary of the case and commitments to enable interested third parties to present their observations, and sets a time limit – of at least one month from the date of communication or publication of the content of the commitments – for the parties, the representative of the Minister for the Economy and, where relevant, interested third parties to make their observations*".

This market test allows the *Autorité* to check that the commitments are relevant, credible and verifiable, and that they are proportionate to the competition concerns expressed in the preliminary assessment, i. e. necessary and sufficient to put an end to all competition concerns identified. This stage is essential in practice to the extent that it makes it possible, in certain cases, to reduce the asymmetry in information available to the *Autorité* and the market operators.

It also allows third parties, whose interests may be affected, to be heard during the procedure. Their observations, which are included in the file in full, may lead to efforts to improve or extend the scope of the proposed commitments, which is often the case in practice.

After the market test, the *Autorité* may also choose to hear "*any person whose evidence it considers to be material to its enquiry*", in accordance with the second paragraph of L. 463-7 of the French Commercial Code (*Code de commerce*). In two recent cases, the Board accordingly heard the representatives of two ministries whose regulatory actions were likely

to influence the continuation of the competition concerns identified by the *Autorité*.

In the first (Decision 17-D-09 of 1 June 2017 regarding practices implemented by Inrap, the French National Institute for Preventive Archaeological Research (*Institut national de recherches archéologiques préventives*)), the French government proposed, following the market test, a reform of the means of access to preliminary archaeological information, the scope of which exceeded the type of commitment that Inrap had been able to offer in response to one of the two competition concerns identified previously.

The public authorities committed to create a secure IT platform enabling all excavation service providers to access this information in comparable conditions, and introduce transitional provisions favouring their effective access. The innovative decision taken by the *Autorité* at the end of this procedure was based, as is traditional, on the commitments undertaken by the body responsible for the behaviour raising the contentious competition concerns, but also took into account the commitments made voluntarily by the government, which were included in the decision. This innovative configuration favoured the effective re-establishment of competition on the market by all means available: the government's intervention, ensuring equal access to archaeological information for all excavation service providers, provided a long-term response for the sector by creating the conditions for renewed competition between its stakeholders.

In the second case (Decision 18-D-04 of 20 February 2018 regarding practices implemented in the sector of meat production and sale in Martinique), AMIV, the Martinique interprofessional association for the meat, livestock and milk sector (*Association martiniquaise interprofessionnelle de la*

*viande, du bétail et du lait*), committed to create a new associate member status with less stringent membership criteria than those for active member status, allowing applicants that so wished to take advantage of European livestock aid without being able to participate in the work of the interprofessional organisation. However, taking into account the potential changes to regulations in the sector, which were confirmed by the public authorities at the hearing, the *Autorité* informed AMIV that it would promptly examine any request to revise the commitments so that implementation of the government's announced reform could be taken into account.

The hearing constitutes the last stage of the commitment procedure. It provides an opportunity to discuss the proposed remedies and any necessary modifications, or their rejection if the Board concludes that they do not address the competition concerns. At the end of the hearing, the *Autorité* may decide not to accept the commitments and return the file for examination with a view to proceeding via an injunction or sanction or, alternatively, to adopt a decision making these commitments obligatory and closing the procedure before a notice of breach.

## SCOPE OF COMMITMENT DECISIONS

The scope of commitment decisions is an important aspect of this decision category and may provide guidance for the company regarding whether or not to propose commitments. The scope is, in principle, limited. However, this is relative, as the civil court will take commitment decisions into account in the context of liability claims seeking compensation for harm caused by anticompetitive practices.

## Limited scope of commitment decisions

Commitment decisions allow companies that have undertaken commitments to avoid the costs associated with a lengthy procedure, and the risk of a potentially serious conviction. These decisions are restricted in scope and create obligations for the companies or bodies that undertake commitments on this basis. Despite the flexibility that characterises the adoption of such decisions, the consequences for the companies that freely proposed and accepted the commitments should not be taken lightly. Accordingly, a failure to comply with commitments may lead the *Autorité* to issue penalties (see for example Decision 15-D-02 of 26 February 2015 concerning the compliance of the economic interest group GIE "Les Indépendants" with the commitments made in *Conseil de la Concurrence* Decision 06-D-29 of 6 October 2006 and developments below).

However, their scope is restricted in comparison to that of sanction or injunction decisions likely to be made by the *Autorité*.

This means that, under French law, if the *Autorité* receives a complaint regarding practices that have already been the subject of a commitment decision, it cannot file this complaint on the basis of the *non bis in idem* principle.

Indeed, the decision to accept commitments represents a unilateral decision, putting an end to a situation that is potentially against competition law. But it does not rule on the culpability of the company and does not therefore constitute the first of a series of repeat offences. The reported practices must therefore necessarily be examined, with the *Autorité* always able to observe, where relevant, that no further action is necessary given that the behaviour in question has come to an end.

It remains the case, however, that under European law, if the Commission or a national competition authority receives a complaint regarding practices that are the subject of the commitment decisions, it may reject it on the basis of Article 13 of Council Regulation 1/2003, paragraph 2, according to which "*where a competition authority of a Member State or the Commission has received a complaint against an agreement, decisions of an association or practice which has already been dealt with by another competition authority, it may reject it*".

Furthermore, a commitment decisions may not be the sole basis for initiating criminal proceedings in application of Article L. 420-6 of the French Commercial Code (*Code de commerce*).

The scope of commitment decisions made by the *Autorité* is therefore more limited than decisions issuing a sanction. Nevertheless, recent civil case law has admitted in certain cases that liability claims may be based on the *Autorité*'s commitment decisions, so this observation is a relative one.

## Extending the scope of commitment decisions: the case of civil liability claims

The first paragraph of Article L. 481-2 of the French Commercial Code (*Code de commerce*), which transposes Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014,[74] states that an "*anticompetitive practice mentioned in Article L. 481-1 is presumed to be irrefutably established with regard to the individual or legal person*

74 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

*designated under the same article, where its existence and its attribution to this person have been established in a decision that can no longer be the subject of ordinary proceedings for the part regarding this observation, made by the Autorité de la concurrence or court of appeal*."

This presumption of irrefutability does not apply in relation to the competition concerns identified in a commitment decision. Indeed, such a decision does not confirm the compliance of the practices raising concerns with competition law, any more than it rules on whether they constitute an infringement. This means that, although victims of anticompetitive practices can seek compensation in court, they have to demonstrate that the company has committed a fault that goes against competition law and has caused the harm they believe themselves to have experienced.

The taking into account of commitment decisions in the context of civil liability or damages claims (sometimes referred to as "private enforcement" ) is recent and testifies to the growing scope of these decisions.

In 2014, the Paris Court of Appeal declared admissible the claims for damages made by the company DKT. The latter alleged several instances of harm arising, it believed, from anticompetitive faults committed by Eco-Emballages and Valorplast originating in various practices that had led to the adoption of a commitment decision by the *Autorité* (Decision 10-D-29 of 27 September 2010 regarding practices implemented by Eco-Emballages and Valorplast in the sector for the collection and recovery of plastic household packaging).

The court found that "*the commitment procedure did not in itself deprive* [DKT of its] *interest in bringing an action*". It specified that a commitment decision makes it possible to close an open file being examined by the *Autorité* "*before any*

*definitive assessment of the practices raising competition concerns*", and that it therefore fell to the victim to "*find and determine which elements constituted, it believed, prohibited competition actions causing it harm*" (Paris Court of Appeal, 24 September 2014, nº. 12/06864, following Decision 10-D-29 of 27 September 2010 regarding practices implemented by Eco-Emballages and Valorplast in the sector for the collection and recovery of plastic household packaging).

When examining the validity of the request for compensation, the Court ruled that the complainant company, which was relying on the *Autorité*'s commitment decision and other factual elements, had not sufficiently demonstrated the existence of the fault to which it was alluding. The Court therefore rejected the claim (Paris Court of Appeal, 20 December 2017, nº. 15/07266).

The Paris General Court of First Instance, whose judgement was confirmed on appeal, did go on to the next stage by recognising a company's liability due to anticompetitive practices that had only been addressed through a commitment decision by the *Autorité* (Paris General Court of First Instance, 22 February 2017, nº. 15/09129, Betclic v GIE Pari Mutuel Urbain; Paris Court of Appeal, 12 September 2018, nº. 18/4914, following Decision 14-D-04 of 25 February 2014 concerning the practices implemented in the online horse racing betting sector). In this case, Betclic believed that PMU's practices in the online betting sector had caused it harm in several ways.

The Court of Appeal specified that although a decision to accept commitments constituted, in most cases, only *prima facie* evidence, it could not be ruled out that "*it contained sufficient elements in itself to establish the liability of the operator*". In this way, although the commitment decision does not constitute an irrefutable presumption of anticompetitive

fault under the conditions described in Article L. 481-2 of the French Commercial Code (*Code de commerce*), the reasons for that decision may suffice to demonstrate the existence of such a fault. In this case, the Court found that the complainant company, Betclic, had not simply reproduced the commitment decision, but had combined it with several economic studies and statistical data from the market, and all these elements together made it possible to characterise, for this specific case, the existence of anticompetitive fault.

This mode of reasoning matches that used in European case law regarding the scope of commitment decisions. This was established following the Gasorba judgement of the Court of Justice of the European Union (hereafter "the Court of Justice" ), issued on 23 November 2017 (CJEU, 23 November 2017, Gasorba SL e. a, C-547/16). The Spanish Supreme Court had referred the case to the Court of Justice for a preliminary ruling regarding the interpretation of Council Regulation (EC) No 1/2003. In its first question, the referring court asked in particular whether "*Article 16 (1) of Regulation No 1/2003* [should] *be interpreted as precluding a national court from declaring an agreement between undertakings void on the basis of Article 101 (2) TFEU, when the Commission has accepted beforehand commitments concerning that agreement and made them binding in a decision taken under Article 9 (1) of that regulation*". The Court of Justice responded in the negative, specifying that "t*he objective of applying EU competition law effectively and uniformly require* [s] *the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101 (1) TFEU*" (emphasis added).

The Betclic case therefore demonstrates that commitment decisions may, in certain scenarios, constitute *prima facie* evidence of anticompetitive fault. However, in law, their scope remains distinct from that of decisions in which an infringement has been observed.

Furthermore, such an observation is limited by the commitment decisions taken on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*). This differs from the case of settlement decisions – whether or not they involve commitments – made definitive and in which anticompetitive fault has been recognised. Indeed, in contrast to commitment decisions, the decisions resulting from a settlement involve qualification of the anticompetitive practices, which are then presumed to be irrefutably established in application of Article L. 481-2 of the aforementioned Commercial Code.

## Commitments arising from a settlement

Commitments undertaken in the context of a settlement and, in the past, in the context of the "no contest of objections" procedure, do not play the central role occupied by those made obligatory at the end of a commitment procedure. This is largely due to the fact that they are generally only a subsidiary part of the settlement procedure, which notably aims to accelerate the processing of litigation cases. In this context, the commitments undertaken by the companies involved may be taken into account in determining the range of financial penalties they receive, while favouring the effective re-establishment of public economic order. However, with a view to maintaining the advantages of recourse to the settlement procedure, the *Autorité* welcomes commitments likely to result in such a reduction. A useful supplement to

the penalty, commitments are accepted at the end of a procedure that respects the principle of functional separation.

## COMMITMENTS THAT ARE OPTIONAL, BUT USEFUL

French Law 2001-420 of 15 May 2001 on the New Economic Regulations introduced the "no contest of objections" procedure, which was intended to accelerate the processing of litigation cases. This procedure was characterised by various elements: the lack of a report, the application of a cap on penalties reduced by half and the establishment of a reduction rate for the penalty normally received by the company. Commitments played an important role in the procedure. Indeed, the application of this procedure required the company involved to refrain from contesting the objections made against it, and to commit to modify its behaviour in the future.

However, to facilitate application of the procedure, Order 2008-1161 of 13 November 2008 on the Modernisation of Competition Regulations removed the condition associated with the acceptance of commitments. Refraining from contesting the objections thereby became sufficient to initiate the procedure, and the commitments became optional.

The optional status of commitments in the procedure was maintained when the settlement procedure was created under French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities. As a result, paragraph III of Article L. 464-2 of the French Commercial Code (*Code de commerce*) now states that "*where a body or an undertaking does not contest the truth of the allegations made against it, the General Rapporteur may submit to it a settlement proposal setting out the minimum and maximum amount of the financial penalty envisaged. Where the undertaking or body agrees to alter its conduct in the future, the General Rapporteur may take this into account in the proposed settlement. If, within*

*a time limit set by the General Rapporteur, the body or undertaking agrees to the proposed settlement, the General Rapporteur shall propose to the Autorité de la concurrence, which shall hear the undertaking or body and the representative of the Minister for the Economy without first drawing up a report, to impose the financial penalty provided for in paragraph I within the limits set by the settlement*".

Despite their subsidiary and optional nature, commitments have, under certain circumstances, helped further the missions of the *Autorité*.

In some cases, when the "no contest of objections" procedure was in force, it seems that commitments have been used as a tool to involve the economic operators penalised in the rapid re-establishment of the correct functioning of the market. Proposed by the company or body seeking a compromise, they demonstrate economic stakeholders' growing awareness of the requirements of competition law and the means of responding to those requirements. Commitments can thereby act as a useful addition to the penalty by introducing a "voluntary" dimension for the company, in contrast to the penalty imposed on it. Furthermore, the *Autorité* recognises that "*in certain market situations, the commitments made* [...] *may be, in relation to compliance with competition rules, more effective than penalties, especially if these penalties translate into the substantial modification of the practices of this company and if the competition authorities are put in a position to verify their effective application*" (see Decision 04-D-65 of 30 November 2004 relative to La Poste's practices regarding its sales contracts, accepting the commitments proposed by the latter, notably: to refrain from offering discounts that discriminate against customers who are themselves operating in the same market, for those of its products covered by a monopoly, and to refrain from offering

bundle or loyalty discounts for products and services open to competition and for which La Poste occupies a dominant position; Decision 08-D-13 of 11 June 2008 relative to practices implemented in the sector of standard building maintenance, accepting the commitments proposed by Onet and companies in the Spid group: to introduce staff training on competition rules, to introduce a clause allowing dismissal for gross misconduct in case of personal participation in a cartel into staff work contracts and to set up a whistleblowing system, allowing any employee to anonymously report any suspected infringement under competition law to a mediator; Decision 09-D-24 of 28 July 2009 on France Télécom's practices on various fixed electronic communications services in French overseas *départements*, accepting the commitments proposed by the latter, notably: to strengthen staff training on competition law within certain departments, to introduce a whistleblowing system and to strengthen local legal support following the recent establishment of an overseas legal service).

Beyond their remedial nature, commitments sometimes make it possible to anticipate future anticompetitive practices and stabilise the functioning of a sector in a sustainable manner (see for example Decision 09-D-06 of 5 February 2009 regarding the practices of SNCF and Expedia Inc. in the sector of online travel sales, accepting the commitments proposed by SNCF that involved significantly lowering the price of their licence and allowing other online travel agencies to use the same connection system as Voyages-sncf.com if they so requested. In the longer term, it also committed to negotiate with third-party intermediaries to ask them to develop a new procedure for accessing its booking system, for the benefit of online travel agencies). Lastly, as they are necessarily proposed after a statement of objections, they are likely to resolve competition issues

arising from serious practices, which could not have been handled using commitments in application of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*).

From the companies' point of view, the advantage of commitments notably lies in the possibility of an additional reduction in any fine, on top of that gained by agreeing to refrain from contesting objections. In this respect, the impact of the commitments undertaken on this reduction in the penalty can be significant, as the *Autorité* has shown itself to be particularly attentive to the quality of the commitments proposed and their effect on the functioning of the market.

Although optional, the commitments made in the context of a settlement procedure do contribute to maintaining free competition. Their utility varies depending on the remedies they contain. This is why the *Autorité* now specifically targets commitments likely to result in a reduction in the range of the penalty awarded in the context of a settlement.

## MORE TARGETED COMMITMENTS

The *Autorité* accept a highly varied range of commitments on the basis of the provisions in paragraph III of Article L. 464-2 of the French Commercial Code (*Code de commerce*), which state that the company or body may agree "*to alter its conduct*".

Commitments may be strictly behavioural, with their content varying depending on the competition issues occurring in each case. They may also remedy practices that go against competition law, or perform a prevention or compliance role if they affect the internal decision-making methods of companies. One example of this is Decision 08-D-32 of 16 December 2008 regarding practices in the steel trade sector, under

which PUM notably agreed to establish a new pricing system for its business. In Decision 08-D-29 of 3 December 2008 in relation to practices uncovered in the public metalwork maintenance sector, two companies belonging to the same group committed to refrain from bidding for public contracts together, to strengthen management control over the way in which bids were drawn up and submitted, and to keep an up-to-date register of the public calls for tender in which they had participated.

Commitments may also have a larger scope, with a more structuring nature, similar to those accepted on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*).

This resulted, through Decision 12-D-06 of 26 January 2012 on practices in the aggregates sector and downstream markets in Saint Pierre and Miquelon, in the *Autorité* accepting commitments proposed by the economic interest group (EIG) "*Exploitation des carrières*" and the companies Allen-Mahé SARL, Atelier Fer SARL, Guibert Frères SARL and SSPT SA. These commitments were to separate aggregate production and road work, to make the conditions for the purchase of aggregates transparent and non-discriminatory for third parties to the EIG and, lastly, for the EIG to refrain from bidding on any contracts for public work. Decision 15-D-08 of 5 May 2015 concerning concerted practices in the sector for the sale of poultry meat also provides a good illustration of this type of commitment. The investigation services criticised the manufacturers and trade associations in the sector for a set of concerted practices contributing to a single anticompetitive aim, namely to reduce the uncertainty of operators when carrying out negotiations with their various categories of customer through the exchange of information or more in-depth cooperation, including concerted fixing of prices

and schedules. In the context of a "no contest of objections" procedure, the Federation of Poultry Industries (*Fédération des Industries Avicoles*) and 17 of the manufacturers concerned, representing almost the whole market, undertook a collective commitment – the first of its kind – to set up a far-reaching inter-branch organisation, with downstream integration through the participation of major retailers. This inter-branch organisation was finally established in May 2018. This demonstrates that the acceptance of behavioural remedies may lead, in certain situations, to the quasi-structural modification of market conditions.

In quantitative terms, when the "no contest of objections" procedure was in force, the majority of decisions applying paragraph III of Article L. 464-2 of the French Commercial Code (*Code de commerce*) concerned the establishment or improvement of a compliance programme (see for example Decision 14-D-19 of 18 December 2014 regarding practices implemented in the home care and insecticide product sector and in the hygiene and personal care product sector; Decision 15-D-03 of 11 March 2015 on practices implemented in the fresh dairy products sector; and Decision 15-D-19 of 15 December 2015 relating to practices implemented in the standard and express delivery industry). Indeed, of around 30 «no contest of objections» and settlement decisions with commitments, two thirds included remedies that involved – exclusively or otherwise – the introduction of compliance programs.

In its Framework Document of 10 February 2012 on Antitrust Compliance Programmes, the *Autorité* defines the latter as "*programmes whereby companies or organisations express their commitment to certain rules and to the values or objectives on which they are based. Those programs generally also include a set of actions intended to assist companies in*

*building a genuine culture of compliance with those rules, but also in detecting likely misconducts, in remedying them and in preventing recidivism*". These programmes rely not only on measures intended to create a compliance culture (training and awareness), but also on whistleblowing, advice, audit and accountability systems that help promote the right reflexes within companies (preventing, detecting and resolving cases of potential misconduct).

This type of remedy could lead the *Autorité* to reduce the company's fine by up to 10% in addition to the 10% reduction associated with the agreement to refrain from contesting the objections, and to the 5% reduction that may be given for other commitments, under the aforementioned framework document.

When the 2015 law adopting the settlement procedure was introduced, the *Autorité* changed its practice regarding commitments, specifically in relation to compliance commitments. Firstly, the *Autorité* noted that the entry into force of the settlement procedure put an end to the established "no contest of objections" procedure (notice of 19 October 2017 regarding the settlement procedure and compliance programmes). It then wished to demonstrate a different approach to compliance initiatives, as expressed in Decision 17-D-20 of 18 October 2017 regarding practices implemented in the hard-wearing floor coverings sector.

This new position proceeds from several observations: on the one hand – given the concerning practices of large companies – penalties must play a deterrent role, without commitments regarding compliance programmes reducing the amount of those penalties as a general rule. On the other hand, the main aim of compliance programmes should be efficiency in the interest of the companies themselves (as they allow the latter to avoid infringements and potentially

heavy penalties). Otherwise, there could even be an advantage in deferring the introduction of such programmes, in order to be able to propose them during a sanction procedure.

This position, which represents a change in policy, was expressed in the notice of 19 October 2017 regarding the settlement procedure and compliance programmes.

In 2012, following a notice of breach, the *Autorité de la concurrence* sought to encourage, by reducing penalties, the adoption of antitrust compliance programmes by companies. However, it seems that – 30 years after the entry into force of the Order of 1 December 1986 – there has been a development in competition culture among all economic stakeholders, and that the development and implementation of such programmes is designed to form part of the everyday management of companies, and constitutes a key element in good management.

The *Autorité* considers that commitments to implement such programmes no longer justify, in principle, a reduction in the financial penalty issued in the context of a settlement procedure. This change is also justified by improved understanding of competition law and the increased risks associated with an infringement of these rules. Directly affected by these issues, economic stakeholders must take the initiative in guarding against the threats they could pose to public economic order. This is why the *Autorité* encourages them to develop the implementation of compliance programmes, without waiting for a breach to be committed.

In addition, from a functional point of view for the *Autorité*, the monitoring of commitments involves a non-negligible

administrative workload, which could threaten the procedural benefits sought in the context of settlement procedures.

The decision of the *Autorité* to stop agreeing – as a general rule and with the exception of special circumstances relating to the position of the company, infringements observed or the public interest – to reduce the amount of penalties in exchange for commitments based on the introduction of a compliance programme demonstrates its desire to encourage companies to propose more targeted commitments for the effective re-establishment of free and undistorted competition.

## PROCEDURE

In the context of a settlement procedure, the *Autorité* must respect the principle of functional separation. This separation also applies to any additional commitments undertaken by the companies or bodies concerned. This is why their development and adoption involve the General Rapporteur and the Board.

### Role of the General Rapporteur

The settlement procedure, similarly to the "no contest of objections" procedure used previously, may be implemented for any case examined by the *Autorité* under provisions regarding anticompetitive practices, as soon as the latter opens the *inter partes* examination procedure provided for under Articles L. 463-1 onwards of the French Commercial Code (*Code de commerce*) by notifying one or several economic stakeholders of objections.

It is for the body or company in receipt of the statement of objections to determine whether or not to refrain from contesting the objections and propose commitments to modify its behaviour in future.

In the same way, if the General Rapporteur agrees to enter settlement with the company, they have discretionary powers to take into account the proposed commitments to consider them, where relevant, when setting the penalty range and submit them, or not, for approval by the *Autorité*. These discretionary powers notably relate to the relevance of the commitments proposed.

In this procedure, contrary to usual "commitment procedure" practices, there is no market test. The final version of the commitments to be presented to the Board during the hearing is therefore solely based on the discussions between the company or body and the General Rapporteur.

In the event that the body or company in question proposes commitments to modify its behaviour in future, and where the General Rapporteur deems it appropriate to propose that the *Autorité* take this into account, it is responsible for ensuring, where relevant, that these commitments are substantial, credible and verifiable. If they do not meet these conditions, the General Rapporteur may invite the company concerned to modify them as necessary or, failing that, decide not to suggest that the *Autorité* take them into account.

If the General Rapporteur decides that the discussions described in the previous section have led to satisfactory results, they indicate to the body or company in question that they will take the proposed commitments into account when determining the minimum and maximum financial penalty envisaged in the settlement proposal to be submitted.

The agreement between the body or company in question and the General Rapporteur is recorded in a report, signed by the parties. Where applicable, it also contains the text of the latest statement of commitments proposed by the company concerned.

## Role of the Board

"*When hearing a case in which the settlement procedure has been applied, the Board shall examine the facts and notified objections, as well as the settlement report. If it considers that the conditions for imposing a fine are met, it shall impose a fine within the range set by the settlement report*" (paragraph 32 of the procedural notice of 21 December 2018 on the settlement procedure).

Where the General Rapporteur has also proposed taking into account commitments entered into by the party concerned, the Board verifies that these commitments are substantial, credible and verifiable. If the Board considers during the hearing that the commitments are not acceptable as they stand, but that the company or body is proposing amendments to make them acceptable, the Board may make the improved commitments binding and impose a financial penalty taking into account the minimum and maximum amounts set out in the settlement report.

However, the Board cannot take into account commitments that have not been appended to the settlement report submitted by the General Rapporteur in setting the financial penalty imposed on the company or body (on this point, see Decision 17-D-20 of 18 October 2017 regarding practices implemented in the hard-wearing floor coverings sector, paragraphs 462 and 463).

* * *

As a result, *ex post*, behavioural measures have until now been the sole type of commitment accepted by the *Autorité*. These commitments have different aims depending on the basis on which they are made obligatory, either preventing a sanction procedure from being opened in the context of the "commitment procedure" or, after it has been opened, reducing the amount of the penalty issued in the context of a "settlement" procedure. However, they form part of a common streamlining dynamic, as shown by the favouring of quasi-structural commitments and the changes in the *Autorité*'s practice regarding compliance commitments. Lastly, more generally, they are carefully monitored, like all commitments.

# 4/ PROCEDURE FOR MONITORING AND REVISING COMMITMENTS

The life cycle of commitments is structured around the same two cardinal principles as those guiding their development. This is why, throughout the duration of their application, these remedies must remain useful and effective. For commitments to be effective, they must be applied consistently by their creator. The *Autorité* checks this by monitoring them. However, changes in actual or legal circumstances that occur before the end of their implementation period are likely to alter or even eliminate their utility. These developments justify the re-examination of commitments with a view to modifying them or, where necessary, lifting them.

## Monitoring compliance with commitments

In order to ensure that commitments have the intended effect on competition, it is essential to monitor their correct implementation. The *Autorité*[75] therefore carefully monitors all decisions subject to commitments. Monitoring is done in various ways and may lead, in the event of a failure to comply with one of the measures monitored, to the opening of a sanction procedure. The *Autorité* has issued around ten decisions in this context since 2008.

75 Previously, this task was assigned to the French Minister for the Economy.

## MONITORED DECISIONS

All decisions to accept commitments are monitored,[76] whether they concern structural[77] or behavioural remedies. Monitoring takes place throughout the commitment implementation period. This is always shorter in the first case, which generally involves the sale of assets, than the second, which requires regular, careful monitoring for the whole period.

Verifying these commitments often involves the mobilisation of significant resources, for the investigation services in particular. Indeed, while it is easy in principle for the *Autorité* to assess compliance or non-compliance with structural commitments, evaluating the implementation of behavioural remedies requires an analysis, sometimes delicate, of the actions of their creator and the context of their implementation. In addition, the *Autorité* has already observed that "*monitoring compliance with behavioural remedies is likely to be, all other things being equal, more complex than in the case of structural measures such as commitments to sell a business within a given deadline*" (see Decision 12-D-15 of 9 July 2012 on compliance with commitments in the decision clearing Groupe Bigard's takeover of Socopa Viandes). This difficulty justifies the *Autorité* taking time to check the choice of commitments and its capacity to monitor them.

**76** Under anticompetitive practice law, this covers commitment decisions taken on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*) and decisions taken on the basis of paragraph III of the same Article. Under competition law, this relates to commitments undertaken during phase 1 in application of paragraph II of Article L. 430-5 of the aforementioned code or in phase 2 under paragraph II of Article L. 430-7 of the same code.

**77** Exclusively under merger law for the moment, as the *Autorité* has never yet accepted structural commitments under anticompetitive practice law.

This is all the more true for the commitment procedure provided for under paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*), which notably aims to rationalise the use of the resources allocated to anticompetitive practices.

In legal terms, monitoring compliance with commitments stems from the *Autorité*'s obligation to check that all its decisions are implemented, in accordance with the sixth paragraph of Article L. 464-8 of the Commercial Code. In relation to merger law, the French Administrative Supreme Court (*Conseil d'État*) has recalled that this requirement arises from the very capacity to accept commitments (on this point, see French Administrative Supreme Court, *Assemblée*, 21 March 2016, NC Numéricable, n°. 390023, *in Recueil*).

On 31 October 2018, the *Autorité* was actively monitoring 18 companies in relation to commitments accepted in application of paragraph I of Article L. 464-2 of the Commercial Code, in comparison to 53 companies in relation to commitments made under paragraph III of the same Article.

On the same date, 30 commitments made following merger clearance decisions were actively being monitored, including two made under the French Minister for the Economy prior to 2009.

Monitoring compliance with commitments is an important role for the *Autorité*, which has various means to perform it effectively.

## The various commitment monitoring processes

In order to effectively monitor the commitments it has accepted, the *Autorité* may seek assistance from a trustee, which does not however preclude recourse to other processes.

## Monitoring by an independent third party

### Role of the trustee and commitment monitoring methods

*In anticompetitive practice law*

The trustee is a third party to whom the *Autorité* has entrusted the monitoring of commitments, independent of the parties, and who plays an auxiliary role to the *Autorité*.

The trustee reports to the *Autorité* on the mission, according to the agreed system, in the reports they send and informs it, where necessary, of any failure by the company to respect the commitments.

Most frequently, the trustee submits a work plan to the *Autorité* for approval at the start of the mission, specifying the methods to be used to successfully perform the task. A copy may be then be sent to the companies concerned.

Several reports are then sent by the trustee to the *Autorité* during the mission, in order to keep it informed of the progress made. On their own initiative, the trustee may also inform the *Autorité*, if the circumstances so justify, of any information associated with the mission that they consider useful. In addition, as a representative of the *Autorité*, the trustee may be solicited by the latter regarding any issues related to their mandate.

Lastly, the trustee is responsible for informing the *Autorité* if they believe, on the basis of reasonably justified elements,

that the companies concerned are failing to comply with the commitments undertaken.

*In merger law*

To guarantee the effectiveness of merger control, the *Autorité* rigorously monitors the implementation of injunctions, instructions and commitments featuring in clearance decisions, whether those decisions were taken by the *Autorité* or the French Minister for the Economy. It may be assisted, where necessary, by an independent trustee that it approves on a proposal from the company.

A trustee is not systematically appointed to monitor compliance with commitments undertaken as part of merger control, although it is recommended in the aforementioned guidelines, notably in the case of behavioural remedies that may be difficult to monitor.

**Circumstances in which the *Autorité* appoints a trustee**

*In anticompetitive practice law*

As seen in Decision 13-D-15 of 25 June 2013 on practices implemented in the sector of sea freight transport between Northern Europe and the French Antilles, the *Autorité* chooses to appoint a trustee to monitor the correct implementation of certain commitments where that "*proves to be both useful and necessary, as* [that] *allows the Autorité de la concurrence to check* [them] *and monitor* [them] *effectively* [...] *while avoiding an excessive use of resources*". Indeed, certain commitments represent "*a disproportionate burden* [for the *Autorité*] *although one of the aims of a commitment procedure is to increase simplicity and rapidity, in order to let the Autorité free up resources for other activities*" (paragraph 164 of the decision).

In practice, recourse to a trustee remains, on the whole, relatively rare in the context of commitments regarding anticompetitive practices. In 10 years, the *Autorité* has only taken such a step in five decisions.

Four of those decisions involved commitments taken on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*).

In the first case, the role of the trustee was to monitor, twice yearly, the use rate of unused capacity pre-empted by CMA-CGM by those entering into agreements with the latter, to ensure that new operators were not being prevented from entering the market (Decision 13-D-15 mentioned previously).

In the second case, the trustee had to monitor the commitment undertaken by PMU to separate the pool of bets registered at physical outlets from those registered online (Decision 14-D-04 of 25 February 2014 concerning the practices implemented in the online horse racing betting sector).

In the third, the role of the trustee was to monitor the changes to the internal organisation of VST, a subsidiary of SNCF, notably in terms of establishing and isolating a designated team that would have no development role and would not communicate with VSC, another SNCF subsidiary (Decision 14-D-11 of 2 October 2014 on the practices implemented in the train ticket distribution sector).

In the last case, the trustee was required to ensure the effective implementation of commitments made by several companies in the SNCF group, which introduced a certain number of conditions that had to be respected regarding contracts providing technical support to urban transport operators (Decision 15-D-05 of 15 April 2015 regarding the practices

implemented by the SNCF group in the passenger transport sector).

The *Autorité* also chose to appoint a trustee in the poultry case (Decision 15-D-08 of 5 May 2015 concerning concerted practices in the sector for the sale of poultry meat) to monitor the particularly wide-ranging remedies that were accepted in the context of a "no contest of objections" procedure.

After the decision, a certain number of manufacturers involved in the poultry sector undertook the collective commitment to set up a far-reaching inter-branch organisation, with downstream integration through the participation of major retailers (regarding the inter-branch notion, see Opinion 18-A-04 on the agricultural sector, notably paragraph 147). The role of trustee in this case was to monitor compliance with these commitments, notably by participating in all the Prefiguration Committee meetings and, where applicable, those of the inter-branch organisation, and to regularly submit reports to the *Autorité* on the progress made and any obstacles encountered.

In these various cases, the appointment of a trustee facilitated and simplified the task of the *Autorité* and allowed the latter to save its resources by avoiding the excessive mobilisation of staff members to monitor the commitments made. It can be observed that appointing a trustee appears to be useful in the monitoring of complex commitments, such as the pricing commitments accepted by the *Autorité* as part of Decision 17-D-16 of 7 September 2017 regarding the practices implemented by Engie in the energy sector, following which the company committed to improve the reliability of the profitability analysis of its market offers, to ensure that the price of its market offers covered their average avoidable costs and to strengthen the monitoring of its price policy. Another example of this are the commitments made by La

Poste following Decision 17-D-26 of 21 December 2017 regarding practices implemented in the collection and recovery of non-hazardous office waste sector.

*In merger law*

Unlike structural or quasi-structural commitments, whose implementation may be monitored by a trustee in certain cases – such as, for example, the irreversible modification of price clauses – behavioural remedies require closer monitoring by the *Autorité*, which may in such cases seek the support of a trustee independent of the parties.

In practice, it therefore asks companies undertaking behavioural remedies to make provision for appointing a trustee whose task is to ensure correct implementation throughout the commitment validity period. As this period is generally five years, as mentioned above, with the possibility of renewal, the role calls for meticulous monitoring.

**System for appointing the trustee**

*In anticompetitive practice law*

The commitments undertaken by companies generally contain provisions to the effect that they must submit the name of a candidate for the role of trustee for approval by the *Autorité*, within a certain period of the decision accepting those commitments.

The trustee must be independent of the parties, have the required qualifications to fulfil their mandate (notably knowledge of the sector concerned by the decision), and must not create or become the subject of a conflict of interests.

If the candidate is not approved by the *Autorité*, the commitments may include the requirement that the company

concerns submit a new candidate, by a certain deadline. If this person is once again rejected, there may also be provision for the *Autorité* itself to select the trustee of its choice, after consulting the company concerned.

Once the trustee has been approved, the company formalises the contract setting out their mission, specifies how they will perform their work and sets the remuneration conditions. The *Autorité* may make any changes to the contract it deems useful.

The trustee is paid by the company under conditions that allow their independent position to be maintained.

*In merger law*

The system for appointing the trustee is covered by the texts concerning the commitments undertaken. It has changed since 2009 in order to take into account examples of best practice from other competition authorities, in particular the Commission.

The procedure for appointing a trustee is similar for all types of commitment, although the commitment template featured in Appendix F of the *Autorité de la concurrence* guidelines on merger control covers divestiture commitments specifically. This procedure states that the notifying company will designate a monitoring trustee to perform the functions specified in the commitments.

Two weeks at the latest after the effective date, the company must submit to the *Autorité*, for approval, a list of one or several people that it proposes appointing as trustee responsible for monitoring. Where applicable, at the latest one month before the end of the first divestiture period, the notifying company must submit to the *Autorité*, for approval, a list of one or several people that it proposes appointing as trustee for the divestiture, on the understanding that the trustee

responsible for monitoring and the trustee for the divestiture may be one and the same.

Inspired by the practice of the Commission, the *Autorité* began specifying in the commitments that the company must provide a list of at least three people, to avoid appointment of the trustee being postponed in the event of approval being initially refused. This system also uses a competitive bidding approach to appoint the trustees, which helps structure this new activity.

The trustee proposal must include sufficient information to allow the *Autorité* to check that they meet the required conditions, as mentioned above, and contains: (i) the full text of the draft mandate, including all the provisions necessary for the trustee to perform their functions regarding the commitments; (ii) an outline of the work plan describing how the trustee intends to perform their mission; and (iii) a note regarding whether the trustee proposed would serve as the trustee responsible for monitoring and as the trustee for divestiture, or whether two separate trustees are being proposed for the two functions.

The *Autorité* has discretionary power to approve or reject a trustee and the terms of the proposed mandate, subject to any modifications it deems necessary to achieve the obligations. If just one name is approved, the notifying company must appoint or have appointed the person or institution concerned as trustee, in accordance with the terms of the mandate approved by the *Autorité*. If several names are approved, the company is free to appoint a trustee from among the approved names. The trustee must generally be appointed within a short period of one week following the approval of the *Autorité*, in accordance with the terms of the mandate it approved.

If all the proposed trustees are rejected, the notifying company must submit the names of at least two other people or institutions within one week of the date on which it is informed of the rejection by the *Autorité*.

If all the trustees put forward under this new proposal are rejected by the *Autorité*, the latter appoints one or several trustees itself, which the notifying company must appoint or have appointed in accordance with a mandate approved by the *Autorité*.

## Other monitoring processes

### In anticompetitive practice law

There are various other ways of monitoring compliance with commitments, which differ from one decision to the next.

Most often, it falls to the company itself to report on the implementation of its commitments and provide evidence of their correct execution directly to the *Autorité*. Companies usually fulfil this requirement by sending regular reports. For example, this was how Visa committed to send, for a period of four years dating from the application date of its commitments, a detailed confidential report to the *Autorité* regarding the implementation of the commitments over the previous year (Decision 13-D-18 of 20 September 2013 in relation to Visa's practices in the payment card sector). After analysing the report sent, the *Autorité* may request further details, explanations or additional documents from the company to ensure the effective implementation of the commitments.

Certain processes can demonstrate a more innovative approach. In the 2007 TDF decision (Decision 07-D-30 of 5 October 2007 relative to practices implemented by TDF in the sector of terrestrial analogue broadcasting of audiovisual

services), the company committed to set up, within its television division and in liaison with its legal department, an "*assessment and follow-up committee*". The committee would meet on a quarterly basis, and had the following tasks:
– to draw up a list of the broadcast service points transferred by television channels;
– to draw up a list of early cancellations of bipartite and tripartite contracts;
– to send the *Autorité* and French Broadcasting Regulator (CSA) the reports of each quarterly meeting of the committee within 15 days of the meeting;
– and to inform the same authorities, according to the same conditions and on a quarterly basis, of the number of service points transferred on the request of terrestrial analogue channel operators to competing broadcasting operators.

In the same vein and more recently, in the delivery industry, GLS BV committed to set up a compliance committee comprising directors from the GLS group, the GLS group compliance and directive manager and the compliance director from the Royal Mail Group. The role of this committee is to ensure that commitments are implemented and to discuss any issues regarding compliance. It meets at least twice a year and can report any concerns directly to the Royal Mail Group monitoring bodies, notably if a potential infringement of French and/or European competition law has been identified (Decision 15-D-19 of 15 December 2015 relating to practices implemented in the standard and express delivery industry).

Monitoring commitments can also involve the completion of an administrative survey if there are doubts regarding their correct implementation. In the Festina case (Decision 06-D-24 of 24 July 2006 regarding the distribution of watches marketed by Festina France), the commitments undertaken

by the company involved offering its current and future sellers a new framework contract for distribution that incorporated contractual stipulations applicable to distance selling, notably online sales, as well as two new specific contracts for distance selling, whether online or mail order. A monitoring survey was sent by the Lyon Competition Investigations Brigade (*Brigade d'enquêtes de concurrence*) to Festina and several of its sellers. It found that the company had sent each of the sellers, from 12 July 2007, a letter proposing a new framework contract for distribution that complied with the commitments approved by the *Conseil*. At the same time, the sellers had been informed of the existence of specific contracts for distance selling, whether online or mail order, that they needed to request if they were involved in these types of selling. The agents performing the survey were also able to observe, after polling several sellers, that the monitoring data provided by Festina France were reliable. It was therefore concluded that the latter had "*respected its commitments in accordance with what was accepted by the Conseil to address competition concerns, and demonstrated active monitoring of the signing process*" (Report of the French Minister for the Economy in the 2007 Annual Report of the *Conseil de la Concurrence*, page 377 – for other examples of commitments met, see in particular Decision 06-D-20 of 13 July 2006 relative to practices implemented by France Télécom, PagesJaunes Group and PagesJaunes SA in the sector for the provision of directory assistance via telephone and internet; or Decision 06-D-28 of 5 October 2006 relative to practices implemented in the sector of selective distribution of hi-fi and home cinema equipment).

Lastly, the monitoring of the introduction of compliance programmes undergoes a critical examination that may result in the *Autorité* formulating recommendations, for example on the content of training or awareness-raising actions for staff

in relation to competition law. In this way, the *Autorité* has been able to note, in certain training support material, inappropriate advice given to staff regarding inspections and referrals, which did not take into account the current laws applicable in that area. For example, it has been possible to issue a reminder of the provisions of the French Commercial Code (*Code de commerce*), which prohibit any attempts to hinder or obstruct investigations, or to withhold information without justification. This example demonstrates the importance the *Autorité* attaches to ensuring respect for both the letter and spirit of commitments regarding compliance programmes, rather than purely formal compliance.

**In merger law**

The *Autorité* systematically monitors compliance with commitments (and injunctions and instructions). This is done by the Mergers Unit and involves all the case officers (*rapporteurs*) in the unit. Monitoring may comprise, where relevant, requests for information or third-party consultations in the event that there are doubts regarding compliance with the commitments made, particularly in the case of behavioural remedies that require long-term monitoring.

The *Autorité* keeps abreast of the correct implementation of commitments through various sources.

Firstly, it receives, at regular intervals and according to the conditions specified in the commitments, a report from the notifying company or from a trustee appointed for this purpose, or even from both of them.

Secondly, a referral may be made by any third party that believes there has been a failure, or partial failure, to comply with the commitment. This is usually done by the main parties with an interest in the effects of the commitment

(suppliers, competitors or customers). If a trustee has been appointed to monitor the commitment, the *Autorité* sends them the information received and works with them to evaluate the implementation problems raised.

Thirdly, the *Autorité* can, in the absence of any complaint, investigate on its own initiative if there are doubts – notably raised by unfavourable changes on the market or public information – which could indicate that the commitment has not been fully or correctly implemented.

The monitoring of commitments, which is necessary to guarantee their effectiveness and credibility in the context of future cases, is facilitated by the clear communication of the decisions taken and the commitments made. These are systematically published on the *Autorité* website, with respect for the business secrecy of the parties.

Having been submitted to a market test during the procedure, the commitments are generally known by the main third parties concerned, which have been questioned using a version of the commitments with any business secrets removed. However, to put the market in a position to issue an informed view on the commitments proposed, this version must be as comprehensive as possible. The *Autorité* therefore requires the notifying party to divulge as much information as possible, with the exception of information likely to harm its legitimate interests.

In this respect, behavioural remedies receive greater publicity than structural commitments.

The duration of behavioural remedies is not generally concealed; this constitutes important information, as the period during which the commercial behaviour of the new entity is restricted must be sufficient to allow the re-establishment, at the end of the commitments, of the structure

of the markets concerned by allowing operators to develop offensive strategies to counterbalance the market power generated by the merger. Depending on the sectors concerned and the type of concerns identified, this duration is not fixed, although it is generally recognised that a period of five years, possibly renewable once, is an acceptable duration. This transparency cannot be fully implemented in structural commitments without compromising their successful execution; indeed, too much publicity, particularly regarding the divestiture details, risks harming the viability of the assets sold, especially in the case of alternative commitments.

Transparency in the context of behavioural remedies also allows interested third parties to check whether the notifying party is complying with its commitments towards them and, where necessary, inform the trustee or *Autorité* of any failures in this respect.

As part of its reflections on the role of trustees in the monitoring of commitments, the *Autorité* plans to improve this transparency by publishing the names and contact details of the trustees appointed in each commitment case in force.

The *Autorité* therefore has several tools to ensure that the remedies it has accepted are effectively implemented. If the commitments are not correctly applied, it can sanction the companies responsible for them.

## SANCTIONING POWERS OF THE AUTORITÉ IN THE EVENT OF NON-COMPLIANCE WITH COMMITMENTS

The *Autorité* may sanction any instances of non-compliance with behavioural remedies it has previously accepted. These powers are granted by Article L. 464-3 of the French Commercial Code (*Code de commerce*) in relation to commitment decisions under anticompetitive practice law, and paragraph

IV of Article 430-8 of the same code under merger law. This right proceeds from the same reasoning regarding the need to ensure that commitments are effective, which therefore requires them to be respected. Nevertheless, the procedures provided for by these two Articles are not strictly identical, as demonstrated by the applicable procedures and the penalties likely to arise from them.

## General principles applicable to checking compliance with commitments

Checks to ensure compliance with commitments form part of a coercive procedure, which is likely to lead to the issuing of an administrative penalty. This explains why the procedure governing them aims to ensure strict compliance with the measures being checked, whether the latter were accepted to put an end to competition concerns or whether they accompany a settlement procedure or merger clearance decision.

In this way, commitments are considered to require strict interpretation (on this point, for anticompetitive practice law see Decision 10-D-21 of 30 June 2010 regarding the compliance of Neopost France and Satas with the commitments made under *Conseil de la Concurrence* Decision 05-D-49 of 25 July 2005, Decision 15-D-02 of 26 February 2015 regarding the compliance of GIE "Les Indépendants" with the commitments made under *Conseil de la Concurrence* Decision 06-D-29 of 6 October 2006, and Paris Court of Appeal, 10 September 1996, Société Méditerranéenne de Béton; and for merger law see French Administrative Supreme Court (*Conseil d'État*), *Assemblée*, 21 December 2012, Groupe Canal Plus, Vivendi, n°. 353856, *in Recueil*).

However, as indicated by Vincent Daumas in his conclusions on the Groupe Canal Plus case mentioned in the preceding paragraph, "*strict interpretation does not, however, mean*

*strictly literal* [interpretation]. *When the letter of a commitment, contrary to what it should be, is not clear and precise, it will be possible to clarify its exact scope by referring to either its context, namely its place in the set of obligations arising from the clearance decision, or to the objective sought by the issuer of this decision, on the condition of course that this objective has been explicitly stated*". The commitment is then clarified using the other provisions of the decision, its purpose and its context. Enlightened by the circumstances under which the commitment was accepted, the *Autorité* is therefore able, under the oversight of the court, to apply its full useful scope.

In addition, this interpretation cannot be limited to superficial checks on compliance with commitments. On this point, past decisions show that the principle of strict interpretation of remedies "*cannot however have the effect of limiting the assessment of compliance with a commitment or injunction to purely formal considerations*" (Decision 15-D-02 of 26 February 2015 regarding the compliance of GIE "Les Indépendants" with the commitments made under *Conseil de la Concurrence* Decision 06-D-29 of 6 October 2006, confirmed by the judgement of the Paris Court of Appeal, 6 October 2016, GIE "Les Indépendants", n° 2015/06776, in turn confirmed by the French Supreme Court (*Cour de cassation*), Commercial Chamber, 26 September 2018, GIE "Les Indépendants", n° 16-25.403). In this decision, the *Autorité* notably observed that several modifications to the internal rules of procedure of GIE "Les Indépendants" contravened the objectives established by this group, such as the extension of the notice period to be respected by a radio station leaving the group, which delayed the point at which the radio station could market its own advertising offers under its own name.

Judicial case law also considers that compliance with remedies must therefore go further than mere appearances. Accordingly, upon referral of an appeal against a sanction decision for non-compliance with an injunction, the Paris Court of Appeal ruled that "*the Conseil did not overstep its powers* [...] *when checking whether the deleted clauses had been replaced with other stipulations that, although formulated differently, would have brought about the prohibited legal consequences*" (Paris Court of Appeal, 21 February 2006, SEMUP e. a., nº 2005/14774, p. 6).

Similarly, in merger law, the French Administrative Supreme Court (*Conseil d'État*) recognised the right of the *Autorité* to search for any attempts to "circumvent" commitments. In this respect, it specifies that the *Autorité* "*has the right to check whether, even in the event of formal compliance with the criteria expressly provided for under a commitment that market changes have not stripped of its purpose, the parties that have undertaken the commitment have adopted measures or behaviours that eliminate the impact of the commitment and produce the anticompetitive effects it was intended to prevent*" (French Administrative Supreme Court, *Assemblée*, 21 December 2012, Groupe Canal Plus, Vivendi, nº. 353856, *in Recueil*). This is what led to the ruling that the *Autorité* had not committed any error of judgement in deciding that a commitment to maintain the availability of a channel was not being respected if the quality and attractiveness of that channel were significantly reduced.

The strict interpretation of commitments protects the companies undertaking them. However, correspondingly, this principle also requires them to comply with all the remedies prescribed to the letter. Indeed, checking compliance with commitments does not take the form of an overall assessment, but covers compliance with the measures taken one by

one, each having an obligatory value (on this point, for merger law see Decision 12-D-15 of 9 July 2012 on compliance with commitments in the decision authorising Groupe Bigard's takeover of Socopa Viandes; and for anticompetitive practice law see Decision 18-D-09 of 21 June 2018 relating to compliance with the commitments made by Randstad in *Conseil de la Concurrence* Decision 09-D-05 of 2 February 2009).

This principle of strict interpretation is accompanied by the obligation, for the *Autorité*, to assess compliance with the remedies concerned in a purely objective manner, without being required to seek out any malicious intent or negligence by the party committing the breach. To this end, the *Autorité* has already had cause to indicate that "*the procedure for non-compliance with commitments instituted by Article L. 464-3 of the French Commercial Code (Code de commerce) has an objective nature, such that failure to comply with a commitment is punishable by a financial penalty without any need to demonstrate* [...] *fraudulent intent by the party committing the breach, the existence of an anticompetitive practice characterising such a breach or the seriousness of the consequences for the market concerned*" (Decision 11-D-10 of 6 July 2011 regarding the compliance of the Marseille city authorities with the commitments taken under *Conseil de la Concurrence* Decision 08-D-34 of 22 December 2008). This objective stance is also required when checking commitments undertaken in connection with a merger clearance decision. This is all the more understandable given that merger law constitutes an administrative police system. Given that its sole aim is to maintain public economic order, judging the intent of market stakeholders has no impact on the performance of this mission.

## Similarities and differences in sanction procedures

In accordance with the general principles applicable to all sanctions, those issued on the basis of paragraph IV of

Article L. 430-8 of the French Commercial Code (*Code de commerce*) and Article L. 464-3 of the same code come at the end of written and oral *inter partes* proceedings allowing the investigation service to set out its analysis of the case in its report, and the parties concerned to give a response.[78]

However, the practical organisation of the procedure diverges on several points.

As a result, the scope of the referral for a procedure relating to non-compliance with commitments is broader under anticompetitive practice law than merger law. Indeed, in the first case, the *Autorité* can both initiate an action of its own motion[79] and receive referrals from the French Minister for the Economy or any company or body concerned, in accordance

**78** In its Groupe Canal Plus and Vivendi Universal decision ((French Administrative Supreme Court (*Conseil d'État*), *Assemblée*, 21 December 2012, nº. 353856, in *Recueil*), the French Administrative Supreme Court notably recalled that "*the granting in law to an administrative authority of the power to set rules within a set domain and to ensure they are respected, through the exercise of powers to check the activities carried out and sanction any breaches observed, does not contravene the requirements of Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as long as these sanctioning powers are managed in such a way as to ensure the respect of rights regarding defence, an inter partes procedure and a fair decision*".

**79** In the Groupe Canal Plus and Vivendi Universal decision mentioned above, the French Administrative Supreme Court (*Conseil d'État*) decided that the *Autorité*'s right to initiate an action of its own motion was subject to sufficient control with regard to the principle of fairness contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the same way, and in the same case, the French Constitutional Council (*Conseil constitutionnel*), to which a priority ruling on constitutionality had been referred by the French Administrative Supreme Court, notably declared that the provisions of Article L. 462-5 of the French Commercial Code allowing the *Autorité* to initiate an action of its own motion were compliant with the Constitution (Decision 2012-280 QPC of 12 October 2012).

with the provisions of Article L. 462-5 of the French Commercial Code (*Code de commerce*) and under paragraph 46 of the Notice on Competition Commitments issued on 2 March 2009.

The deadlines for the procedure are also different. The procedure applicable to merger law grants the parties issuing notification of the transaction and the representative of the French Minister for the Economy 15 working days to present their observations in response to the communication of the report by the investigation services. This tight deadline is explained by the general economy of this sanction procedure, which must lead the *Autorité* to issue a decision rapidly, within a period of 75 working days, which is not however mandatory "*under penalty of withdrawal of jurisdiction or procedural irregularity*" (French Administrative Supreme Court, 31 March 2017, Altice Luxembourg and Numéricable-SFR, n° 401059). At the same time, the French Administrative Supreme Court has also specified that this deadline "*is measured from the point at which* [the *Autorité*] *receives observations from the parties in response to the communication of the report mentioned in the second paragraph of Article L. 463-2 of the French Commercial Code or, in the absence of any such observations, after the deadline of 15 working days provided for in the fifth paragraph of IV of Article L. 430-8 of the same code has expired*".

On the other hand, the procedure allowing the *Autorité* to sanction non-compliance with commitments made under anticompetitive practice law is not subject to any deadline. This is why Article R. 464-9 of the French Commercial Code allows the parties and the representative of the French Minister for the Economy to present their observations for a period of two months. Nevertheless, if urgency so requires, the General Rapporteur can reduce this period to one month.

## Diversity of measures likely to be issued by the *Autorité*

The measures likely to be issued by the *Autorité* against operators that have not fulfilled their commitments vary according to the procedure implemented.

Under merger law, paragraph IV of Article L. 430-8 of the French Commercial Code states that: "*If it considers that the parties have not fulfilled an order, requirement or commitment in its decision, the Autorité de la concurrence records a breach of these obligations. It may*: *1° Withdraw the decision authorising the merger. Unless the situation is returned to the state prior to the merger, the parties are required to notify the merger again, within one month of the withdrawal of the decision, otherwise they will incur the penalties specified in I; 2° Order the parties subject to the unfulfilled obligation, subject to a periodic penalty payment, to fulfil, within the limits of the provisions in II of Article L. 464-2, the injunctions, instructions or commitments included in the decision, within a deadline it sets; 3° Order the parties subject to the obligation, subject to a periodic penalty payment, to fulfil, within the limits of the provisions in II of Article L. 464-2, injunctions or instructions in place of the unfulfilled obligation, within a deadline it sets. In addition, the Autorité de la concurrence may impose on the persons subject to the unfulfilled obligation, a financial penalty that may not exceed the amount defined in I* [...]". The Commercial Code therefore makes available to the *Autorité* a wide range of measures, which can be divided into two categories.

The first includes all measures intended to maintain or restore a sufficient level of competition on the markets concerned by the cleared transaction. To this end, the *Autorité* may decide to order offenders to comply with their unfulfilled commitments within a deadline it sets, subject to periodic

penalty payments or, since the legislative reform of 2015,[80] decide to replace those commitments with injunctions, also subject to periodic penalty payments (see for example Decision 17-D-04 of 8 March 2017 regarding compliance with the commitment in the decision clearing the acquisition of SFR by Altice, in relation to the agreement with Bouygues Telecom of 9 November 2010, confirmed by the French Administrative Supreme Court (*Conseil d'État*), 28 September 2017, Altice Luxembourg and SFR Group, nº. 409770, *in Recueil*).

More radically, the *Autorité* can even decide to withdraw the decision clearing the transaction (see for example Decision 11-D-12 of 20 September 2011 regarding compliance with the commitments in the decision clearing the acquisition of TPS and CanalSatellite by Vivendi Universal and Groupe Canal Plus, confirmed on this point by the French Administrative Supreme Court, *Assemblée*, 21 December 2012, Groupe Canal Plus, nº. 353856, *in Recueil*).

The second category includes financial penalties that the *Autorité* may impose on companies that contravene their commitments. Financial penalties may be issued alone (see for example Decisions 12-D-15 of 9 July 2012 on compliance with commitments in the decision authorising Groupe Bigard's takeover of Socopa Viandes; 16-D-07 of 19 April 2016 on compliance with the commitment to divest of Outremer Telecom mobile telephone activities on Reunion Island and Mayotte in the decision authorising the acquisition of SFR by Altice, confirmed by the French Administrative Supreme Court, 31 March 2017, Altice Luxembourg and

**80** French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

Numéricable-SFR, n°. 401059), or combined with the "corrective" measures mentioned in the previous paragraph.

The *Autorité* has a more limited range of measures under anticompetitive practice law. Article L. 464-3 of the French Commercial Code only provides for financial penalties for companies that fail to fulfil their commitments. These provisions refer to Article L. 464-2 of the same code for the determination of the legal limit of these penalties. Higher than that provided for under merger law,[81] the applicable limit in the event of non-compliance with commitments regarding anticompetitive practices is identical to the limit applicable to penalties issued for any breach of competition law: 3 million euros if the offender is not a company[82] and 10% of global pre-tax turnover if the offender is a company. This amount reflects the importance attached by the legislator to the correct application of the remedies undertaken by the offenders themselves.

In relation to commitments undertaken in application of paragraph I of Article L. 464-2 of the French Commercial Code, the *Autorité* may force the companies or bodies that proposed them to comply with them by imposing a periodic penalty payment on the basis of paragraph II of the aforementioned Article (see for example Decision 15-D-02 of 26 February 2015 regarding the compliance of GIE "Les

81 Article L. 430-8 of the French Commercial Code (*Code de commerce*) states that the maximum amount of the penalty likely to be imposed by the *Autorité* on the basis of paragraph IV of that Article is "*for legal persons, 5% of their pre-tax turnover made in France during the last closed financial year, plus, if applicable, the turnover that the acquired party made in France during the same period, and, for natural persons, 1.5 million euros*".

82 This threshold, in force at the time of writing, is due to be removed upon transposition of the ECN+ Directive.

Indépendants" with the commitments made under *Conseil de la Concurrence* Decision 06-D-29 of 6 October 2006).

Although the penalties likely to be inflicted by the *Autorité* in the event of non-compliance with commitments linked to a decision clearing a merger or in application of anticompetitive practice law therefore form part of a slightly different legal framework, they must in all cases be personalised and proportionate. These criteria are exclusive. In addition, the *Autorité* does not have to assess the damage to the economy (see on this point French Supreme Court (*Cour de cassation*), Commercial Chamber, 26 September 2018, GIE "Les Indépendants", n° 16-25.403), unlike in the case of penalties directly repressing anticompetitive practices.

Personalisation of the penalty requires it to be set according to the specific circumstances of each case. This may lead the *Autorité* to take into account aggravating or extenuating circumstances, where appropriate (see for example Decision 16-D-07 of 19 April 2016 on compliance with the commitment to divest of Outremer Telecom mobile telephone activities on Reunion Island and Mayotte in the decision authorising the acquisition of SFR by Altice, in which two instances of aggravating circumstances and a single instance of extenuating circumstances were taken into account when evaluating non-compliance with the commitments on which the merger clearance was contingent).

Proportionality means that the *Autorité*'s decision must provide an appropriate response that is balanced in terms of the breach it is sanctioning, but which acts as a sufficient deterrent to prevent any attempts by companies to evade their commitments (see for example Decision 16-D-07 of 19 April 2016 on compliance with the commitment to divest of Outremer Telecom mobile telephone activities on Reunion Island and Mayotte in the decision authorising the acquisition

of SFR by Altice). In the case of financial penalties, the principle of proportionality requires the *Autorité* to examine the seriousness of the contentious breach with regard to the effects that the remedies were intended to prevent (see for example Decision 11-D-10 of 6 July 2011 regarding the compliance of the Marseille city authorities with the commitments taken under *Conseil de la Concurrence* Decision 08-D-34 of 22 December 2008).

Under anticompetitive practice law, the decision-making practice of the *Autorité* and case law consider non-compliance with commitments to be "*a serious practice in itself,* [...] *especially* [...] *given that the acceptance of commitments takes place on the initiative of the parties involved, which propose them*" (Decision 10-D-21 of 30 June 2010 regarding the compliance of Neopost France and Satas with the commitments made under *Conseil de la Concurrence* Decision 05-D-49 of 25 July 2005, paragraphs 103 and 104, and Paris Court of Appeal, 6 October 2016, GIE "Les Indépendants", n°. 2015/06776, confirmed by the French Supreme Court (*Cour de cassation*), Commercial Chamber, 26 September 2018, GIE "Les Indépendants", n°. 16-25.403). The *Autorité* also considers that the seriousness of the practice is particularly marked when the unfulfilled commitments were taken under a "no contest of objections" procedure,[83] as in this case it enabled the party concerned to further reduce the fine it received (Decision 10-D-21 of 30 June 2010 regarding the compliance of Neopost France and Satas with the commitments made under *Conseil de la Concurrence* Decision 05-D-49 of 25 July 2005; and Decision 18-D-09 of 21 June

**83** The "no contest of objections" procedure was replaced by the settlement procedure under French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

2018 relating to compliance with the commitments made by Randstad in *Conseil de la Concurrence* Decision 09-D-05 of 2 February 2009).

Under merger law, the seriousness of the breach is assessed by analysing the importance of the commitments fully or partially neglected with regard to the set of remedies adopted and the anticompetitive effects they were intended to prevent, and the scale of the breach. Furthermore, when the *Autorité* also decides to impose a remedy by issuing an injunction subject to periodic penalty payments or decides to withdraw a clearance decision, it is responsible for ensuring that this step is necessary to maintain or restore sufficient competition on the markets concerned (French Administrative Supreme Court, *Assemblée*, 21 December 2012, Groupe Canal Plus, n°. 353856, *in Recueil* and French Administrative Supreme Court, 28 September 2017, Altice and SFR Group, n°. 409770, *in Recueil*).

The seriousness criterion is assessed *in concreto*. Several elements can then be taken into account by the Board of the *Autorité*, notably a short period between the decision to accept commitments and those commitments being neglected (see for example Decision 18-D-09 of 21 June 2018 relating to compliance with the commitments made by Randstad in *Conseil de la Concurrence* Decision 09-D-05 of 2 February 2009) or the number of commitments not respected in relation to the total number of commitments undertaken (see for example Decision 18-D-16 of 27 July 2018 regarding compliance with the commitments associated with Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac).

## OVERVIEW OF SANCTION DECISIONS ISSUED BY THE AUTORITÉ

Since 2008, the *Autorité* has issued fewer than 10 sanction decisions for failing to fulfil commitments. Four of these were issued under anticompetitive practice law and five under merger law, four of which involved non-compliance with behavioural measures. This situation illustrates that companies generally do comply with remedial solutions that they themselves have proposed.

### In anticompetitive practice law

Two of the sanctions issued by the *Autorité* involved non-compliance with commitments undertaken in the context of a "no contest of objections procedure".[84]

In this regard, the *Autorité* recalled that non-compliance with commitments was a serious matter in itself, and stressed that this was all the more true given that the remedies had allowed the companies proposing them to benefit from a reduction in the penalty they received.

The first case concerned the postage machine rental sector (Decision 10-D-21 of 30 June 2010 regarding the compliance of Neopost France and Satas with the commitments made under Decision 05-D-49 of 25 July 2005 on practices in the postage machine rental and maintenance sector).

The *Autorité* observed that Neopost France and Satas, which had agreed to refrain from contesting the objections notified, had failed to respect their commitments regarding the

84 The "no contest of objections" procedure was replaced by the settlement procedure under French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

deletion, from all their rental contracts, of clauses requiring payment of an amount greater than the cost of the remaining rental period in the event of early cancellation of these contracts. As a consequence, each company was fined 100,000 euros.

In the second case (Decision 18-D-09 of 21 June 2018 relating to compliance with the commitments made by Randstad in *Conseil de la Concurrence* Decision 09-D-05 of 2 February 2009), the *Autorité* observed that Groupe Randstad France SAS, Randstad SAS, Randstad Holding NV and Randstad France SASU had not respected part of the commitments accompanying their decision to refrain from contesting the objections raised against them. These measures notably concerned the marketing, via an independent subsidiary of Groupe Randstad France, of a tool allowing all the temporary employment agencies to manage their flow of temporary workers. As a result, the *Autorité* imposed a fine of 4.5 million euros jointly and severally on Groupe Randstad France SAS, Randstad SAS, Randstad Holding NV and Randstad France SASU.

The other two sanction decisions involved non-compliance with commitments undertaken on the basis of paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*).

In the case concerning funeral services in Marseille (Decision 11-D-10 of 6 July 2011, regarding the compliance of the Marseille city authorities with the commitments taken under *Conseil de la Concurrence* Decision 08-D-34 of 22 December 2008), the *Autorité* noted that the Marseille city authorities had failed to fulfil one of the commitments made obligatory under Decision 08-D-34 of 22 December 2008. This commitment notably required information regarding the total number of deaths and burials in the city, and the number of

deaths recorded in each residential care establishment, to be made available to all companies providing funeral services. It also required the city authorities to refrain from sharing data on the activity of one operator to another operator.

The *Autorité* has indicated that – without any need to rule on the existence of damage to the economy – any breach of commitments that harms the solution negotiated, which was intended to restore a normal competitive context and prevent any anticompetitive practices, is of a particularly serious nature. It therefore imposed a financial penalty of 60,000 euros on the Marseille city authorities.

Lastly, under Decision 15-D-02 of 26 February 2015, the *Autorité de la concurrence* sanctioned the economic interest group GIE "Les Indépendants" for failing to comply with the commitments proposed and made obligatory under Decision 06-D-29 of 6 October 2006 (Decision 15-D-02 of 26 February 2015 regarding the compliance of GIE "Les Indépendants" with the commitments made under *Conseil de la Concurrence* Decision 06-D-29 of 6 October 2006).

Having observed the difficulties independent local radio stations faced in accessing the national advertising market when they were not members of GIE "Les Indépendants", in 2006 the *Autorité* accepted the commitments proposed by the latter, which were intended to make the conditions for joining and leaving this group more transparent and objective, and non-discriminatory. Practically speaking, these remedies involved modifying the internal rules of procedure of the economic interest group and creating information notices to replace the old user guides sent to radio stations wishing to join the group.

However, the *Autorité* uncovered several instances of non-compliance with the commitments linked to their poor

application, notably in relation to the economic interest group's modification of its internal rules of procedure in 2011. As a consequence, it issued a fine of 300,000 euros to the economic interest group, and forced it to comply with its commitments or face periodic penalty payments of 500 euros for each day's delay after a period of four months running from the date of notification of the decision. The appeal against this decision was rejected by the Court of Appeal, whose judgement was confirmed by the French Supreme Court (*Cour de cassation*) (Paris Court of Appeal, 6 October 2016, GIE "Les Indépendants" n°. 2015/06776, confirmed by the French Supreme Court, Commercial Chamber, 26 September 2018, GIE "Les Indépendants", n°. 16-25.403).

### In merger law

To date, the landmark penalties issued by the *Autorité* for non-compliance with commitments on which a merger clearance decision was contingent have chiefly concerned behavioural remedies.

A particularly striking sanction decision is that relating to checks on the commitments undertaken by Vivendi Universal and Groupe Canal Plus, which were required as part of the clearance decision issued by the French Minister for the Economy[85] regarding the creation of Canal+ France, which combined the pay television activities of TPS and Groupe Canal Plus. The case concerned an especially wide range of remedies, namely 59 commitments undertaken by Groupe Canal Plus and Vivendi Universal relating notably to access to broadcasting rights, the availability of channels to third-party

**85** Letter C2006-02 from the French Minister for the Economy, Finance and Industry of 30 August 2006 to Vivendi Universal's advisers relating to a merger in the pay television sector, BOCCRF 7 bis of 15 September 2006.

distributors, the take-over of independent channels and the distribution of third-party channels.

However, after recognising that the failure to fulfil part of these commitments was not evenly spread in terms of seriousness, but originated with an operator that was especially experienced on the pay television market, and that this neglect had harmed competition in a way that the decision had attempted to prevent, the *Autorité* decided to issue a double sanction. This sanction involved the unprecedented withdrawal of the contentious clearance decision, on the one hand, and the imposition of a fine of 30 million euros on Groupe Canal Plus and the subsidiaries it controls, on the other. This decision was partially upheld by the French Administrative Supreme Court (*Conseil d'État*),[86] which ruled that, in application of the principle of proportionality and having considered that two of the 10 instances of non-compliance attributed to Groupe Canal Plus had not been established, to reduce the penalty by 10%, taking it from 30 to 27 million euros.

Furthermore, in the telecommunications sector, after checking compliance with the commitments required for the issuing of clearance decision 14-DCC-160 of 30 October 2014 regarding the acquisition of sole control of SFR by Altice, the *Autorité* issued two sanctions.

The largest arose from Decision 17-D-04 of 8 March 2017 regarding compliance with the commitment in the decision clearing the acquisition of SFR by Altice, in relation to the agreement with Bouygues Telecom of 9 November 2010.

**86** French Administrative Supreme Court (*Conseil d'État*), *Assemblée*, 21 December 2012, Groupe Canal Plus and Vivendi Universal, n°. 353856, *in Recueil*.

Through this agreement, known as the "Faber contract", SFR and Bouygues Telecom had decided to jointly invest in fibre optics in very dense areas. They wished to build infrastructure to compete with Numéricable based on coaxial cable technology to provide very high-speed internet connections.

Yet the purchase of SFR by Altice, the parent company of Numéricable, had the effect of calling into question SFR's incentive for complying with the obligations of this contract. This is why, to prevent the anticompetitive effects that the transaction would produce in this respect, Altice and Numéricable undertook several commitments intended to guarantee that the contract was respected.

However, the *Autorité* notably observed that these commitments had not been met: the rate at which buildings were being connected to the optic fibre network by Altice for Bouygues Telecom slowed down significantly after the transaction was completed, and did not really pick up again until a year later, causing a substantial delay with regard to the commitments undertaken. In addition, this failure was accompanied by a degradation in network maintenance conditions, which harmed Bouygues Telecom.

As a result, the *Autorité*, after finding that the commitment had not been fulfilled, handed down a fine of 40 million euros to Altice/SFR Group. It also issued several injunctions to ensure the effective implementation of the commitments in question, and ensure that Altice/SFR Group refrains from such behaviours. In particular, it set Altice/SFR Group a new implementation timetable including deadlines for completion and gradually increasing fines for non-compliance, to force it to proceed with the effective connection of all concentration points not effectively connected. This decision was confirmed by the French Administrative Supreme Court (*Conseil d'État*), which considered that the failure to comply with

the commitments had notably arisen from ignorance of the objectives set by the "Faber contract".[87]

By issuing injunctions subject to periodic penalty payments, the *Autorité de la concurrence* applied for the first time the provisions of the French Law of 6 August 2015 for Growth, Activity and Equal Economic Opportunities (known as the "Macron Law" ), which gives it additional powers in the event of non-compliance with commitments undertaken as part of a merger.

The second decision related to the purchase of SFR by Altice concerned non-compliance with behavioural remedies undertaken in addition to the remedies involving the divestiture of the mobile telephone activities of Outremer Telecom (OMT), a subsidiary of Altice since 2013, which were intended to protect "*the economic viability, commercial value and competitiveness of this asset*". However, the *Autorité* observed that after the entry into force of the commitments, OMT introduced several increases in the price of its subscriptions on Reunion Island and Mayotte. These increases threatened the competitiveness of the divested business, contravening the commitments undertaken. In light of these facts, the *Autorité* imposed a financial penalty of 15 million euros jointly and severally on Altice Luxembourg and Numéricable-SFR. This decision, like the previous one, was also confirmed by the French Administrative Supreme Court.[88]

This was not the first time that the *Autorité* had sanctioned a company for harming the viability of an asset subject to a

**87** French Administrative Supreme Court (*Conseil d'État*), 28 September 2017, Altice Luxembourg and SFR Group, n°. 409770, *in Recueil*.

**88** French Administrative Supreme Court (*Conseil d'État*), 31 March 2017, Altice Luxembourg and Numéricable-SFR, n°. 401059.

transfer of ownership, as shown by the decision regarding the non-compliance with commitments undertaken in the meat sector (Decision 12-D-15 of 9 July 2012 on compliance with commitments in the decision authorising Groupe Bigard's takeover of Socopa Viandes).

In this case, the French Minister for the Economy had cleared, on 17 February 2009, the acquisition of sole control of Socopa Viandes by Groupe Bigard, on the condition that seven commitments were undertaken: five structural commitments regarding the sale of the same number of production sites, and two behavioural remedies, one of which involved the signing of a licensing contract for the Valtero brand for a period of five years. This last remedy, undertaken in addition to the structural measures, was intended to eliminate the risk of horizontal effects on certain "fourth transformation" markets corresponding to the manufacture of beef products.

In parallel to the efforts made to sign the licensing contract mentioned above, Groupe Bigard decided to launch the Socopa brand. However, the *Autorité* established that, although the commitments undertaken did not prevent the company from taking such a step, the latter nevertheless had "*a responsibility to maintain the reputation and viability of the brand to be licensed, both before and during the licensing contract*". In light of all the facts, which were not contested by Groupe Bigard, the *Autorité* decided that the trade practices implemented when launching the Socopa brand had clearly harmed the Valtero brand. As a result, it handed down a financial penalty totalling one million euros to Groupe Bigard.

Since 2008, the majority of the penalties issued by the *Autorité* for non-compliance with commitments have therefore concerned behavioural remedies. However, very recently and for the first time, the *Autorité* sanctioned a company for

non-compliance with a structural commitment (Decision 18-D-16 of 27 July 2018 regarding compliance with the commitments associated with Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac).

During the 2016 examination of the acquisition of Darty by Fnac, the *Autorité* observed that the transaction was likely to harm competition on the retail markets for brown goods (television sets, hi-fi and audio equipment, etc.) and grey goods (personal microcomputers, screens, telephones and other devices) due to the disappearance of competitive pressure in several catchment areas, notably in Paris. In order to remedy the anticompetitive effects of the transaction, Fnac committed to sell, before 1 August 2017, six stores located in Paris and the surrounding region: Darty Wagram, Darty Italie 2, Fnac Beaugrenelle, Darty Belleville, Darty Saint-Ouen and Darty Vélizy.

Yet, out of the six stores, three – Fnac Beaugrenelle, Darty Belleville and Darty Saint-Ouen – were not sold to an approved purchaser within the set deadlines, in breach of the commitments undertaken. The *Autorité* also decided to impose a fine of 20 million euros on Fnac Darty and forced it to sell Darty Montmartre and Darty Passy in place of those not sold.

The French Administrative Supreme Court *(Conseil d'État)*, to which only the aforementioned financial penalty was referred, considered that Fnac Darty was not entitled to request its cancellation or review (CE, 7 November 2019, Fnac Darty, 424702, *in Recueil*).

On that occasion, it decided on a number of new issues.

With regard to the reasons for the decision, it noted that 'it does not follow from any provision or any guideline of the *Autorité* (…) that, for a fine imposed in relation to merger

control, the *Autorité* should proceed to [the] clarification of the amount of the fine imposed'. This solution is consistent with the administrative case law applicable to decisions on fines issued by the French Broadcasting Regulator (CSA)[89], but also with European case law relating to fines imposed within the scope of European merger law[90].

In regard to the validity of the decision, the *Conseil d'État* first defined the analysis framework relating to financial penalties before applying it to the present case.

Thus, it noted that 'unlike the penalties that the *Autorité de la concurrence* may impose pursuant to the aforementioned provisions of 1°, 2° and 3° of IV of Article L. 430-8 of the French Code of Commercial Law *(Code de commerce)*, the financial penalty that it may additionally impose in the event of failure to effectively fulfil commitments undertaken by the parties to a merger has a purely punitive purpose'. In that regard, it noted that 'it is for the *Autorité de la concurrence*, as well as the court with full jurisdiction appeal, to assess the proportionality of such a sanction in the light of the seriousness of the breaches found, i.e., the extent of the commitments not fulfilled in all the corrective measures adopted in order to prevent the anticompetitive effects of the merger, the conduct of the company in implementing the commitments entered into and its particular situation, in particular its financial position'.

In this case, it ruled out any error with regard to the assessment of the seriousness of the breaches or Fnac Darty's behaviour in implementing the commitments.

**89** See CE, 18 May 1998, M6, 178765, in the tables; CE, 15 October 2018, Vortex, 408212.

**90** See Tribunal, 26 October 2017, Marine Harvest ASA / Commission, T-704/14.

As regards the quantum of the fine, the *Conseil d'État* specified that it 'represents approximately 0.3% of the consolidated turnover in France for the 2017 financial year and 7% of the maximum amount incurred'. It added that 'given the seriousness of the breaches committed, the behaviour of Fnac Darty and its particular situation and although it is high compared to the profit before tax of about €37.5 million in 2017, the amount of €20 million does not seem disproportionate'.

In an essential point for the credibility of merger control, this decision of the *Conseil d'État* confirms that commitments must be applied very strictly and respected by companies under penalty of strong sanctions: companies cannot "play for time", present inadequate buyers or propose commitments that they know are very difficult to implement.

Studying these 10 cases shows that non-compliance with commitments can result in significant fines being issued.

Furthermore, it should be stressed that non-compliance with commitments is likely to have significant repercussions in terms of civil liability. Indeed, the ordinary court considers that although "*the Autorité's decisions regarding compliance with commitments in a decision clearing a merger are not imposed upon* [the court], [...] *they can be produced in court as evidence*", adding that the commitments undertaken in the context of a merger have a binding value and "*may be contested by the companies that they aim to protect, non-compliance with such commitments constituting a civil fault*" (French Supreme Court (*Cour de cassation*), Commercial Chamber, 31 January 2018, Groupe Canal Plus, n°. 16-21173).

Through this ruling, the French Supreme Court confirmed the sentencing of Groupe Canal Plus, Canal Plus France and Canal Plus Distribution, jointly and severally, to compensate

Parabole Réunion, Médiacom and RTPS for the harm they had experienced, occurring between 19 June 2008 and 31 December 2012, and to order an interlocutory expert assessment to assess that harm. This harm was associated with the degradation of Parabole Réunion's premium offer, which, combined with the loss of exclusivity on the film channels, led to a reduction in its subscriber numbers. It arose in part due to the failure of Groupe Canal Plus to comply with commitments 22 and 34, upon which the decision of 30 August 2006 by the French Minister for the Economy clearing its creation was contingent (see paragraphs 384 and 419 onwards of the present study regarding non-compliance with these commitments).

Additionally, if there are *de jure* or *de facto* changes in the data according to which the commitments were accepted and made obligatory, their creator has every interest in requesting their revision.

## Revision of commitments

As they are accepted on the basis of a given competitive context that is likely to evolve, it must be possible to modify commitments to ensure they remain proportionate. In practice, this modification may take several forms, as demonstrated by the *Autorité*'s past decisions regarding revision.

### IMPLEMENTING THE REVISION OF COMMITMENTS

The sources of powers to revise commitments have developed over time. The procedures are fairly similar but differ according to whether the commitments concerned were accepted under anticompetitive practice law or merger law. However, in both cases, the role of the *Autorité* remains more or less the same.

## Sources of powers of revision

The right of the *Autorité* to accept commitments implies, correspondingly, that it can also modify their content. These powers of modification therefore concern all the commitments undertaken before the *Autorité*.

They can first of all be used before the end of the implementation period for the remedies concerned, in order to take into account any *de jure* or *de facto* changes in circumstances likely to affect the competition data according to which they were accepted. It is thereby possible to recalibrate the corrective measures and prevent the companies or bodies involved facing excessive restrictions that are not justified by the maintaining or restoration of public economic order.

Yet to begin with, under anticompetitive practice law, neither Article 10 of French Order 2004-1173 of 4 November 2004 on the Adaptation of Certain Provisions in the Commercial Code to Community Competition Law – which established the commitment procedure codified in Article L. 464-2 of the French Commercial Code (*Code de commerce*) – nor any provisions in the French Commercial Code explicitly mentioned these powers of revision.

Commitment decisions therefore included a clause that provided for the possibility of revision (see for example Decision 07-D-32 of 9 October 2007 relative to practices implemented by *Nouvelles Messageries de la Presse Parisienne* (NMPP) and *Société Auxiliaire pour l'Exploitation des Messageries Transport Presse* (SAEM-TP)). In this case, paragraph 3 of the commitments undertaken by these companies stated that "*the present commitments will cease to be binding on NMPP and/or TP if one of the facts on which the decision of the Conseil was based undergoes a significant change*".

Since 2 March 2009, the Notice on Competition Commitments has explicitly referred to the *Autorité*'s option of initiating a revision procedure for commitments undertaken in application of paragraph I of Article L. 464-2 of the French Commercial Code. In paragraph 46, which is largely based on Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, it states that "*the Autorité has the discretion to determine the need to review commitments and to decide, of its own initiative, to reopen the proceedings and in light of any developments that may occur on the market in question. Cases may be brought before the Autorité involving conduct already covered by a commitment decision upon request of the applicant, the Minister for the Economy, any other interested undertaking or at the Autorité's own initiative*: *(a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties*."

In addition, the revision of commitments may also occur at the end of the first implementation period, in the context of a rendez-vous clause (for an example of such a clause, see Decision 14-D-11 of 2 October 2014 on the practices implemented in the train ticket distribution sector, in relation to commitments undertaken in application of paragraph I of Article L. 464-2 of the French Commercial Code; and Decision 14-D-05 of 13 June 2014 on practices implemented in the mobile telephone sector for household customers on Reunion Island and Mayotte, in relation to commitments undertaken in application of paragraph III of Article L. 464-2 of the French Commercial Code).

The purpose of this type of revision differs somewhat from that of the first. In this case, it is no longer about allowing the modification or lifting of commitments before the end of the implementation period in order to protect companies from the consequences of random and often unpredictable changes in circumstances. Instead, it involves checking whether, given the change in the competitive context of the markets, the corrective provision introduced at the start remains necessary. Re-examination clauses are therefore often included in commitments whose duration cannot be definitively fixed when the initial decision is taken, notably due to the rapidly evolving nature of the markets in the sector concerned.

The French Commercial Code does not explicitly provide for these powers of revision in merger law either. Paragraphs 306 onwards of the *Autorité*'s guidelines regarding merger control do, however, provide supplementary guidelines on the subject.

As in anticompetitive practice law, the revision of commitments accepted by the *Autorité* may also take place at the end of the first remedy implementation period, at the end of a re-examination or rendez-vous clause, or at any time, generally on the request of companies (sometimes, the revision takes place on the basis of both elements: see for example Decision 17-DCC-92 of 22 June 2017 reviewing the injunctions of Decision 12-DCC-100 of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi SA and Canal Plus Group).

## Initiation of the revision procedure and decision-making

### In anticompetitive practice law

As specified in paragraph 46 of the notice mentioned above, the revision request may be made by the complainant, the French Minister for the Economy or any other company with an interest in bringing an action, including the company that undertook the commitments.

In principle, the decision regarding whether to proceed with the revision of commitments is taken by the Board of the *Autorité*, in accordance with the provisions of Article 461-3 of the French Commercial Code (*Code de commerce*).

### In merger law

In its decision regarding NC Numéricable (French Administrative Supreme Court (*Conseil d'État*), *Assemblée*, 21 March 2016, NC Numéricable, n°. 390023, *in Recueil*), the French Administrative Supreme Court ruled that the *Autorité* can, of its own initiative, decide to revise the commitments on which a merger clearance is conditional, without it having received any request in this regard.

In practice, the relevance of commitments is most commonly re-examined following a revision request, which is a scenario provided for by paragraphs 306 onwards of the *Autorité*'s guidelines regarding merger control.

Indeed, the committed parties are best placed to identify any changes in the functioning of their sector that should lead to a modification of the remedies they are applying.

Once the procedure has been initiated, the revision decision may be adopted by the President or a Vice-President that they have appointed, in accordance with the last paragraph

of Article L. 461-3 of the French Commercial Code which, in a departure from the principle of collegiality governing *Autorité* decisions, states that "*the President, or a Vice-President that they have appointed, may adopt alone the decisions specified in Article L. 462-8* [...]. *They may do the same for the decisions specified in Article L. 430-5, decisions to revise the measures mentioned in paragraphs III and IV of Article 430-7 or decisions required to implement these measures*".

The option of the President, or the Vice-President that they have appointed, adopting alone decisions to revise the measures mentioned in paragraphs III and IV of Article 430-7 or decisions required to implement these measures was introduced by the legislative reform of 2015.[91] The French Administrative Supreme Court (*Conseil d'État*) referred a priority ruling on constitutionality to the French Constitutional Council (*Conseil constitutionnel*) in relation to these new provisions. The issue was raised by Fnac Darty in the context of an appeal in relation to abuse of power against two decisions of the *Autorité* President regarding the implementation of commitments associated with Decision 16-DCC-111 of 27 July 2016 clearing the acquisition of sole control of Darty by Fnac (for the decision to refer, see French Administrative Supreme Court, 1 February 2018, Fnac Darty, n°. 414654 and n°. 414657).

The Constitutional Council decided that the exception to the rule of collegiality for decisions made by the *Autorité* introduced by the law of 2015 was constitutional (Constitutional Council, Decision 2018-702 QPC of 20 April 2018, Fnac Darty). Ruling on the appeals filed against the decisions

**91** French Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities.

made regarding the implementation of the commitments undertaken by Fnac Darty, the French Administrative Supreme Court recognised the jurisdiction of the President or Vice-President to take this type of decision alone "*where the case presents no particular difficulties or where deadlines so require*" (French Administrative Supreme Court, 26 July 2018, Fnac Darty, n°. 414657, in the tables of the *Recueil*, and n°. 414654)[92] and ruled that in this case, the second condition had been met. There are few doubts that these alternative criteria governing the lawfulness of the exception to the principle of collegiality of the *Autorité*'s decisions apply not only to the decisions required for the implementation of the measures mentioned in paragraphs III and IV of Article L. 430-7 of the French Commercial Code, but also to the decisions to revise these measures, which include the commitments made obligatory at the end of phase 2.

## Role of the *Autorité*

No text details the powers held by the *Autorité* in the context of revising commitments.

In relation to remedies on which a merger clearance decision is contingent, the French Administrative Supreme Court (*Conseil d'État*) has specified that the *Autorité* may only modify commitments to reduce or eliminate their impact. Indeed, in the NC Numéricable case (French Administrative Supreme Court, *Assemblée*, 21 March 2016, NC Numéricable, n°. 390023, *in Recueil*), it ruled that: "*in virtue* [of the provisions of Article L. 430-7 of the French Commercial Code] *it*

92 In this case, the French Administrative Supreme Court ruled that the President of the *Autorité* had the power to adopt the contested decision as it was only on 11 July 2016 that Fnac Darty requested the postponement of its divestiture commitment, which expired on 31 July 2017.

*is for the Autorité de la concurrence to oversee the correct implementation of commitments undertaken by parties before it in order to remedy the anticompetitive effects of a merger; of injunctions linked to the transaction clearance decision for the same purpose; and of instructions, imposed on the parties, to make sufficient contribution to economic progress to compensate for the harm done to competition, throughout the execution period of these commitments, injunctions or instructions, so that it derives from these provisions the possibility of modifying them to reduce or even eliminate their impact according to the evolution of the context of the relevant markets and the utility of the continued implementation of these commitments, injunctions or instructions*".

The issue of knowing whether this analysis should be applied to the commitments accepted to address anticompetitive practices, on the basis of paragraphs I or III of Article L. 464-2 of the French Commercial Code (*Code de commerce*) has never been settled by the Paris Court of Appeal or the French Supreme Court (*Cour de cassation*).

## THE DIFFERENT WAYS OF MODIFYING COMMITMENTS

Commitments may be modified to a greater or lesser extent. Modification may involve minor adjustment or extensive revision.

### Minor adjustment of commitments

#### Adjustments not affecting competition issues

In both anticompetitive practice law and merger law, the *Autorité* allows commitments to be adjusted as long as their useful effect is maintained.

Indeed, if the commitments are intended to maintain or restore public economic order, there is no difficulty in introducing

various types of update or adjustment in response to the company's needs, as long as such modifications have no impact on the purpose and effectiveness of efforts to restore competition.

This is notably why the *Conseil de la Concurrence* agreed that Festina's draft contract for mail order selling, which was approved as part of its commitments, could be modified after the decision approving those commitments, as long as those modifications "*responded to justifications that were not anticompetitive*" and on the condition that "*the substance of the responses to the competition concerns expressed* [...] *was clearly preserved*" (Decision 06-D-24 of 24 July 2006 regarding the distribution of watches marketed by Festina France). In the same way, in relation to contracts for the online sale of cosmetic products, see Decision 07-D-07 of 8 March 2007 relative to practices implemented in the sector of cosmetic and personal hygiene products, also, in relation to practices in the pharmaceutical product distribution sector, Decisions 07-D-45 of 13 December 2007 regarding practices in the pharmaceutical product distribution sector; 07-D-46 of 13 December 2007 regarding practices in the pharmaceutical product distribution sector; and 07-D-22 of 5 July 2007 regarding practices in the pharmaceutical product distribution sector).

The flexibility of this decision-making practice makes it possible to reconcile the constraints faced by market stakeholders and the imperatives of public economic order.

**Adjustments intended to clarify the scope of commitments**

*De facto* or *de jure* changes in circumstances within a sector may lead companies that have undertaken commitments to ask the *Autorité* to clarify their scope. In such cases, the

content of the commitment is neither removed nor modified. The *Autorité* simply takes a position on the extent of its application, i. e. on its scope, given the altered situation.

This was expressly decided by the French Administrative Supreme Court (*Conseil d'État*) in its NC Numéricable decision (French Administrative Supreme Court, *Assemblée*, 21 March 2016, NC Numéricable, n°. 390023, *in Recueil*), which did not involve modifying the scope of a commitment, but rather one of the injunctions on which clearance for Groupe Canal Plus and Vivendi to combine TPS and GCP pay television activities was contingent.

This injunction required Groupe Canal Plus (hereafter "GCP"), in distribution contracts signed with operators, to "*value the distribution on each proprietary platform in a distinct, transparent way* [...] *by precisely identifying the value, where relevant, of the exclusivity granted for distribution on each platform in question*", specifying that these exclusive offers should be made on the basis of objective, transparent and non-discriminatory criteria, taking into account the number of subscribers served by the platforms covered by the contracts.

On the one hand, it aimed to allow alternative distributors to effectively compete with GCP to obtain exclusive broadcasting rights, by forcing GCP to formulate separate offers for each platform, so that they could be replicated by each competing distributor individually. On the other, it aimed to give operators the possibility of choosing between exclusive distribution on CanalSat or distribution, exclusive or otherwise, among the offers of competing operators. However, given Numéricable's decision not to offer CanalSat to its subscribers on a self-distribution basis, the *Autorité*, in its Decision 13-DAG-01 of 7 June 2013 approving the reference offer drafted by GCP in application of injunction 3 (c) issued in the decision of 23 July 2012, took the view that

the acquisition by GCP of exclusive channel broadcasting rights on the Numéricable platform would have the effect of depriving the operator of the right to offer these channels to its subscribers. Given the risk of Numéricable being excluded, and the resulting effects on competition on the pay television markets, the *Autorité* – in the reasoning for this approval decision – interpreted injunction 5 (a) as prohibiting GCP from obtaining exclusive distribution rights on the platform of any operator refusing to carry the CanalSat offer. Further, GCP responded to this interpretation of injunction 5 (a) by modifying its reference offer and abstaining, in practice, from acquiring exclusive broadcasting rights on the Numéricable platform.

Nevertheless, following the acquisition of sole control of SFR by Numéricable, a subsidiary of the Altice group, in November 2014, GCP asked the *Autorité* to note the merging of the Numéricable and SFR platforms and rule on the impact of this merger on the implementation of injunction 5 (a) in this respect. In response, the *Autorité* decided that the decision taken by the new entity (resulting from the merger between SFR and Altice) to combine the Numéricable and SFR proprietary platforms, thereby offering CanalSat on a self-distribution basis to some of its subscribers, had had the effect of eliminating, on this new combined platform, the exclusion risk previously analysed. It then observed that as the Numéricable platforms had effectively been combined, the considerations of Decisions 12-DCC-100 and 13-DAG-01 with the effect of preventing GCP's acquisition of exclusive broadcasting rights on the Numéricable cable platform were no longer relevant.

This NC Numéricable decision represents an important development in case law. In line with the Fairvesta decision issued the same day (French Administrative Supreme

Court, *Assemblée,* 21 March 2016, Fairvesta, n°. 368082, *in Recueil*), and in relation to the annulment for abuse of power of notices published by the French Financial Regulator, the French Administrative Supreme Court considered that the soft law applied by regulatory authorities was likely to be the subject of appeals in relation to abuse of power whenever it generated significant economic effects or affected the behaviour of companies.

Indeed, it specified that although "*opinions, recommendations, warnings or positions adopted by regulatory authorities in the performance of their duties may be referred to the court judging abuses of power when they are have the nature of general, mandatory provisions or when they set out individual instructions that could subsequently result in censure by these authorities in the event of non-compliance*", they can also be the subject of such an appeal "*if they are likely to produce significant effects, in particular of an economic nature, or are intended to significantly influence the conduct of the persons to whom they are addressed*".

In this case, it ruled that the decision regarding the scope of the commitments taken under merger law fell into this category of soft law.

Since then, this opening up of litigation to the annulment of the soft law of regulatory authorities has seen several applications concerning soft law rulings by regulatory authorities (see for example French Administrative Supreme Court, 20 June 2016, FFSA, n°. 384297, in the tables of the *Recueil* and French Administrative Supreme Court, 10 November 2016, M^me^ E, n°. 384691, *in Recueil*). This has notably led the French Administrative Supreme Court to recognise the admissibility of appeals in relation to abuse of power against the guidelines on sharing mobile networks published on 25 January 2016 by the French Telecommunications Regulator (French

Administrative Supreme Court, 31 December 2017, Company Bouygues Telecom nº 401799, *in Recueil*).

## Formal revision of commitments

### Revision before the end of commitments

*In anticompetitive practice law*

In accordance with paragraph 46 of the Notice on Competition Commitments issued on 2 March 2009, a revision request implies that there has been a "*material change*" in the circumstances that motivated the decision. In her paper on commitments in relation to anticompetitive practices, Patricia Kipiani therefore considers that the company must demonstrate "*a sufficiently serious, unusual change that would disrupt the normal fulfilment of its commitments*".[93]

This change may take the form of a change in the actual circumstances, evidenced, for example, by the transformation of the market (on this point, see Decision 15-D-16 of 27 November 2015 regarding the request to revise the commitments of the French Golf Federation (*Fédération Française de Golf*) made obligatory by Decision 12-D-29 of 21 December 2012). However, it may also take the form of a change in the rules of law for the sector of activity concerned (on this point, see Decision 16-D-13 of 13 June 2016 regarding the request to revise the commitments of MasterCard made obligatory by Decision 13-D-17 of 20 September 2013).

93 Patricia Kipiani, *Les engagements en matière de pratiques anticoncurrentielles – Analyse des droits français, européen et américain* [Commitments in relation to anticompetitive practices – Analysis of French, European and American law], LGDJ, 2014.

Evaluating this change is not always easy. The companies and bodies undertaking commitments play an important role in this area, as they are best placed to detect important changes likely to have an impact on the remedies being implemented.

Yet in certain clearly identified cases, the *Autorité* and the companies or bodies concerned may make provision for a special, in-depth mechanism to monitor the effect of commitments. The Booking.com case provides a perfect illustration of this (Decision 15-D-06 of 21 April 2015 on the practices used by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector).

In the case, the *Autorité* had accepted the commitments proposed by Booking.com, considering that they addressed the competition concerns arising from the "parity" clauses implemented by the latter.

Through these clauses, the platforms, including Booking.com, required hotels to give them rates, a number of nights and supply conditions (reservation conditions, breakfast, etc.) that were at least as favourable as those offered on competing platforms and all other online and offline distribution channels, including the hotel's own channels (website, telephone, email, hotel reception, etc.).

Their application by all the platforms forced hotels to set identical prices and conditions across all their distribution channels, and put the same number of nights on sale on all the hotel booking platforms. Although hotels were free to modify their prices, including several times a day, they were not able to favour one distribution channel over another by setting a lower rate per night or by allotting it more nights' availability. The implementation of these parity clauses led

to reduced competition between Booking.com and competing platforms, and the exclusion of the smallest platforms or those entering the market.

To address these competition concerns, Booking.com committed to modify its price parity clause and remove all clauses imposing obligations to ensure parity in room availability, in relation not only to competing platforms, but also to the direct offline sales channels of hotels and part of their online channels. It committed to implement these commitments for a period of five years from 1 July 2015 at the latest, and to submit a report on the implementation of the commitments to the *Autorité*, with a view to drawing up an *inter partes* assessment of their effectiveness by 1 January 2017 at the latest.

This assessment of the effectiveness of the commitments undertaken by Booking.com is a *sui generis* exercise introduced by the Booking.com decision. It was implemented by the *Autorité* after an *inter partes* oral hearing on 6 December 2016 (on this point, see the *Autorité*'s annual report for 2016). This assessment, completed on the basis of a specific examination covering the requests formulated by the parties and hotels, allowed the *Autorité* to analyse how the competitive context had changed in the online hotel booking sector and the effects of the commitments on competition between platforms.

*In merger law*

Special circumstances are also required to revise commitments made under merger law. In this respect, paragraph 306 of the *Autorité*'s guidelines specifies that it is only "*in exceptional circumstances* [that] *the parties that have undertaken commitments may propose their re-examination by the Autorité*". It is therefore incumbent on these companies to provide sufficient elements to enable the *Autorité* to proceed

with a new examination of the case concerned, leading to an updated competitive analysis of the markets in question, followed by checks to establish whether the commitments are adequate for the new context.

**Revision at the end of commitments**

In both anticompetitive practice law and merger law, the revision of commitments at the end of their implementation period occurs through a revision clause.

It is this clause that sets the framework for revision, which is likely to result in the extension of the remedies, duly modified if necessary.

In general, and as it occurs after the initial implementation period of the commitments, the revision is initiated automatically. It does not require the companies concerned to demonstrate any special circumstances.

## OVERVIEW OF COMMITMENT REVISION DECISIONS

Examination of the *Autorité*'s past decisions shows that the revision of commitments is less common in anticompetitive practice law than in merger law.

### A little-used procedure in anticompetitive practice law

In ten years, only two decisions have been made ruling expressly on a request to revise commitments.

In the first case, Eurogolf Liber'Tee had, in a letter dated 13 April 2012, submitted a complaint to the *Autorité* regarding the practices implemented by the French Golf Federation (*Fédération française de golf*: "FF Golf" ) in the sector of supplementary insurance aimed at golfers in France. In Decision 12-D-29, the *Autorité* had identified competition concerns relating to the existence of barriers to the development of

supplementary insurance products aimed at golfers, linked to the potential abuse by FF Golf of its apparently dominant position on the market. It accepted and made obligatory the commitments undertaken by FF Golf to allow the deployment of this type of insurance offer.

On 22 January 2015, FF Golf requested the revision of these obligatory commitments, notably citing the disappearance of two major stakeholders in the specialised golf insurance sector and the huge drop in the number of people taking out this type of insurance between 2012 and 2014. It also proposed marketing, once again, "individual accident" insurance and "repatriation assistance" insurance that would be optional and voluntary, in the sense that any member could declare (by ordinary or recorded letter, or email) that they did not wish to take out this insurance within a period of one month of receiving their licence.

In Decision 15-D-16 mentioned previously, the *Autorité*, of its own initiative, decided that there were no longer competition concerns on the market of supplementary insurance products for golfers in 2015, and that as a result the commitments undertaken by FF Golf and appended to Decision 12-D-29 of 21 December 2012 were no longer relevant. Furthermore, in the absence of any competition concerns on the relevant market, the *Autorité* decided that FF Golf was once again subject to ordinary law and the applicable legislation regarding sports activities and insurance.

In the second case, the French Federation of Trade and Retail Companies (*Fédération des entreprises du commerce et de la distribution*) had, on 27 February 2009, submitted a complaint to the *Autorité* regarding the interbank fees applied to the different payment methods used in France. In particular, it reported anticompetitive practices linked to the creation and implementation of multilateral interbank

fees or multilateral interchange fees applied to transactions using MasterCard cards issued in France.

In Decision 13-D-17 of 20 September 2013 regarding MasterCard's practices in the payment card sector, the preliminary assessment concluded that MasterCard had apparently implemented practices likely to qualify as an anticompetitive agreement prohibited by Articles L. 420-1 of the French Commercial Code and 101 of the Treaty on the Functioning of the European Union. MasterCard notably committed to reduce its interbank fees to a level, as a weighted annual average, less than or equal to 0.28% of the payment amount.

On 7 May and 6 November 2015, MasterCard requested that the commitments be lifted, taking the view that the adoption of the Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions constituted a highly significant change in the factual and legal context that justified this request. To this end, it specified firstly that under the above regulation, the multilateral interchange fees applicable to debit card transactions were capped at 0.2% of the value of the transaction, while those applicable to credit card transactions were capped at 0.3% of the value of the transaction. It therefore indicated that maintaining the commitments would place the company in a discriminatory position with respect to the economic interest group CB, the dominant operator on the market, as the latter could offer issuing banks multilateral interchange fees that were higher than its own. It then indicated, more fundamentally, that the simultaneous application of the commitments accepted by the *Autorité* and the provisions of the new regulation were not provided for by the latter.

However, like the Commission, whose opinion it sought on this point, the *Autorité* decided that the regulation on

multilateral interchange fees did not preclude the combined application of the caps it was setting out and those in MasterCard's commitments. Furthermore, MasterCard had not provided any evidence making it possible to ascertain that it would not be able to comply with both its commitments and the regulation. The *Autorité* also specified that the case contained no instances of discrimination, as the situations of the payment systems used by MasterCard and economic interest group CB were not similar. In these conditions, it decided to reject the requested revision.

## Numerous decisions in merger law

In merger law, commitments are revised more often.

The overwhelming majority of commitment revision decisions take the form of a letter from the President of the *Autorité de la concurrence* detailing the reasons for the decision.

It is notably in this form that two revisions (in 2012 and 2018) were made to the decision included in the letter from the French Minister for the Economy, Finance and Employment of 22 May 2007 to Unibail's advisers regarding a merger in the property services sector.

On 13 November 2007, the Paris Chamber of Commerce and Industry (*Chambre de Commerce et d'Industrie de Paris*: "CCIP", later "CCIR" ) and Unibail were granted authorisation by the French Minister for the Economy and Finance to combine their activities in the fields of conference/exhibition site management, run by the joint subsidiary Viparis, and the organisation of fairs and shows, run by the joint subsidiary Comexposium. In order to reduce scarcity on the site management market, the parties committed to complete a significant extension of the covered surface area at Paris-Nord Villepinte pertaining to 135,000 m² before 1 January 2021. This extension commitment was due to be executed in four

successive stages. Several behavioural remedies were also adopted (concerning pricing regulations, non-discrimination in access to conference/exhibition sites, limitation of the parties' share in occupation of their own sites by their own shows and regulations regarding additional services). The behavioural remedies remain in force while one of the notifying parties holds the concession for the Porte de Versailles exhibition centre (which currently runs until 31 December 2064), with the exception of the commitment to limit parties' share in their sites, which expires once the surface area extension is complete.

The first stage of the structural commitment was started in 2010 as planned. On 4 October 2012, the *Autorité* accepted the parties' request to postpone the second stage of the extension of the exhibition surface area to 1 January 2017 (instead of 1 January 2013), given the market conditions. On 2 May 2018, the *Autorité* agreed to revise all the structural commitments undertaken by the notifying parties.

When the case is particularly complex, the *Autorité* may however use other procedural formats. In this way, it revised the commitments undertaken as part of Decision 14-DCC-50 of 1 April 2014 through a decision by the Board, after an in-depth examination. This decision stands out due to the range of questions asked and the level of examination needed to rule on the market and whether to lift or adapt the commitments called into question.[94]

On 23 July 2012, following a phase 2 examination, the *Autorité* effectively cleared the acquisition of sole control of Direct

94 On the same day, the *Autorité* published Decision 17-DCC-92 revising the injunctions taken as part of Decision 12-DCC-100 of 23 July 2012 regarding the same company.

8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi and Groupe Canal Plus (hereafter "GCP" ), subject to a set of commitments. Through a decision dated 23 December 2013, the French Administrative Supreme Court annulled the *Autorité*'s clearance decision. The transaction was once again cleared following a new notification, on 2 April 2014, subject to new commitments. The commitments undertaken by GCP and Vivendi as part of Decision 14-DCC-50 are identical to those that had been accepted by the *Autorité* during the first examination of the transaction, with the exception of the commitment regarding the rights to broadcast French films, the scope of application of which was extended in accordance with the decision of the French Administrative Supreme Court.

The commitments were undertaken for a period of five years from 23 July 2012. Decision 14-DCC-50 stated that "[at] *the end of this period, the Autorité will be able to renew the implementation of all or part of these commitments once if the competitive analysis it performs indicates that this is necessary. The parties will be able to submit their observations to the Autorité before it makes its decision*". In the context of this provision, and following an in-depth examination performed before the end of the five-year period, the *Autorité* observed that the free-to-air television markets on which GCP is active are increasingly competitive, notably due to the fact that Altice has implemented a global and ambitious strategy to combine its activities as an internet service provider, and as an operator and distributor of pay and free-to-air television. This is why, given the proposed revision of the commitments formulated by GCP on 9 June 2017, the *Autorité*, through Decision 17-DCC-93 of 22 June 2017, lifted or adapted the commitments undertaken by GCP in the context of Decision 14-DCC-50. This was notably the case for the commitment regarding the acquisition of broadcasting rights for recent

American films, the *Autorité* having agreed to raise to two the number of majors with which GCP can sign framework agreements combining the purchase of broadcasting rights for pay and free-to-air television. It was also the case for the commitment regarding the acquisition of broadcasting rights for major sporting events. Indeed, the *Autorité* decided to lift the commitment regarding the organisation of competitive bidding for the sale of rights to this type of competition. However, the *Autorité* considered that it was still necessary to maintain some of the initial remedies, including that relating to the quotas for original French-language films for which combined purchasing for pay and free-to-air television are authorised.

* * *

In this way, the enforceable nature of the decisions making commitments obligatory requires the companies that proposed them to comply with them in both letter and spirit, or face penalties. Yet strict compliance with commitments does not necessarily imply that these remedies are immutable. Indeed, the flexibility of commitments lets their creator request their revision by the *Autorité* in the event of a *de jure* or *de facto* change in circumstances. Although this does not involve the re-examination of the transaction or practices that gave rise to the commitments undertaken, the examination of a request to revise or lift commitments leads the *Autorité* to check whether the measures continue to be useful in preserving or restoring public economic order. A decision rejecting such requests can be challenged in court, just like any other decisions regarding commitments or non-compliance with commitments.

# 5/ COMMITMENTS AND LITIGATION

Under French law, litigation over commitments is divided between the Paris Court of Appeal, which has derogatory legislative powers to rule on all decisions taken by the *Autorité* in relation to anticompetitive practices, and the French Administrative Supreme Court (*Conseil d'État*), which has jurisdiction under ordinary law to rule on all decisions taken by the *Autorité*, notably those taken in application of merger law. Beyond the specific details of the two courts, the judicial and administrative litigation procedures dealing with commitments respond to similar imperatives and share common features regarding the definition of litigation over commitments and the powers of the court to issue a ruling in such cases.

## Framework for litigation over commitments

Appeals against commitment decisions are covered by a dual procedural framework linked to the purpose of the appeal and the interest of bringing proceedings of the party launching the appeal.

### ACCEPTANCE OF COMMITMENTS, THE ONLY ACT LIKELY TO BE CONTESTED

An appeal opened against a commitment decision is limited by the nature of the act contested. As a result, the Paris Court of Appeal cannot rule on an appeal formulated directly against a decision to refuse initiation of the commitment procedure. For its part, the French Administrative Supreme Court (*Conseil d'État*) considers that third parties cannot usefully criticise the lawfulness of the *Autorité*'s choice to take a clearance decision associated with commitments undertaken by the parties, without recourse to an in-depth examination.

## The impossibility of contesting, by way of an action, decisions to refuse initiation of a commitment procedure before the Paris Court of Appeal

In accordance with paragraph I of Article L. 464-2 of the French Commercial Code (*Code de commerce*), the *Autorité* can accept commitments presented by the parties to put an end to competition concerns likely to constitute prohibited practices, notably set out in Articles L. 420-1 and L. 420-2 of the Commercial Code.

In practice, companies or bodies are informed that the *Autorité* is planning to apply these provisions by the case officer (*rapporteur*), who performs the preliminary assessment of the practices in question in accordance with Article R. 464-2 of the aforementioned code.

However, the choice regarding whether to implement this procedure or not lies with the *Autorité* alone.

If a refusal is implicitly indicated, where relevant, by a statement of objections being sent, the parties in question cannot contest this decision directly by way of an action.

Indeed, this procedural choice cannot be separated from the sanction decision likely to be issued by the *Autorité*.

This was expressly stated by the French Administrative Supreme Court in its decision regarding the Umicore companies (French Administrative Supreme Court, 11 October 2017, n°. 402268, in the tables of the *Recueil*). Although these companies had submitted an appeal to the court regarding abuse of power, directed notably against the refusal, by the *Autorité*'s investigation services, to comply with their request to open a commitment acceptance procedure, the French Administrative Supreme Court ruled that the refusal "*which in this case was combined with the decision to initiate a sanction*

*procedure,* [could not be] *separated from this procedure, which is placed under the control of the judicial authority.* [From this, it was concluded that] *the administrative court* [did not have] *jurisdiction to rule on the request by Umicore France and Umicore SA/NV, which* [should] *as a consequence be rejected as having been brought before a court without the power to rule on it*."

This decision to refuse to implement the commitment procedure can, however, be contested during an appeal against the sanction decision taken by the *Autorité*, and brought before the Paris Court of Appeal in application of Article L. 464-8 of the French Commercial Code.

The appeal filed by the aforementioned Umicore companies against sanction decision 16-D-14 of 23 June 2016 constituted an application of this special category of objections (Paris Court of Appeal, 17 May 2018, Umicore France SAS and others, n°. 2016/16621).

In this case, the complainants invoked several procedural methods, one of which was based on the *Autorité*'s failure to open the commitment procedure. They maintained that the investigation services did not have the power to refuse to implement this procedure, and that such a refusal was discriminatory.

The Court of Appeal agreed to examine, by way of an exception, the lawfulness of the refusal to follow the commitment procedure.

It firstly ruled that, in this case, the refusal to open the commitment procedure arose from the "*implicit negative decision of the Board*" to make this procedural choice rather than a choice made by case officers (*rapporteurs*), as the complainants had indicated.

It then observed that "*although a commitment procedure can be opened when actual harm to competition is, or could be, observed, the objective of this procedure is to rapidly put an end to this harm and secure a commitment from the company in question to modify its behaviour in the future*". From this it deduced that, in this context, the choice of opting for such a procedure is "*discretionary*", which justifies the very limited nature of its oversight on this point.

This means that, from a formal point of view, it ruled that the Board did not have to "*formalise or, a fortiori, provide reasons for its decision*". On the merits of the case, it considered that "*the fact that the Autorité was able, in other similar or related cases, but in different contexts, to accept the implementation of the commitment procedure does not demonstrate that the Umicore companies, for which such a procedure was refused, was discriminated against.*"

This decision is important as it recognises the special flexibility the *Autorité* has in its choice of opening, or not, a commitment procedure, as much in terms of assessing the appropriateness of using this procedure as regarding the procedural framework.

## The impossibility, for third parties, of relying on the refusal to proceed with an in-depth examination of a request for clearance under merger law

Once notified to the *Autorité* or referred by the Commission, a merger may involve two successive examination phases.

At the end of *phase 1*,[95] the *Autorité* may, in application of paragraph III of Article 430-5 of the French Commercial Code

**95** See the *Autorité de la concurrence*'s guidelines regarding merger control, paragraph 135.

(*Code de commerce*), observe that the transaction is not covered by merger control; clear it, if necessary subject to commitments undertaken by the parties when it is likely to have anticompetitive effects; or, if there is a serious risk to competition that could not be counteracted by any commitments that might be proposed, initiate an in-depth examination, known as "*phase 2*".

This in-depth examination, chiefly governed by Articles L. 430-6 and L. 430-7 of the aforementioned code, results in a report addressed to the notifying parties and the representative of the Minister for the Economy, who may submit their observations. The transaction is examined in a hearing before the Board of the *Autorité*. At the end of these *inter partes* proceedings ensuring that the rights of the parties are upheld, the *Autorité* may clear the transaction, possibly subject to the implementation of commitments undertaken by the parties, or injunctions or instructions imposed upon the parties, or prohibit it.

As a result, the French Administrative Supreme Court ruled, in its Primagaz decision (French Administrative Supreme Court, 6 July 2016, n° 390457, *in Recueil*), that "*these provisions offer the parties to the merger a guarantee that the clearance of a transaction may not be made subject to any conditions other than the implementation of commitments that they themselves have proposed, or that a transaction may only be prohibited after an in-depth examination*". As indicated by Vincent Daumas, the public case officer (*rapporteur*) in this case, "*if the legislator has provided for this phase of in-depth examination of the transaction, it is solely in the interest of the parties to the merger. This in-depth examination has the sole aim of guaranteeing that the envisaged transaction is not prohibited, or cleared subject to conditions to which the parties have not consented, without placing the latter in a position to set out their point of view beforehand, within a formal framework*".

This in-depth examination phase therefore aims to offer guarantees to the parties to the transaction and enable them to express their observations before the handing down of a decision likely to restrict their freedom of enterprise.

That said, the choice of whether or not to initiate a phase 2 procedure is a neutral one for third parties and simply constitutes a special method for examining a merger, without any impact on the substance of the decision. Furthermore, the examination of the threat to competition and remedies that could address it is as demanding in phase 1 as in phase 2, and does not change according to the phase of the procedure. This is why the French Administrative Supreme Court logically concluded that "*third parties cannot usefully criticise the lawfulness of the Autorité's choice to take a clearance decision associated with commitments undertaken by the parties, without recourse to an in-depth examination. They may, however, if they can justify an interest that allows them to act and if they consider that this decision harms the preservation of sufficient competition on the markets it affects, contest its validity*."

Third parties can therefore only contest the *Autorité*'s decision – for example to accept set commitments – and not the procedural methods chosen by the *Autorité* to examine the merger concerned.

The admissibility of third-party appeals against commitments is therefore restricted in terms of their subject. Only certain aspects of the decision to accept commitments can be contested before the court. The complainants must also justify the interest of bringing an action.

## AN INTEREST IN BRINGING PROCEEDINGS, THE LIMITING CONDITION OF THIRD-PARTY LITIGATION

Although they bring about discussions with the parties, commitments do not constitute contracts, but are incorporated into enforceable unilateral decisions subject to legal review. The commitments are not subject to the rule on the relative effect of agreements guaranteed by Article 1199 of the French Civil Code (*Code civil*) (formerly Article 1165 of the same code). This means that third parties can contest them, on the condition that they have an interest in doing so. This condition of admissibility applies to appeals before both the Paris Court of Appeal and the French Administrative Supreme Court (*Conseil d'État*).

### An interest in bringing proceedings never yet denied in relation to anticompetitive practices

The applicability of the rules of the French Code of Civil Procedure (*Code de procédure civile*) to litigation concerning the *Autorité*'s decisions before the Paris Court of Appeal is governed by Article R. 464-10 of the French Commercial Code (*Code de commerce*), which states that "*by way of derogation from Title VI of Book II of the Code of Civil Procedure, appeals before the Paris Court of Appeal against the decisions of the Autorité de la concurrence are formulated, investigated and judged in accordance with the provisions of the present section and Section IV*". The limit it imposes is not absolute, and notably does not include the provisions of Book I of the Code of Civil Procedure, including Article 31 regarding the complainants' interest in bringing an action, which are applicable to appeals against commitment decisions.

The Paris Court of Appeal has drawn conclusions from this, specifying that "*although a party before the Autorité de la*

*concurrence may apply for the annulment or review of a decision taken by the latter, in the case of decisions covered by the first paragraph of Article L. 464-8 of the French Commercial Code, this right must be exercised under the conditions applicable to court proceedings provided for by the French Code of Civil Procedure. In particular, the parties making the appeal must justify their interest in bringing proceedings or risk finding their appeal or request declared – possibly automatically – inadmissible, without an examination on the merits*" (Paris Court of Appeal, 24 September 2015, Cegedim, nº. 2014/17586).

In litigation over commitments, the Court of Appeal has issued two favourable rulings regarding the interest in bringing proceedings of companies that had referred anticompetitive practices leading to commitment decisions to the *Conseil de la Concurrence* (Paris Court of Appeal, 6 November 2007, Canal 9, nº. 2006/18379; see also Paris Court of Appeal, 16 October 2007, Bijourama, nº. 2006/17900).

In the first case, Canal 9, the operator of the "Chante France" radio station, accused a radio group called GIE "Les Indépendants", involved in marketing the advertising slots of national or international advertisers, of having rejected on several occasions its applications to join the group – a condition it considered essential to access the national advertising market. In the second, Bijourama, a retailer specialising in the sale of watches, jewellery and silversmith's pieces exclusively on the internet, criticised the exclusive distribution conditions imposed by Festina France, which prevented it from selling its products on the internet.

After the preliminary assessment of these two cases by the *Conseil de la Concurrence*, GIE "Les Indépendants" and Festina France proposed commitments, which were accepted by the *Conseil*.

Dissatisfied, the complainant companies brought appeals against these decisions, which were ruled admissible by the Paris Court of Appeal.

In the Bijourama ruling, it indicated that "*the decision to accept commitments, putting an end to the procedure, does not do justice* [to the] requests [of this company, which] *is permitted to make an appeal against this decision*".

In the Canal 9 ruling, the Paris Court of Appeal seems more precise. Indeed, it admits the interest of Canal 9 in bringing proceedings at the end of a more general section, stating that "*the commitments contained in the decision are likely to have legal effects on its own situation*". Essentially, these effects could have arisen from the inadequacy of the commitments intended to ensure access to GIE "Les Indépendants" in an objective, transparent and non-discriminatory way, thereby preventing Canal 9 from accessing the national advertising resources marketed by this group, to the detriment of competing local radio stations also active on this advertising market.

For the Paris Court of Appeal, the interest in bringing proceedings of a person contesting a commitment decision therefore appears to be implicitly, but necessarily, conditioned by the circumstances under which this person is active on the market concerned by the disputed commitments. Its assessment of this condition for admissibility is close to that used by the French Administrative Supreme Court in litigation over decisions associated with commitments in merger law.

## An interest in bringing proceedings conditioned by the action of the complainant on one of the markets concerned by the merger

In administrative litigation, a complainant may only bring proceedings before the court regarding abuse of power on the condition that the interest cited is relevant to the purpose of the contested decision.

This requirement of correspondence between the interest cited and the purpose of the contested decision is particularly applicable to third party appeals against the administrative clearance decisions issued on the basis of specific legislation.

In relation to mergers, excluding appeals by parties against a clearance decision combined with injunctions or instructions imposed by the administrative authority (French Administrative Supreme Court decision of 21 December 2012, Groupe Canal Plus, n°. 362347, *in Recueil*), third parties to the transaction for which an interest in bringing proceedings has been recognised are those that can justify an interest associated with competition considerations, which are the sole considerations taken into account in merger decisions.

Case law therefore admits appeals by competitors of the parties to the transaction (French Administrative Supreme Court decision of 21 December 2012, Groupe Canal Plus, n°. 362347, *in Recueil*), professional bodies that unite such competitors (French Administrative Supreme Court decision of 21 October 2016, Association of Medical Biology Companies (*Association des entreprises de biologie médicale*), n°. 394147) and companies that could potentially be customers of the parties to the transaction (French Administrative Supreme Court decision of 20 July 2005, Fiducial Informatique and Fiducial Expertise, n°. 279180, *in Recueil*).

Indeed, the situation of these different categories of complainant, which are present on the same markets at the parties, is likely to have been affected by the anticompetitive effects of the transaction that merger control aims to prevent (in this regard, see Article L. 430-6 of the French Commercial Code (*Code de commerce*), which states that the *Autorité* must examine whether the transaction is "*likely to have an adverse effect on competition, in particular by creating or reinforcing a dominant position or by creating or reinforcing buying power that places suppliers in a situation of economic dependence.*" ).

Beyond these scenarios, the French Administrative Supreme Court has also recognised the interest in bringing proceedings of minority shareholders in a beneficiary company of a merger clearance decision, to the extent that such a complainant is involved in the transaction involving a company it owns (French Administrative Supreme Court decision of 31 January 2007, France Antilles, n°. 294896, *in Recueil*).

On the other hand, neither French nor European case law has ever recognised the interest of bringing proceedings of a complainant that does not exercise any economic activity on the markets concerned by the merger.

In the SCI Beaugrenelle case (French Administrative Supreme Court, 4 April 2018, n°. 405343, in the tables of the *Recueil*), the French Administrative Supreme Court therefore ruled that "*the lessor of a shop of a company not operating on any of the markets concerned by the merger between this company and another company cannot justify, through its quality as lessor, an interest in bringing proceedings against the decision of the Autorité de la concurrence regarding the acquisition of sole control of this other company by the company for which it is the lessor*".

Litigation over commitment decisions therefore poses similar questions to each of the courts required to issue a ruling in this respect. This observation is all the clearer in relation to the scope of powers of the court to which an appeal of this type is referred.

## Ordinary role of the court ruling on commitments

The role of the Paris Court of Appeal and the French Administrative Supreme Court is similar regarding commitment litigation. Their respective powers, whose scope depends on the type of decision challenged, are very similar, with the exception of the degree of oversight they exert.

### A RANGE OF POWERS DETERMINED ACCORDING TO THE TYPE OF DECISION CHALLENGED

The courts charged with checking the lawfulness of the commitment decisions or clearance decisions for a merger combined with commitments have powers that are less extensive than those charged with checking the sanctions issued in the event of non-compliance with commitments.

#### Powers limited to proceedings annulling decisions to accept commitments

When an appeal against a merger clearance decision is referred to the French Administrative Supreme Court, it issues rulings as a court judging abuses of power (French Administrative Supreme Court, *Section*, 9 April 1999, The Coca-Cola Company, n°. 201853, *in Recueil*). It implicitly confirmed this in 2012 (French Administrative Supreme Court, *Assemblée*, 21 December 2012, Groupe Canal Plus and others, n°. 362347, *in Recueil*).

Its role may lead it, if the appeal is well founded, to fully or partially annul the contested decision, but does not go as far as to include that powers to review the decision that are invested in the court of full jurisdiction. As Vincent Daumas indicates in his submissions on the Groupe Canal Plus case mentioned above, "*the merger control court seems to us to have to assess the lawfulness of the administrative decision challenged on the date of the latter. It should limit its own decision to an annulment, which will most often be total but which may, in certain cases, be only partial. It is the responsibility of the administration, if necessary, to take up the case and rule again, to the extent of the annulment pronounced. This court, as you recognise, is the court judging abuses of power. We therefore invite you to confirm your case law as per The Coca-Cola Company case*".

Consequently, in the event of a judicial appeal against a decision clearing a merger subject to the fulfilment of commitments entered into by the parties, the French Administrative Supreme Court may not, in the event that these remedies are unlawful, reform or replace them with other measures. In this case, it only has the power to annul the contested merger clearance.

However, the French Administrative Supreme Court may, if the unlawful commitment can be separated from the other remedies, decide to cancel that commitment alone, and therefore partially annul the decision clearing the merger. This notably occurs when one of the commitments is not sufficient to prevent an anticompetitive effect on a specific market, this unlawfulness not however having an impact on the other markets concerned by the transaction, or on the remedies regarding those markets (French Administrative Supreme Court, 6 July 2016, Compagnie des Gaz de Pétrole Primagaz and others, n°. 390774, in the tables of the *Recueil*).

The same goes for commitments undertaken by companies or bodies in relation to anticompetitive practices.

This means that, when examining an appeal for annulment or review – as provided for under Article L. 464-8 of the French Commercial Code – against a decision taken in application of Paragraphs I or III of Article L. 464-2 of the French Commercial Code, the Paris Court of Appeal does not have the power to discuss new commitments with the company with a view to making them obligatory, nor can it order it to comply with other special conditions that are not provided for in the contested decision. Indeed, no discussion phase is opened by the law to the parties before it.

Case law of the court of appeal is also fixed in this respect, in relation to commitments taken in application of paragraph III of Article 464-2 of the French Commercial Code. When examining appeals brought against a decision taken regarding a company that had agreed to refrain from contesting the objections and which had, furthermore, committed to modify its behaviour in the future, in application of the aforementioned statutory provisions in force at the time, the Court of Appeal rejected requests from complainants aiming to impose additional commitments on the company in question, considering that "*the scope of the referral to the Court is demarcated by the context of the contested decision; and that in the case, as the Conseil de la Concurrence had issued a ruling on the commitments taken by the* [party in question] *in the context of paragraph III of Article. L. 464-2 of the French Commercial Code, the Court does not have the power to impose additional commitments*" (Paris Court of Appeal, 23 February 2010, Expedia, n°. 2009/05544). By ordering the company concerned to undertake additional commitments, the Court would have overstepped the powers conferred on it by law, and committed an error of law.

European case law is similar, with the Court of Justice ruling, in the aforementioned Alrosa Company Ltd judgement (CJEU, 29 June 2010, Alrosa Company Ltd, C-441/07), that "*application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties. Judicial review for its part relates solely to whether the Commission's assessment is manifestly incorrect*".

## Broader powers in litigation over sanctions for non-compliance with commitments

Under merger law, paragraph IV of Article L. 430-8 of the French Commercial Code (*Code de commerce*) confers upon the *Autorité* sanctioning powers in the event of non-compliance with remedies featured in a merger clearance decision.

The French Administrative Supreme Court (*Conseil d'État*) applied these provisions for the first time in 2012 (French Administrative Supreme Court, *Assemblée*, 21 December 2012, Groupe Canal Plus and Vivendi Universal, n°. 353856, *in Recueil*), in the context of the appeal by Groupe Canal Plus and Vivendi Universal against decision 11-D-12 of 20 September 2011, in which the *Autorité*, observing the failure to fulfil several commitments undertaken by the parties in the context of the merger, decided to withdraw the decision clearing this transaction and issued the companies with a financial penalty of 30 million euros.

Following on from the ruling of the French Constitutional Council (*Conseil constitutionnel*), which declared paragraph IV of the aforementioned Article L. 430-8 compliant with the Constitution based on the version introduced by French Law 2008-776 of 4 August 2008 on the Modernisation of the Economy, the French Administrative Supreme Court ruled that all the measures taken on this basis constitute sanctions on which it may rule in its quality as court of full jurisdiction.

In this respect, it can adjust the amount of the financial penalty imposed on parties to the transaction. The Groupe Canal Plus and Vivendi Universal case provides an illustration of such a step, the French Administrative Supreme Court having reduced the amount of the contested penalty from 30 to 27 million euros.

It has also highlighted the specific nature of checks on non-financial penalties likely to be imposed on parties, including withdrawal of the merger clearance decision or an injunction subject to periodic penalty payments to implement the remedies associated with the clearance decision or new remedies. On this point, the court noted the hybrid nature of such measures, which, unlike financial penalties, have the aim of maintaining public economic order in addition to their punitive objective.

The French Administrative Supreme Court has provided further details on how the proportionality of decisions taken on this basis is checked, stating that "*the scale of the commitments that have not been met, whether in full or in part, should be taken into account in relation to the whole set of remedies adopted and the anticompetitive effects they were intended to prevent, the scale of the breaches and the need to maintain sufficient competition on the markets concerned*".

Based on this analysis framework, and in view of the breaches attributed to Groupe Canal Plus and the requirements to maintain public economic order, it decided that the withdrawal of the merger clearance decision of 30 August 2006 was proportionate to the contentious breach.

The French Administrative Supreme Court once again had reason to apply these oversight criteria when examining the appeal against Decision 17-D-04 of 8 March 2017, in which the *Autorité* noted breaches in the fulfilment of commitments undertaken by SFR and Altice in the context of the acquisition of sole control of the former by the latter (French Administrative Supreme Court, 28 September 2017, Altice Luxembourg and SFR Group, n°. 409770, *in Recueil*). As these commitments had not been respected, the *Autorité* notably ordered the parties to fulfil the commitments associated with the clearance decision by a new deadline, or face periodic penalty payments.

The Paris Court of Appeal also checks the proportionality of the penalty imposed by the *Autorité* on the basis of L. 464-3 of the French Commercial Code, which allows the *Autorité*, if the commitments provided for under Articles L. 464-1 and L. 464-2 of the Commercial Code are not respected, to issue a financial penalty within the limits specified in Article L. 464-2 of the Code.

It has only been asked to rule on an appeal against this type of sanction once, rejecting it.

To do so, it used an analysis framework similar to that used by the French Administrative Supreme Court. It notably considered that the size of the penalty imposed on GIE "Les Indépendants" was justified in light of the number and seriousness of the breaches noted – which consisted of the failure to fulfil clear, precise commitments accepted by the *Conseil*, in

exchange for which it had agreed to refrain from initiating a sanction procedure – and the competition concerns to which the commitments undertaken were intended to put an end (Paris Court of Appeal, 26 February 2015, GIE "Les Indépendants", n° 2015/06776). Very recently, the French Supreme Court (*Cour de cassation*) confirmed this decision (French Supreme Court, Commercial Chamber, 26 September 2018, GIE "Les Indépendants", n° 16-25.403). Furthermore, it noted that when determining the size of the penalty, the *Autorité* had merely followed the general principles of personalisation and proportionality applicable to all sanctions. Then again, it is not obliged to apply all the criteria set out in paragraph 3 of Article L. 464-2 of the French Commercial Code, including the evaluation of the amount of damage done to the economy.

The powers conferred on the Paris Court of Appeal and the French Administrative Supreme Court are therefore similar regarding commitment litigation. This is also partially true regarding the degree of oversight exercised by each court.

## DIFFERENCE IN DEGREE OF OVERSIGHT OF THE FRENCH ADMINISTRATIVE SUPREME COURT AND THE COURT OF APPEAL

The Paris Court of Appeal and the French Administrative Supreme Court check the lawfulness of commitment decisions using a very similar analysis framework. However, there is a difference in the degree of oversight that each of these courts exercises, regarding both the competitive analysis and the proportionality of the commitments accepted.

### A foundation for oversight common to both courts

Oversight of commitment decisions by the Paris Court of Appeal in anticompetitive practice law and the French Administrative Supreme Court in merger law shows

high levels of similarity linked to the type of lawfulness oversight.

All elements of lawfulness are covered: the lack of jurisdiction of the party issuing the act (French Administrative Supreme Court, *Assemblée*, 23 December 2013, Métropole TV, n°. 363702, *in Recueil*), the irregularity of the procedure (French Administrative Supreme Court, *Section*, 9 April 1999, Interbrew, n°. 191654, *in Recueil*; Paris Court of Appeal, 6 November 2007, Canal 9, n°. 2006/18379; French Supreme Court, Commercial Chamber, 2 February 2010, CSRP, n°. 08/70449), technicalities, errors of law, errors of fact, errors in the legal characterisation of the facts and misuse of power.

The specific methods for overseeing commitments are fundamentally very similar. The Paris Court of Appeal checks that the commitments accepted by the *Autorité* to put an end to anticompetitive practices are relevant, credible, verifiable and proportionate, in accordance with paragraph 34 of the Notice on Competition Commitments issued on 2 March 2009. For its part, the French Administrative Supreme Court ensures that the commitments conditioning clearance decisions under merger law are effective, that their implementation does not present any difficulties and that they are necessary and proportionate.

However, the degree of oversight of each of these courts differs.

## Different degrees of oversight of competitive analysis and proportionality

The differences in oversight firstly concern the examination of the competitive analysis.

On this point, the French Administrative Supreme Court has ordinary oversight. It checks that the *Autorité* has, "*based on a prospective analysis taking into account all the relevant data and based on a plausible economic scenario,* [characterised] *the anticompetitive effects of the transaction and* [evaluated] *whether these effects are likely to pose a risk to the preservation of sufficient competition on the markets it affects*" (French Administrative Supreme Court, 6 July 2016, Compagnie des Gaz de Pétrole Primagaz, Vitogaz France, n°. 390457, in the tables of the *Recueil*).

It notably checks the geographical and material segmentation of the markets applied by the *Autorité*, the methods for checking the anticompetitive effects on these markets and the assessment of these effects.

In the Compagnie des Gas de Pétrole Primagaz and Vitogaz France case mentioned above, the French Administrative Supreme Court notably criticised the contested merger clearance decision for failing to examine the effects of the transaction on certain local markets for liquefied petroleum gas distribution in small-scale bulk.

However, the Court of Appeal has restricted oversight, limited to clear errors in assessment or the competitive analysis performed by the *Autorité*.

As a result, it considers that "*the complainant parties may not, except in the event of a clear error, challenge in the Court of Appeal the assessments of the decision according to which certain contested facts do not raise, based on the elements of*

*the file, competition concerns; that it is therefore appropriate to check whether the argument made by the complainants to challenge the assessments of the decision regarding the market likely to be identified as relevant and the practices targeted by the referral demonstrates clear errors in the decision assessments*" (Paris Court of Appeal, 19 December 2013, Cogent Communications France, nº 2012/19484).

In the context of the appeal against this order, a plea was notably submitted to the French Supreme Court alleging the unlawfulness of limiting the oversight exercised by the Court of Appeal to clear errors in assessment within the scope of competition concerns. The former rejected the plea, stating "*that having refuted the argument contesting the analysis of the Autorité de la concurrence regarding the relevant market, rejected the pleas of fact and law cited by Cogent in support of the qualification of essential infrastructure for AS 3215 interconnection ports, and checked that the competition concerns identified by the Autorité de la concurrence, at the preliminary stage, had – given this analysis and the absence of elements confirming the various discriminatory behaviours of which France Telecom was accused – been limited to potential margin squeeze practices likely to be revealed by the formalising of exchanges between Orange Internet and Open Transit, the Court of Appeal has not misjudged the scope of its oversight*" (French Supreme Court, Commercial Chamber, 12 May 2015, Cogent, nº V14-10.792).

This difference is also seen when checking the proportionality of commitments.

In merger law, commitments accompanying a clearance decision are subject to ordinary oversight by the French Administrative Supreme Court. This degree of oversight was recognised in the ruling regarding The Coca-Cola Company (French Administrative Supreme Court, *Section*, 9 April 1999,

nº. 201853, *in Recueil*), the French Administrative Supreme Court ensuring that the authority charged with merger control had not committed an assessment error in ruling that the commitments proposed by The Coca-Cola Company were insufficient to compensate for the anticompetitive effects of the contested transaction and ordering it to renounce its aim of acquiring Pernod-Ricard assets relating to "Orangina" drinks in France.

The French Administrative Supreme Court confirmed this in the Métropole Télévision case (French Administrative Supreme Court, *Section*, 30 December 2010, nº. 338197, *in Recueil*), specifying that it checks the sufficient nature of the commitments taken as a whole by the parties with a view to maintaining sufficient competition on the market.

However, checking the proportionality of the commitments taken on the basis of Article R. 464-2 of the French Commercial Code seems to be different.

The Court of Appeal has not yet had occasion to rule on the issue. Yet, if it had to align with European case law in relation to anticompetitive practices, checking the proportionality of this type of measure should be limited to clear errors in assessment (CJEU, 29 June 2010, Alrosa Company Ltd, C-441/07 P).

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The purpose of commitments and the procedures following which they are made obligatory varies according to whether they are made under merger law or anticompetitive practice law. However, litigation over commitments continues, as a general rule, to be dominated by the aim of finding a balance between restoring or maintaining public economic order, and protecting freedom of enterprise.

# CONCLUSION

As this retrospective analysis of decision-making practice shows, commitments constitute a particularly useful intervention tool for competition authorities, as they are flexible and adaptable, and make it possible to maintain or rapidly re-establish public economic order, whether in anticompetitive practice law or merger law.

The effectiveness of commitments lies notably in the special way in which they are developed, namely that they are proposed by the very companies that must apply them and developed jointly with other stakeholders on the market concerned, which strengthens companies' ownership of the remedies they contain.

Commitments may take a highly diverse range of forms, particularly in the case of behavioural remedies, which illustrates their great flexibility. They may involve remedies intended to modify the commercial behaviour of operators or, more fundamentally, to transform their internal organisation by creating, for example, a "Chinese wall" between certain departments.

In addition, the dialogue that takes place with third parties during the examination of this type of remedy may, in anticompetitive practice law, make the public authorities aware of the difficulties that certain regulations pose in relation to competition law, and push these authorities to address them (see for example Decision 17-D-09 of 1 June 2017 regarding practices implemented by Inrap, the French National Institute for Preventive Archaeological Research (*Institut national de recherches archéologiques préventives*); and Decision 18-D-04 of 20 February 2018 regarding practices implemented in the sector of meat production and sale in Martinique).

However, behavioural remedies are not completely without inconveniences, which principally come to light during their monitoring and review. A monitoring system that is too complex and time-consuming can eliminate any procedural advantages gained by the initial acceptance of the commitments.

In addition, the introduction of certain complex remedies, particularly in the telecommunications and audiovisual fields, is likely to lead the *Autorité* to act like a sector-specific regulator. It also risks preventing the market from functioning by itself, without leaning on the "crutch" provided by the commitments.

This is why the *Autorité*, alongside other competition authorities, is currently considering the more stringent use of behavioural remedies, favouring quasi-structural commitments in anticompetitive practice law and structural commitments in merger law whenever they provide a better response to the competition issues.

Autorité de la concurrence

**Édition bilingue français-anglais**

Les engagements constituent un outil d'intervention particulièrement utile à une autorité de concurrence, car il est souple, adaptable, et permet de maintenir ou de rétablir l'ordre public économique rapidement, en droit des pratiques anticoncurrentielles comme en droit des concentrations.

En présentant et en analysant de façon synthétique la pratique décisionnelle en matière d'engagements comportementaux, l'Autorité vise à fournir aux entreprises confrontées à la préparation d'opérations de concentration ou à des procédures pour pratiques anticoncurrentielles, des outils afin de comprendre la méthodologie qu'elle applique en la matière et les objectifs poursuivis. Il s'agit ainsi d'éclairer les entreprises concernées et l'ensemble des parties prenantes. L'étude s'insère, par ailleurs, dans la réflexion plus largement menée par l'Autorité sur l'adaptation de ses moyens d'intervention et sur sa doctrine d'emploi des engagements comportementaux.

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Commitments constitute a particularly useful intervention tool for competition authorities, as they are flexible and adaptable, and make it possible to maintain or rapidly re-establish public economic order, whether in anticompetitive practice law or merger law.

By presenting and providing a summary analysis of decision-making practice in terms of behavioural remedies, the Autorité aims to provide companies preparing for a merger or procedures related to anticompetitive practices with tools to understand the methodology it applies in this area, and the desired objectives. It therefore aims to clarify the matter for the companies concerned and all stakeholders. In addition, the study forms part of a broader reflection carried out by the Autorité on the adaptation of its intervention methods and its application of behavioural remedies in case law.

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