Strategic considerations in preparing a French mandatory notification

The decree implementing the new French merger control rules applies to all binding transactions concluded as of May 18. *Jean-Michel Coumes* of Hogan & Hartson LLP, Paris offers some strategic advice on complying with the new mandatory notification scheme

Under France's new merger control regime, the parties to a merger, acquisition or full-function joint venture not subject to EU merger control must notify their transactions for approval to the French Ministry of Economic Affairs if their combined worldwide turnover exceeds €150 million, and at least two parties each achieve a turnover above €15 million in France.

The parties must suspend their transaction until they obtain final approval from the Ministry. Within five weeks from the date of notification, the Ministry shall either decide to clear the transaction (phase 1) or open a second-phase investigation if the transaction raises serious competition concerns (phase 2). In that case, the matter is referred to the Conseil de la Concurrence, which shall give an advisory opinion on the transaction within three months. The Ministry has a period of four weeks following receipt of the opinion to authorise or prohibit the merger. The substantive test for a prohibition is a significant restriction of competition, notably through the creation or strengthening of a dominant position. The parties may propose remedies to address the competition concerns raised by the transaction.

The entry into force of the new rules will bring significant changes for industry in France. Companies will enjoy less freedom of action. The combination of a mandatory regime and relatively low turnover thresholds will significantly increase the number of transactions subject to review by the Ministry. It should also increase the exposure of 'problematic' deals to the control of the French regulators.

At the same time, proceedings in French merger control give companies more possibilities than under EU merger control to save such deals from a negative decision.

Longer time frame

Companies involved in a French merger filing benefit from a longer time frame. There is no specific filing deadline. More importantly, the timetable is automatically extended by three weeks in both phases 1 and 2 when the parties offer remedies to address the competition concerns raised by their transaction. In EU merger control, there is no extension in phase 2.

The maximum duration of a phase 1 investigation is therefore eight weeks in French merger control against six weeks in an EU filing. The maximum duration of a phase 2 is four months and three weeks in French merger control, compared with four months in an EU filing. Overall, companies involved in a phase 2 investigation under French merger control can benefit from an extra one-and-a-half months in comparison with an EU filing.

Increased transparency

French merger control affords more opportunities for companies to exercise their rights of defence. Like EU merger control, in the event of a phase 2 investigation, the parties have the opportunity to submit their views on the Conseil's objections both in writing and orally. Unlike in EU merger control, parties have the opportunity to submit their comments on the Ministry's final draft decision when such decision aims to prohibit the transaction or impose conditions on the parties.

Efficiencies

Unlike EU merger control, French merger control expressly takes into account any efficiencies created by the transaction; a concentration may be authorised if its efficiencies outweigh the restrictive effects. The Ministry of Economic Affairs will take into account its economic and social benefits, in particular in terms of furthering "economic progress".

When facing a problematic deal, companies should therefore learn to make the best use of the flexibility and transparency of the system. In this respect, they should be aware of a few strategic issues involved in preparing a notification which may prove decisive in securing clearance of their transaction.

The necessity of informal contacts with the DGCCRF prior to notification

The parties should establish informal contact prior to notification and set up a preliminary meeting with the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF), the section of the Ministry responsible for assessing mergers and acquisitions.

The DGCCRF always encouraged prior informal contacts under the old system. They have not yet issued guidelines on the procedure under the new regime but, given their past practice and the similarities of the new regime to the EU Merger Regulation, it seems likely that they will follow the approach adopted by the EU Merger Task Force. On that basis, a pre-notification meeting should take place one month before the parties' expected date of notification to give companies time to complete the notification form. At least one week before the meeting, the parties should send a briefing paper describing the transaction, the parties and markets involved etc. The briefing paper will set the agenda for the meeting.

The purpose of the meeting is for the parties to obtain the preliminary views of the DGCCRF on the status of their transaction prior to notification so that they can take full advantage of the post-notification timetable to adapt their strategy. In preparing their agenda, the parties should consider the following issues.

Potential deal-breakers

In problematic deals, potential deal-breakers are usually market definition issues, and the existence of enough remaining competition to the merged entity (so-called 'workable' competition). These issues need to be identified early in the process.

Relevant markets

Defining relevant markets is a particularly important issue because it will determine whether and to what extent the merged entity holds a dominant position. The parties should explain in the briefing paper their views on the product and geographic market definition. If possible, working documents such as price elasticity tests or trade flow statistics should be annexed or brought to the meeting.

It is important for the parties to know prior to notification if their market definition matches the DGCCRF's. If market definition issues are still outstanding at the time of notification, the risks for the parties are threefold.

Firstly, the parties risk spending the weeks post-notification debating these issues with the DGCCRF at a time when they might need to focus on other priorities (such as remedies or efficiencies) to win a phase 1 approval. Secondly, it increases the chance that the DGCCRF will seek further information on market definition by requesting third parties' views on the matter. This is an area where companies should avoid handing the initiative to their competitors. Thirdly, if the transaction raises very serious competition concerns and a phase 2 investigation cannot be avoided, it is essential that the parties 'knock down' market definition issues as soon as possible to keep the scope of the investigation focused exclusively on competition issues.

Existence of workable competition

The absence of 'workable' competition to the merged entity is a second potential deal-breaker. The briefing paper should describe the competitive structure on the market post-merger. In this regard, it should give estimates of the parties' and competitors' market shares and identify other countervailing power to the merged entity (suppliers' or customers' bargaining power, international competitiveness, trade flows etc). By discussing the competitive structure at an early stage, the parties will obtain an initial impression concerning whether the DGCCRF is likely to request remedies and, if so, what type (structural or behavioural) might be contemplated.

Remedies

When the transaction raises very serious concerns, it is unlikely that the deal will go through without remedies. In cases where it is clear that such issues arise, it is generally advisable for companies to devise a remedy strategy prior to notification. The idea is for companies to establish as early as possible what remedies might be acceptable in order to obtain phase 1 approval.

On the other hand, delaying consideration of the remedy issue until after notification may compromise the chances of a phase 1 approval. Even if timing under French merger control is flexible, companies often will find that devising remedies will absorb most of their post-notification time. The main problem is to find types of remedy that will not only resolve the competition concerns but are also acceptable to all affected parties. Admittedly, this may prove difficult given that some of the shareholders may consider that the proposed remedies undermine the value of the transaction. In addition, companies should remember that the DGCCRF will need time to market test the proposed undertakings.

The efficiency defence

As mentioned above, French merger control takes into account the efficiencies linked to a merger. The parties should therefore include efficiencies arguments in their briefing paper. In preparing these arguments, they should take account of the following:

First, benefits that the parties derive from the transaction are not "efficiencies" for merger control purposes. For example, a mere improvement in the parties' position in terms of market share or profits is unlikely to be accepted as an efficiency defence. The key task is for the parties to prove that a fair share of the benefits will be passed on to consumers in terms of lower prices, better products or more sophisticated technology. This may be the case, for example, if the merged entity achieves economies of scale resulting in price reductions or introduces new products, processes or services through the combining of the parties' technology or IP resources.

Secondly, the Ministry has in the past taken into account efficiencies linked to non-economic matters. These seem to cover a broad range of areas, including environmental, social, political (eg promoting commercial relationships with certain countries) and industrial policy issues (such as improving the competitiveness of French industry in international markets.)

Lastly, if remedies are to be offered in parallel, companies should verify that these remedies are consistent with their efficiency arguments. Certain clear-cut remedies such as divestitures may resolve competition concerns but also eliminate expected efficiencies, for example economies of scale. If the parties develop efficiency arguments, it is not advisable at the same time to offer remedies that would undermine their credibility. The parties may first decide to test the DGCCRF's reactions to the efficiency defence before moving to remedies. Obviously, this will depend on whether the strength of the efficiency arguments can overcome the competition concerns raised by the transaction. As mentioned above, when the transaction raises very serious competition issues, companies should prioritise a remedy strategy since the case is unlikely to be won solely on efficiency arguments.

Identification of relevant individuals

Establishing prior contacts implies the identification of the relevant case handlers in the DGCCRF and officials in the Ministry to whom the case handler reports. The DGCCRF has recently increased its staff and there are now approximately 20 case handlers reporting to Mr Stanislas Martin, who is a newly appointed director. It is however possible that the expected increase in the number of notifications will mean the appointment of further case handlers.

Testing the marketplace

Under the old regime, the existence of a voluntary notification was kept secret unless the parties chose to make it public. Under the new rules, third parties will be informed of the notification. First, upon receipt of the notification, the DGCCRF will publish a notice with basic information on the transaction (name of the parties, markets involved etc) and invite third parties to submit their comments. Second, in the course of the proceedings the DGCRF itself may request information from the marketplace on issues such as relevant markets or the structure of competition. Thirdly, as mentioned above, the DGCCRF will conduct market test exercises on remedies.

Companies should therefore bear in mind that third parties, and in particular competitors, may play an active role in the process. In certain circumstances, the parties may want to consider anticipating these concerns by conducting a market test exercise with suppliers and customers before publication of the Ministry's notice.