

## French merger review procedure

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The May 2001 NRE law (NRE standing for "new economic regulation) has extensively modified the French company law, especially concerning the governance of French limited company (SA). For instance, this regulation has introduced a strict limitation on the number of mandate held by executive officers in limited companies or made possible the split between the functions of executive officer and chairman of the board.

This law also contains a competition law section that reformed the French merger review procedures which entered into effect on April 30, 2002 when a governmental decree taken in pursuance of this law was issued.

**Inspired by EU Regulation.** This reform was strongly inspired by EU Regulation 4064/89 of December 21, 1989, which requires a prior notification to the European Union Commission of mergers and acquisitions exceeding certain thresholds expressed in term of turnover.

**Previous regulation.** The previous French regulation merger was making the prior notification of the merger an option and the review procedure criteria involved both a set share of the French market of the products (25 % of the concerned market) and a turnover condition. These criteria were much less objective than the new ones and therefore quite difficult to deal with.

**Concentration.** French merger review procedures apply to what French law calls "concentrations". According to French law, a transaction might be a concentration in the three following cases (article L430-1 of the French commercial Code):

- Mergers:

A concentration is deemed to occur when two or more independent undertakings are merged.

- Acquisitions:

A concentration is deemed to occur when one or more persons, already controlling at least one undertaking, acquire, directly or indirectly, control of one or more other enterprises. Acquisitions involves purchase of stocks of a target company, of business assets, or any other contractual means transferring control of one or more undertakings.

- Common enterprise "joint venture":

The creation of a common enterprise may be considered as a concentration when two undertakings conduct themselves durably as a single autonomous economic unit.

**Applicable thresholds.** Pursuant to new Commercial code as modified by NRE law, a concentration is subject to a pre-merger control from the French authority if the following cumulative thresholds are surpassed :

- The worldwide turnover (excluding VAT) of all undertakings to the transaction exceeds  $\approx$ 150 million.

- The French turnover (excluding VAT) made by at least two of the parties to the concentration process exceeds €15 million.

**Institutional investors issue.** These turnover criteria underline a clear limit between transactions that must be notified and the others. However, this became a significant issues

for institutional investors like venture capital funds which are likely to control companies exceeding the turnover thresholds above mentioned and likely to invest in such companies but are not likely to affect a market.

Previously, such investors could easily assume that they would not exceed a certain market share in making diversified investments. They are now obliged to notify the prospective transaction to the French government even if they have hardly no chance to get a significant share in a market. The notification procedure often delays the transaction.

**Unofficial simplified notification.** If parties consider that a market is not affected or have doubts, a simplified notification procedure may be followed. The simplified notification must contain a description of the transaction with copies of the relevant documents and makes possible a discussion with the Minister of Economy and facilitate the calculation of turnovers and ease and speed up the process if a formal notification happens to be requested.

**Official procedure.** A transaction surpassing the above mentioned thresholds is notified to the Minister of Economy at the French government (i.e. department of finance), agency of concentrations and aids (B3) by individuals or legal entities who are purchasers of the target enterprise in the case of acquisitions.

On the contrary, when a common enterprise is formed, all the parties concerned must notify the transaction (art L430-3 of the French commercial Code).

The transaction must be notified when parties are "irrevocably committed", which means that such notification has to be prepared when an agreement has been met on the main conditions of the acquisition. However, notification must be given prior to the achievement of the transaction. Practically, the sale and purchase agreement is subject to a condition precedent.

The Minister must answer within five weeks of receiving a notification that is deemed to be complete. The transaction will be deemed to be approved after this time period expires, except if the Minister decides that the transaction must be modified (the parties may then propose measures to alleviate anti-competitive effects) or if the Minister decides to consult the Competition consult.

**Works council rights.** The minister of economy must also publish information concerning the transaction within five working days of the parties' notification.

Following this official statement, the works committee of each party to the transaction must be consulted by the head of each company. This consultation must take place within three days of the official publication from the Minister of Economy.

The works council may decide to be assisted by an expert to get more information concerning the transaction. Whether an expert is appointed or not, the works council shall have to give his opinion about such transaction before the transaction is completed.

**Conflict with EU Law.** However, if the European community law applies, i.e. when European thresholds are reached, this national procedure does not apply and jurisdiction is automatically transferred to the EU commission. Jurisdiction may revert to the French administration when the EU Commission decides to refer the matter to the French minister of economy if the European market is not affected.

**Fines.** The transaction that shall be completed without a prior notification to the Minister of Economy shall give rise to a fine of up to 5 per cent of the aggregated turnover of the purchaser and target company during the financial year ended prior to completion of the transaction. For individuals, the fine may amount to €1.5 million.