

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

Autorité de la concurrence (FRANCE)

13 May 2009

IMPORTANT NOTE: This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. Reading the template is not a substitute for consulting the referenced statutes and regulations.

1. Merger notification and review materials (please provide title(s), popular name(s), and citation(s)/web address)

A. Notification provisions	Title III of the IV th book of commercial code (articles L430-1 to L430-10). Implementing regulation : law of modernization of the economy n°2008-776, august 4 th , 2008)
B. Notification forms or information requirements	Merger notifications must contain all the information required by art.R430-8 of commercial code (decree n°2009-139, February 10 th , 2009). Forms can be found on : http://www.autoritedelaconcurrence.fr
C. Substantive merger review provisions	Article L430-6 of commercial code. Both dominance test and substantial lessening of competition may be used in the analysis.
D. Implementing regulations	Title III of the IV th book of commercial code (articles L430-1 to L430-10 of commercial code). Implementing regulation (law of modernization of the economy n°2008-776, august 4 th , 2008)
E. Interpretive guidelines and notices	Guidelines on the assessment of concentrations are available on the web site : http://www.autoritedelaconcurrence.fr

2. Authority or authorities responsible for merger enforcement.

<p>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</p>	<p>The Competition Authority (Autorité de la concurrence) is in charge of merger control. The dedicated service with the Authority is the merger unit (Service des Concentrations).</p>
<p>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</p>	<p>Autorité de la concurrence Service des concentrations 11, rue de l'Echelle F - 75001 Paris Tel. : 01 55 04 01 72 Fax : 01 55 04 01 66 E-Mail : controle.concentrations@autoritedelaconcurrence.fr Web site : http://www.autoritedelaconcurrence.fr</p>
<p>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</p>	<p>Pre-notification contacts are highly recommended. Any question should be addressed preferably via e-mail : controle.concentrations@autoritedelaconcurrence.fr</p>

3. Covered transactions

<p>A. Definitions of potentially covered transactions (i.e., concentration or merger)</p>	<p>According to article L430-1 of the commercial code, a concentration arises in the following cases :</p> <p>1° Merger of two or more previously independent firms. 2° Acquisition of direct or indirect control by one or several companies of the whole or parts of one or several companies. 3° Creation of a joint-venture performing on a lasting basis every function of an autonomous activity.</p>
<p>B. If change of control is a determining factor, how is control defined?</p>	<p>Control is defined as the possibility of exercising decisive influence on an undertaking. All factual and legal circumstances (shares, contracts) are taken into account to define such an influence.</p>
<p>C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?</p>	<p>Minority shareholding may be covered depending on the actual control it confers to the owner. There is no set level.</p>
<p>D. Do the notification requirements cover joint ventures? If so, what types (e.g., production joint</p>	<p>Yes, any foundation of a joint-venture constitutes a merger provided that the JV performs on a lasting basis every function of an autonomous activity. (see the communication of the European Commission JO C 66 of 2.3.1998 page 1).</p>

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4. Thresholds for notification

A. What are the general thresholds for notification?	The combined aggregate worldwide turnover of all participating companies must be above Euro 150 million and the domestic turnover of at least two participating companies must be above Euro 50 million each. To be notified in France, the merger must not fulfill the European criterion for notification to the European Commission. For mergers in the retail sector, thresholds are respectively Euro 75 and 5 million. The same thresholds also apply for mergers in overseas departments.
B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?	<p>The entities included in the calculation of the merger notification thresholds are :</p> <ul style="list-style-type: none"> • The acquired entity. • The whole group of the acquiring entity. <p>The methodology used is described in the communication of the European Commission (JO C 66 of 2.3. 1998, page 14)</p>
C. Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.	There is no regular adjustment.
D. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?	The thresholds relate to the last closed financial year for which the accounts have been audited. If there has been a significant change in the size of the company meanwhile (e.g. a previous merger), then different figures may be used. The French authority bases its analyses on the communication of the European Commission (JO C 66 of 2.3. 1998, page 25, especially points 25 to 27).
E. Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets?	<p>The French law refers to the EC Merger Regulation (article 5). The notification requirement is based on turnover which is calculated according to the communication of the European Commission (JO C 66 of 2.3. 1998, page 25).</p> <p>See, Guidelines on the assessment of concentrations (20 October 2000). Guidelines are available on the web site : http://www.autoritedelaconurrence.fr</p>
F. Describe methodology for calculating exchange rates.	The French Authority uses the rules set down in the communication of the Commission (JO C 66 of 2.3. 1998, page 25, points 49 and 50)
G. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?	Both are relevant.

<p>H. Can a single party trigger the notification threshold (e.g., one party's sales, assets, or market share)?</p>	<p>No.</p>
<p>I. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an "effects doctrine," please describe how this is applied. Is there a requirement of local presence (local assets/affiliates/subsidiaries) or are import sales into the jurisdiction sufficient to meet an "effects" test?</p>	<p>The concentration must have domestic effects, which are assessed by the national threshold. No requirement of local presence.</p>
<p>J. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?</p>	<p>The relevant criterion is the location of the customers (see the communication of the Commission, JO C 66 of 2.3. 1998, page 25, points 45 to 48).</p>
<p>K. If market share tests are used, are there guidelines for calculating market shares?</p>	<p>Non applicable.</p>
<p>L. Are there special threshold calculations for particular sectors (e.g., banking, airlines, media) or particular types of transactions (e.g. joint ventures, partnerships, financial investments)?</p>	<p>Yes, for insurance and bank companies, as set in the communication of the Commission (JO C 66 of 2.3. 1998, page 25, points 53 to 61).</p>
<p>M. Are any sectors excluded from notification requirements? If so, which sectors?</p>	<p>No</p>
<p>N. Are there special rules regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign?</p>	<p>No, a concentration involving foreign companies is subject to notification, as long as it reaches the turnover thresholds.</p>
<p>O. Does the agency have the authority to review transactions that fall below the thresholds?</p>	<p>No, however, the Authority might ask for referral under article 22 of the merger EU regulation (139/2004). The European Commission did accept several times to examine mergers referred by France as a result of the potentially damaging effects on the French markets, though these operations falling below the thresholds. See for instance EU case Omya/JM Huber M376.</p>

5. Notification requirements and timing of notification

<p>A. Is notification mandatory pre-merger?</p>	<p>Yes, (articles L430-3 and L430-4 of commercial code).</p>
<p>B. Is notification mandatory post-merger?</p>	<p>All concentrations subject to notification have to be notified before they are completed and may not be completed until they have been cleared. If a concentration is completed without notification, the Minister may impose a fine and will request that the parties notify it.</p>
<p>C. Can parties make a voluntary merger filing even if filing is not mandatory? If so, when?</p>	<p>No specific provision.</p>
<p>D. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)?</p>	<p>Filing may be made at any time once the parties are in a position to notify a project that is sufficiently well advanced, and in particular when they have entered into a gentlemen's agreement or signed a letter of intent, or after the publication of the purchase or exchange offer.</p>
<p>E. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?</p>	<p>There is no specified period to file the notification, as long as it is filed once parties can demonstrate a good faith intention to conclude an agreement (or in the case of a public bid, where they have publicly announced an intention to make such bid) and the transaction is not implemented before the decision of the Authority. There are special rules for public takeover bids.</p>
<p>F. Can parties request an extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.</p>	<p>Non applicable</p>

6. Simplified procedures

Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain responses, etc.).	No specific provision.
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7. Documents to be submitted

A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).	Merger notifications must contain all the information required by decree n°2009-139 of 10 February 2009, terms can be found in : http://www.autoritedelaconurrence.fr
B. Are there any document legalization requirements (e.g., notarization or apostille)?	No
C. Are there special rules for exemptions from information requirements (e.g. information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign?	No

8. Translation

A. In what language(s) can the notification forms be submitted?	The notification file should be in French.
B. Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification of the translation, language(s) accepted, and whether summaries or excerpts are allowed in lieu of complete translations.	Attached documents in English are usually accepted (for other languages, a consultation of the staff is necessary)

9. Review periods

A. Describe any applicable review periods following notification.	<p>An initial examination phase of 25 working days starts as soon as the notification has been accepted (i.e has been recognized as complete by the Authority). A 15 working days extension time is provided to allow for assessment of proposed remedies. Then the minister of economy has 5 days to request for an in depth analysis.</p> <p>If the transaction may affect competition, the Authority conducts an in-depth analysis. The review period is 65 working days and can be extended by 20 working days if commitments are received less than 20 days before the end of the initial review period. Then the minister of economy has 25 working days to reform the Authority 's decision for other concerns than competition ones.</p>
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<p>B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>As regard public tenders, the suspension applies to use of rights attached to the shares exchanged, but does not prevent the exchange of the shares.</p>
<p>C. What are the procedures for an extension of the review periods, if any (e.g., suspended by requests for additional information, suspended at the authority's discretion or with the parties' consent)? Is there a statutory maximum for extensions?</p>	<p>Besides the already mentioned extension for commitments, the parties can ask for an extension of no more than 15 working days. If an in-depth analysis is undertaken, the parties can ask for an extension of 20 working days. A suspension by the Authority is possible when the parties fail to provide requested information or when third parties refuse to provide requested information due notifying parties' interference.</p>
<p>D. What are the procedures for accelerated review of non-problematic transactions, if any?</p>	<p>None</p>

10. Waiting periods / suspension obligations

<p>A. Describe any waiting periods/suspension obligations following notification, including whether closing is suspended or whether the implementation of the transaction is suspended or whether the parties are prevented from adopting specific measures (e.g., measures that make the transaction irreversible, or measures that change the market structure), during any initial review period and/or further review period.</p>	<p>All mergers subject to notification have to be notified before they are completed and may not be completed until they have been cleared. If a merger is completed without notification, the Authority may impose a fine and will request that the parties notify it.</p>
<p>B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?</p>	<p>If the parties put forward major reasons for allowing the closing (e.g firms under judicial review), the Authority may grant a derogation from prohibition of putting a merger into effect before final decision.</p>

<p>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance (e.g. request for a derogation from the suspension obligations, commitment to hold separate the local business operations, escrow agents.)</p>	<p>The waiting period is applicable to the merger as a whole.</p> <p>There are no specific provisions dealing with the possibility of closing the transaction outside the French territory only.</p>
<p>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</p>	<p>Yes</p>
<p>E. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period/suspension obligation.</p>	<p>None.</p>
<p>F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.</p>	<p>None.</p>
<p>G. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).</p>	<p>None.</p>

11. Responsibility for notification / representation

A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both? Does each party have to make its own filing?	<p>The acquiring person is responsible for notifying. In case of joint-venture, all participating companies are supposed to notify. In practice, it is sufficient for one of these companies to notify on behalf of the others. However, all parties are subject to liability.</p> <p>No separate filing is necessary.</p>
B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?	No.
C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?	No.
D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?	<p>There is no formal attestation required. However, firms are asked to provide a power of attorney (that does not need to be notarized, legalized or apostilled).</p> <p>There are no special rules for foreign representatives.</p>

12. Filing fees

A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)?	None.
B. Who is responsible for payment?	Non applicable.

C. When is payment required?	Non applicable.
D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	Non applicable.

13. Confidentiality

A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?	When the notification file is received (even if not complete), a notice is made public within 5 days on the web site disclosing the name of the parties, the type of operation, the activities to comment. The nature of decision eventually made by the Authority is also made public within 5 days. The text of the decision is made public within a few weeks.
B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?	In phase 1, parties have no right to access the Authority's file, but the staff has a general obligation of clear and fair information, with respect to business secrets. In phase 2, parties have access to all documents on which the Authority bases its decision.
C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?	Third parties cannot access the notification materials and the agency's file. Other agencies can request some information, which will be delivered upon a waiver granted by the parties.
D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.	The fact of notification cannot remain confidential, but prenotification talks are completely confidential as well as the material communicated in the filing. Information covered by business secret cannot be accessed, unless the parties have given a waiver, which may be used to exchange information, between competition authorities especially.
E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?	The Authority is part of the European Competition Authorities Association (ECA), which organizes exchanges of non confidential information relevant to multi-filing cases. See : http://www.autoritedelaconurrence.fr/doc/echanges_infos_concen_eca.pdf

<p>F. Can the agency exchange documents or information with other reviewing agencies? If so, does it need the consent from the parties who have submitted confidential information to exchange such information?</p>	<p>Agencies can exchange information, provided that the parties have given a waiver.</p>
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14. Transparency

<p>A. Does the agency publish an annual report? Please provide the web address if available.</p>	<p>Yes, the Authority publishes an annual report that is available on its website.</p>
<p>B. Does the agency publish press releases related to merger policy or investigations?</p>	<p>Yes, press releases are published on the website of the Authority : http://www.autoritedelaconcurrence.fr</p>
<p>C. Does the agency publish decisions on why it cleared / blocked a transaction?</p>	<p>Yes, decisions are published on the Authority website : http://www.autoritedelaconcurrence.fr</p>

15. Sanctions/penalties

<p>A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods/suspension obligations?</p>	<p>Violations of the prohibition of putting a concentration into effect before a decision of the Authority can be punished by imposing a fine of to 5% of the turnover made in France.</p>
<p>B. Which party/ies are potentially liable?</p>	<p>Acquiring party or all parties in case of a JV</p>
<p>C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.</p>	<p>The Authority can impose directly these sanctions</p>

16. Judicial review

Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.

Decisions may be challenged before the High administrative court (Conseil d'Etat).
The appeal must be filed within two months after notification or publication of the decision.
Even though there is no fast track procedure, the Conseil d'Etat usually reviews merger cases within a short timeframe.

17. Additional filings

Are any additional filings/clearances required for some types of transactions, e.g., sectoral regulators, securities regulator?

If a phase 2 is opened, the opinion of independent administrative bodies may be requested when the parties are active in some specific areas: telecommunications regulation authority (ARCEP), Media commission (Conseil Supérieur de l'Audiovisuel), banking and insurance sector control authorities (CECEI and CEA).

18. Closing deadlines

When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?

None.

19. Post merger review of transactions

Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?

Yes (see article L430-8).

1. In the event of an omission or an inexact declaration in a notification, the Authority may impose a fine on persons having made notification. This fine may be combined with withdrawal of the decision that authorized the operation. Unless the parties return to the state prior to the concentration they shall then be obliged to again notify the operation within a period of one month from the withdrawal of the decision, failing which fines will be imposed.

2. If it considers that the parties have not, in the periods laid down, complied with an injunction, requirement or commitment, the Authority may :

- Withdraw the decision that authorized the operation to be carried out. Unless the parties return to the state prior to the concentration, they shall then be obliged to again notify the operation within a period of one month from the withdrawal of the decision, failing which the fines set forth in I shall apply.

- Enjoin, subject to a fine, the parties upon whom the unperformed obligation was incumbent to comply with the injunctions, requirements or commitments in a period they shall determine.

In addition, the Authority may impose a fine on persons upon whom the unperformed obligation was incumbent.