

Template of the ICN Framework on Competition Agency Procedures

I. Introduction

The French *Autorité de la concurrence* (hereafter “the *Autorité*”) is an independent administrative authority, which ensures free competition and contributes to the competitive functioning of markets (Art. L. 461-1 of the Commercial Code).

More information is available on its website: <https://www.autoritedelaconcurrence.fr>

The *Autorité* is a member of the Framework on Competition Agency Procedures adopted by the International Competition Network.

II. Laws, Regulations, and Policies relevant for the Implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

a) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

Article 1 of the French Constitution of 1958, enforced by the Constitutional Court, ensures equality before the law, without any distinction of origin, race or religion. This provision ensures that Persons of other jurisdictions have a treatment not less favorable than French Persons in like circumstances.

b) Transparency and predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

French legislation is freely accessible and publicly available. One main source is the online public service *Legifrance* (<https://www.legifrance.gouv.fr/>).

The Commercial code comprises the main statutory provisions and secondary legislation applicable to investigations and enforcement proceedings. Competition laws and regulations and procedural rules applicable to investigations and enforcement proceedings, as well as guidance on investigations and enforcement proceedings are made publicly available by the *Autorité* on its website (<https://www.autoritedelaconcurrence.fr/fr/textes-de-reference>).

Additionally, a database of the decisions issued by the *Autorité* relating to the control of mergers and anticompetitive practices, as well as opinions delivered by the *Autorité*, is also available online on the *Autorité*'s website. Decisions and opinions are accompanied by press releases.

The *Autorité* also publishes on its website its annual report, which presents its activities and the important cases of the year.

c) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practically and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

Anticompetitive practices

Antitrust proceedings before the *Autorité* are adversarial (Art. L. 463-1 of the Commercial Code). The *Autorité* informs any person that is the subject of an investigation of that investigation as soon as practically and legally permissible.

The investigation begins with the nomination by the General Rapporteur of the case handler(s) in charge of the file (Art. L.450-6 and R.463-4 of the Commercial Code).

The case handler(s) may proceed with investigatory measures as provided by law, including requests for information in connection with the matter under investigation (Art. L. 450-1 *et seq.* of the Commercial Code).

In case the General Rapporteur considers, after a preliminary investigation, that competition law was infringed, either he/she or a Deputy General Rapporteur issues a statement of objections to the parties along with relevant documents (Art. L. 463-2, Art. R. 463-11, Art. R. 464-8 of the Commercial Code). The statement of objections is a reasoned document setting out the facts of the case and how competition rules may have been infringed. Its notification is made subject to formal rules established by law (Art. R. 463-11 of the Commercial Code).

The parties have access to the case file and have two months to submit their observations in response to the statement of objections (Art. L. 463-2 and R. 463-2 of the Commercial Code). Thereafter, in more complex cases, a report is notified to the parties (Art. L. 463-3 of the Commercial Code). The parties have two months to submit their observations in response to this report.

Merger control

The merger control regime operates on the basis of *ex ante*, mandatory notification to the *Autorité* of proposed mergers and acquisitions (as defined by Art. L. 430-1 of the Commercial Code) above a given turnover threshold (set by article L. 430-2 of the Commercial Code).

The *Autorité* reviews notified mergers and acquisitions along a tight schedule defined by law (i.e., “phase 1”, Art. L. 430-5 of the Commercial Code), which can be extended into a longer review period when a more thorough examination is warranted (i.e., “phase 2”, Art. L. 430-6 of the Commercial Code). The phase 1 review process is to be carried out “in a spirit of cooperation between the parties and the *Autorité* in order to collect the elements required for a reasoned decision” (§210 of the *Autorité*’s 2013 Merger Guidelines; §248 of the draft *Autorité*’s 2019 Merger Guidelines, to be published). The case handler(s) may engage with the notifying parties and, as the case may be, with other interested market players, through written exchanges or face to face meetings, depending on the complexity of the case (2013 Merger Guidelines, §218 *et seq.*; draft *Autorité*’s 2019 Merger Guidelines, §256 *et seq.*). In addition, the phase 2 review process provides for a report to be issued by the case handler(s). The notifying parties have 15 working days to submit their observations in response to this report. The case is then decided by the board of the *Autorité* after an oral hearing.

d) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

Antitrust proceedings

The principle set out by Article 6 §1 of the European Convention on Human Rights (“ECHR”) whereby everyone has the right to a hearing within a “reasonable time” applies to antitrust proceedings before the *Autorité*, as confirmed by European and French case law.

Art. 3 §3 of the European directive 2019/1 of 11 December 2018 (“the ECN + directive”), to be transposed into domestic law by 4 February 2021, also provides that “Member States shall ensure that enforcement proceedings of national competition authorities are conducted within a reasonable timeframe”.

There is a statutory time bar for antitrust proceedings to be commenced before the *Autorité* (Art. L. 462-7 of the Commercial Code).

Interim measures

When there appears to be a *prima facie* infringement of competition rules likely to be causing serious and immediate harm to either of these interests: the economy, the sector at stake, consumers or the complainant, the *Autorité* may issue interim measures, pending a decision on the merits of the case. The “seriousness” is that of the harm only, not that of the suspected practices, and the “immediacy” refers to the harm being either actual or imminent. A high standard of proof applies to the finding of a causal relationship between the *prima facie* infringement of competition rules and said damage.

In order to effectively prevent the worsening or the materialization of said damage, decisions on interim measures are made swiftly, within a few months of the referral (Art. L. 464-1 of the Commercial Code). Interim measures must by law be strictly limited to what is necessary to address the urgency. They take the form of an injunction to either take a specified action or abstain from one, e.g., to withdraw anticompetitive clauses from a contract)

Following the transposition into domestic law of Article 11 of the ECN+ directive, the *Autorité* will be in a position to order interim measures on its own initiative.

Merger control

Mergers and acquisitions above statutory thresholds must be notified to the *Autorité*. If the transaction does not pose any particular concern or if the commitments presented by the parties remedy the issues identified, the decision is issued within a period of 25 working days from the notification (i.e., following a “phase 1” review, Art. L. 430-5 of the Commercial code).

If a serious doubt concerning a potential infringement of competition remains at the end of this phase 1 review, the *Autorité* opens a “phase 2” investigation in order to perform an in-depth examination. After an additional review period not exceeding 65 working days, the board of the *Autorité* issues a decision that may either clear the transaction unconditionally, clear it subject to commitments, or prohibit it.

The procedure for merger control was recently modernized (Decree n° 2018-339 of 18 April 2019) to allow for streamlined notification requirements and an online notification system.

e) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

Respect of confidentiality

Members of the board of the *Autorité* are bound by the secrecy of deliberations, (Art. 9, § 4 of the law of 20 January 2017).

Staff and members of the board are bound by a statutory duty of confidentiality (Art. 26, § 1 of the law of 13 July 1983 for staff and Art. 9, § 4 of the law of 20 January 2017 for members of the board).

Business secret protection

The protection of business secrets in enforcement proceedings before the *Autorité* is a principle set by law (Art. L. 463-4 of the Commercial Code). There is now a statutory definition of business secrets (Art. L. 151-1 of the Commercial Code), following the transposition into domestic law of the Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

The parties have an extensive right to request business secret protection of confidential information. As part of their access to the case file, the parties also have a right to request that business protection of confidential information be waived.

Decisions on business secret protection are made by the General Rapporteur. These decisions can be challenged in court (Art. R. 463-13 *et seq.* of the Commercial Code).

f) Conflicts of Interests

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Upon taking office, staff of the investigation units and members of the board issue a formal statement whereby they commit to exercise their duties in a fully independent and impartial manner.

Members of the board and staff of the *Autorité* are under a statutory duty to prevent or, as the case may be, terminate any conflict of interests, as defined by law (Art. 2 of the law n° 2013-907 of 11 October 2013).

The Code of ethics of the *Autorité* (last amended on 29 November 2019) provides a reminder of all applicable legislation and sets out good practices toward the identification, prevention and handling of such conflicts.

There are internal procedures in place for members of the board to recuse themselves from the consideration of a case and for staff to withdraw from an investigation in the event of a perceived conflict of interests.

In addition, all members of the board and some top management, as designated by law, must file an asset and interests disclosure, designed to prevent conflicts of interests.

g) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

There is a statutory guarantee for the parties to have the opportunity to defend in the course of the investigations and enforcement proceedings before the *Autorité* (Art. L. 463-1 *et seq.* of the Commercial Code).

As soon as the statement of objections has been notified, the proceedings are fully adversarial (Art. L. 463-1 of the Commercial Code). The parties, including the persons subject to the proceedings and the claimant, have access to the case file. They have two to three opportunities to defend. There is a first adversarial debate whereby the parties respond in writing to the alleged violations put forward in the statement of objections. In more complex cases, the parties are furthermore invited to respond in writing to a report notified by the General Rapporteur that summarizes the position of the case handler(s) in response to the parties' first written observations. In every enforcement case, the final adversarial debate is an oral hearing systematically held before the board of the *Autorité*.

There is an internal separation between investigative and decision-making functions, which means that the board takes no part in the investigation of a case and only adjudicates the case once the investigation is finalized and the case is scheduled for a hearing. Conversely, no member of the investigation units participates in nor attends the deliberation of the board in enforcement proceedings.

h) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

All parties have a right to legal representation throughout the entire proceedings before the *Autorité*. When a party is interviewed by the case handler(s) in charge of the investigation, the right for said party to be assisted by a counsel must be notified by the case handler(s) (Art. R. 463-6 of the Commercial Code). When appearing at an oral hearing before the board of the *Autorité*, the parties can be represented or assisted by a counsel (Art. L. 463-7 of the Commercial Code).

French law provides for the protection of the legal professional privilege (Art. 66-5 of the law of 31 December, 1971). This privilege applies in all proceedings before the *Autorité*.

i) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

All decisions of the *Autorité* relating to the application of competition law are in writing. They set out the findings of fact and provisions of law on which they are based.

Any decision by the *Autorité* has to be reasoned, including decisions imposing sanctions, accepting commitments or dismissing a case (Art. L. 464-6).

Decisions are published on the website of the *Autorité*.

The *Autorité* can order a company on which it has imposed an enforcement decision to publish it in its annual report and/or have it published in the press (Art. L. 464-2 of the Commercial Code).

j) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

Every binding decision of the *Autorité* is subject to judicial review.

Antitrust decisions may be appealed to the Paris Court of Appeal (*cour d'appel de Paris*) for annulment or review. Decisions imposing interim measures may be appealed within 10 days, and all other enforcement decisions may be appealed within a month (Art. L. 464-7 and L. 464-8 of the Commercial Code). Appeals are non-suspensive. The companies sanctioned have to pay their fines. In certain cases, a stay of execution may be requested from the Court.

The decision of the Court of Appeal may be appealed to the French Supreme Court within one month after its notification. This appeal is non-suspensive. The president of the *Autorité* may appeal to the Supreme Court a decision of the Court of Appeal having annulled or reviewed a decision by the *Autorité*.

In merger control, the parties and any interested party may appeal the decisions of the *Autorité* before the Administrative Supreme Court (*Conseil d'État*) (Art. R. 311-1 of the Administrative Justice Code) within two months.