

## Law for the Modernisation of the Economy (LME) one step further towards a single independent competition authority

*The French competition system is still of a dual nature, the powers being divided between the Ministry for the Economy (investigations, mergers) and an independent competition authority (anticompetitive practices).*

*Such a dual system, with decisional powers exercised by the political, has attracted more and more criticism over the years.*

*As a number of other Member States, France has now tackled a true reform of this dual system.*

The Law for the Modernisation of the Economy n°2008-776, adopted on 4 August 2008 and published in the Official Journal dated 5 August 2008, undoubtedly achieves one step further toward a single independent competition authority, but merely one step : the Minister for the Economy will continue to enjoy very significant prerogatives in competition matters<sup>(1)</sup>.

The LME and its draft application measures also bring in a number of substantive amendments to competition and distribution laws.

### A new “Competition Authority”

The *Conseil de la Concurrence* will change of name to become “*l’Autorité de la Concurrence*” (thereafter the Competition Authority) and article L 461-1 of the Commerce Code now states that it is an independent administrative authority monitoring the free exercise of competition and contributing to the level playing field at the European and international level. There is however no doubt that the *Conseil de la Concurrence* already qualified as an independent administrative authority.

The LME first brings a number of institutional amendments : reduction from 6 to 5 years of the members’ mandate, one additional vice president (notably for merger control), increase in the number of members appointed by reason of their economic or competition competences, etc. So far, the draft ordinance for the implementation of the LME provides that the *Conseil* will hold office until the members of the *Autorité* will be appointed. The mandates of the present members will therefore need to be confirmed or new members be appointed.

The Competition Authority will now adopt a number of decisions as a single member (the president or a vice-president) notably on Ministry referrals, as well as for phase 1 merger decisions.

Part of the investigators presently within the Ministry for the Economy will join the investigation services of the Competition Authority, who will now have full capacity to carry out judicial as well administrative inspections (the so-called “heavy” and “simple” inspections).

A new hearing officer will also be appointed but will only have a power of proposition to the president, based on the submissions of the parties in that respect. This power will be detailed in a further decree but, so far, does not appear to apply in merger procedures.

Finally, the Authority will be empowered to act before Courts, whereas only the Minister for the Economy has this power today.

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(1) The Law reforms a number of other business law rules which are not detailed in the present information memo dedicated to competition.

### **Merger control is transferred to the Competition Authority**

Merger notifications will now be received, investigated and cleared by the Competition Authority, in phase 1 as well as in phase 2. The decisional power is transferred by the Law but a number of application measures will still be necessary to adapt the trial procedure of the Authority to the treatment of phase 1 cases (likely suppression of the hearing, introduction of state of play meetings, adaptation or suppression of the statement of objections, due process, etc.).

Time-limits are now set in working days and remain largely similar as far as the procedure before the Authority is concerned. Phase 1 duration will be 25 or 40 working days, depending on whether the parties propose remedies or not. Phase 2 is even significantly reduced and will now last for 65 or 85 additional working days, depending on the date remedies are submitted.

A stop-the-clock mechanism is introduced, in slightly different terms in phase 1 and 2. In phase 2, time-limits can also be suspended by the Authority in case the parties and some third parties do not provide information in due time.

### **However, the Minister keeps the power to change the outcome of cases**

A new article L 430-7-1 maintains significant powers for the Minister : whenever he will decide to do so, he will keep the last word in merger cases :

- At the end of phase 1, the Minister has 5 working days after receiving the clearance decision to “ask” the Competition Authority to open a phase 2 notwithstanding such clearance decision. The grounds likely to justify such an intervention are not detailed, nor the actions the Competition Authority can take following such a “request”.
- At the end of phase 2, the Minister has 25 working days after receiving the Authority's decision to rule on the case for public interest grounds other than the preservation of competition. The Law limits neither the eligible public interest grounds, nor the type of decisions concerned on the part of the Authority (clearance as well as prohibition), nor the powers of the Minister (adding as well as suppressing remedies, turning the clearance into a prohibition and *vice-versa*).

During these time-periods, the parties shall not implement the transaction, total time-limits being therefore rather 30 to 45 working days for phase 1, and 90 to 110 working days for phase 2.

### **New notification thresholds for retail outlets and overseas territories**

If the LME significantly raises the administrative authorization thresholds for retail outlets, more constraints are introduced on other aspects, such as in merger control. Moreover, the LME adapt the existing thresholds for overseas departments (and now also overseas communities) and introduces a notification obligation in that respect.

These transactions will now be subject to notification upon lower thresholds than other transactions :

- an aggregate worldwide turnover for all parties above 75 million euros (instead of 150) ;
- an individual French turnover in retail activities or in one DOM/COM for at least two parties above 15 million euros (instead of 50).

### **Second stage in the reform of commercial relationships rules**

The LME establishes the free negotiability of commercial terms by recognising the possibility to adopt differentiated general sales conditions, and by establishing the principle of free negotiation of particular sales conditions. Consequently, the LME abolishes the tort of discrimination laid down in article L 442-6, a French specificity resulting in a prohibition of discriminations between buyers placed in a similar position, absent any dominant position or economic dependency.

However, the list of *per se* prohibited commercial practices in article L 442-6 is extended, notably to include most favoured nation clauses. If these clauses have indeed raised difficulties in the supermarket sector, they are here generally addressed and will now exposes those benefiting therefrom to indemnify any resulting damage and to a civil fine up to 2 million euros or three times the unduly paid sums.

Litigation based on article L 442-6 will also be transferred to specialized courts (probably those having jurisdiction for competition litigation).

Finally, the LME reduces the formalism of the single annual convention to be concluded between suppliers and distributors, and it clarifies a number of uncertainties raised by the previous drafting of article L 441-7, under the Chatel Law of 3 January 2008.

### **Entry into force**

Provisions relating to the second stage in the reform of commercial relationships rules are immediately applicable. On the other hand, the other provisions detailed above (merger control, Competition Authority) will only enter into force upon the adoption of the ordinance referred to in article 97 of the LME, and at latest on 1<sup>st</sup> January 2009.

## **The draft ordinance**

The draft ordinance that was released before the summer is presently being adapted to the finalised LME and will contain a number of other provisions.

### **The Minister will have jurisdiction over micro-infringements**

First, the draft ordinance creates a new regime for micro-anticompetitive practices i.e. local infringements, by small businesses (turnover thresholds), unlikely to fall within the scope of article 81 and 82 of the EC Treaty. Where the Minister is aware of such micro-infringements, he can order the companies concerned to put an end to the infringement and propose a transaction (within the limit of 75 000 euros or 5 % turnover). Where no transaction is concluded, the Minister may refer the case to the Competition Authority.

At the time powers are transferred to the Authority, returning powers to the Minister rather comes as a surprise and might raise substantial issues : breach of equality between companies below/above the thresholds, impossibility of the Competition Authority to oppose a transaction, except between its signing and the payment of the amount negotiated, etc.

### Antitrust investigations

Concerning investigatory powers, the draft ordinance proposes to recognise the right of companies to be assisted by a counsel during inspections but, so far, this recognition does not make clear enough the assistance the counsel can provide (it is notably unclear whether he will be entitled to read the documents to be seized).

Following the Ravon decision<sup>(2)</sup> of the European Court of Human Rights, the draft ordinance also proposes to create an appeal for the challenge of heavy inspections. The progress is however here again limited as this appeal will replace the existing ability to refer any complaint relating to the implementation of the inspection to the judge having ordered the inspection, after it is carried out.

But the most controversial provision as far as inspections are concerned is the one allowing to regularize ex-post seizures of documents concerning other possible infringements than the ones covered by the judicial authorisation by returning before the judge, i.e. unlawful seizures according to French and EC case-law.

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Definitely a compromise text, the LME reveals a complex carving-out of competences between the Ministry services and the Competition Authority, from which the initial aim to liberate growth does not stand out so clearly now.

Such a construction is likely to create new opportunities for businesses, but it is all the more likely to raise difficulties in its application, with longer and more complex procedures, notably in merger control.



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(2) ECHR, 21 February 2008, Ravon e.a. c. France, Req n° 18497/03.

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