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# Key developments in merger control in 2023

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## Introduction

A review of the French Competition Authority's (FCA) merger control activity during the year 2023 sheds light on several notable trends.

The FCA has maintained a very high level of activity with a stable number of merger decisions compared to last year<sup>(1)</sup> and, looking across the piece, three trends stand out. First, the FCA has adopted several noteworthy decisions concerning conglomerate mergers. Second, it has indicated the need for vigilance with respect to mergers concerning the French overseas territories. Third, it has indicated its willingness to make use of mechanisms which allow for intervention even when French merger control jurisdictional thresholds are not met. This article investigates these three trends in more detail and draws out takeaways for 2024 cases.

## Increased activity in conglomerate mergers

The number of cases across 2023 in which the FCA conducted a thorough assessment of potential conglomerate effects arising in merger cases catches attention, as well as several of the specific cases in which this kind of analysis was carried out. Conglomerate effects may arise when a merger provides the new entity with an increased ability or incentive to leverage its market power on a given market to develop its position in a closely related or neighbouring market.

A noteworthy example was the acquisition of joint control of Cityscoot by RATP and Caisse des Dépôts et Consignations. RATP holds exclusive rights for the operation of metros, trams and buses in Paris and its inner suburbs. It also offers mobility-as-a-service applications, of CityScoot, an electric scooter-sharing service active mostly in Paris.<sup>(2)</sup>

In this case the FCA examined, inter alia, whether RATP could either bundle its public transportation services with the newly acquired scooter-sharing services in Paris or use the resources from its activities under exclusive rights to support the development of the newly acquired activities in markets open to competition. The FCA, however, ended up ruling out both risks after finding that RATP would not have any ability (or incentive in the case of bundling) to implement such foreclosure strategies, nor have any advantage (public transportation data, ability to offer preferential prices for scooter-sharing) that would not also be accessible to its competitors. Noting the absence of horizontal overlaps or credible risk of restrictive vertical effects, the FCA unconditionally cleared the transaction in Phase 1.

Similarly, the FCA cleared without conditions the acquisition by Electricité de France (EDF) of the sole control of General Electric's GE Steam Power division. EDF is the French incumbent energy operator and main energy producer and wholesaler in France. GE Steam Power division is a supplier of "conventional islands" and their turbo-alternator generators, which with nuclear islands, are the main components of nuclear power plants.<sup>(3)</sup>

Even though the FCA found that GE Steam Power is the sole credible supplier of very high-power turbo-alternator generators adapted to the EPR nuclear islands supplied by EDF and that the two products were closely related, it also noted that the choice of supplier of conventional islands occurs once the supplier of the nuclear island has already been chosen, and that there was already only one credible supplier before the transaction. It therefore concluded that the transaction was not capable of giving rise to any merger-specific conglomerate effects.

Another noteworthy example of a case this year which has considered conglomerate effects is the acquisition by La Française des Jeux, which holds exclusive rights for the operation of lottery and offline sports betting in France, of ZETurf, a provider of online sports and horserace betting services.<sup>(4)</sup>

Notwithstanding the limited horizontal overlap between the parties and their small combined market share in the competitive market for the provision of online sports betting services, the FCA concluded that potential conglomerate effects could not be excluded based on the finding that the relevant markets would be closely related. To obtain the FCA's approval, La Française des Jeux therefore had to give several commitments.

These cases show that the FCA enjoys wide discretion in determining both:

- whether some products or services belong to closely related markets (even in the absence of a large common customer base); and
- whether the merged entity may have an increased ability and incentive to adopt a foreclosure strategy.

Such an observation can be made with respect to whether the existence of laws and contracts prohibiting the use of non-replicable advantages is a sufficient guarantee against such risks, to what risks are to be considered specific to a merger (or may have pre-existed), and to how the evidence of the merging parties' past behaviour in these respects is considered.



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All these points highlight the need for businesses holding appreciable market positions and considering acquisitions where conglomerate effects might be raised to anticipate comprehensive assessments by the FCA beyond any horizontal overlap and vertical relationship, and, where necessary, to gather evidence to refute any potential concerns in advance.

### Tackling inflation in French overseas territories

The FCA has always paid specific attention to the French overseas territories, which are particularly exposed to economic challenges due to their specific characteristics and are facing issues typically related to insularity (eg, small size, vital importance of imports, high transportation costs, high market concentration, possible barriers to entry and materially higher prices), whilst the average consumer purchasing power is lower than in mainland France.

These issues have arguably become even more acute over the past few years against the global backdrop of rising inflation. The FCA has therefore made clear that one of its priorities is to combat concerns relating to inflation in the French overseas territories. In this context, merger control is seen as an efficient tool to restrain the effects of inflation in these territories. Even if this has not resulted so far in a surge of merger control cases concerning these territories this year, the FCA closely scrutinises transactions that could potentially have effects on these markets, especially when it comes to vertical mergers.

A notable illustration of this is the recent acquisition by the Mauritian IBL Group of sole control over Make Distribution, which operates four supermarkets on the island of La Réunion. Since IBL is active locally in the production and distribution of carbonated soda drinks and bottled spring water and is also an important producer of other alcoholic and non-alcoholic drinks, the FCA assessed whether the transaction could allow IBL to foreclose other supermarkets. The FCA however ultimately ruled out the prospect of any such effects and unconditionally cleared the transaction.<sup>(5)</sup>

Given the ongoing inflationary environment, the FCA is expected to remain particularly vigilant in the coming months to the potential effects of vertical mergers on the structure and functioning of local supply chains and their consequences on prices in overseas territories. The President of the FCA has recently indicated that the number of intermediaries in these markets is a "real problem" as it tends to increase costs, and in turn, impacts consumer purchasing power.<sup>(6)</sup> More generally, he has stressed that the overseas territories will remain a "transversal and geographical priority" of the FCA in 2024.<sup>(7)</sup>

It is worth recalling that some French overseas territories (French Polynesia and New Caledonia) have their own competition authorities. These authorities enforce a separate regime with specific merger control thresholds and are entirely dedicated to preserving competition, lowering barriers to entry, and easing pressure on prices in those territories. This specific mandate further reinforces the need for businesses already active or contemplating entry into those territories to take care to account for local specificities and sensitivities when preparing for such transactions.

### Increased attention to transactions below FCA's jurisdictional thresholds

During 2023, the FCA continued to make use of the referral mechanism under article 22 of the EU Merger Regulation (EUMR). This allows one or more Member States to request the EU Commission (Commission) to examine any merger that does not meet the thresholds under the EUMR, but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.<sup>(8)</sup> In 2020, the Commission clarified its interpretation of this, to encompass referrals to the Commission by NCAs of mergers which fall not only below the EU Commission's jurisdictional thresholds, but also below their own jurisdictional thresholds.

In August 2023, the FCA, alongside other competition authorities in the EU, decided to refer Qualcomm's acquisition of Autotalks to the Commission. It did so after its preliminary analysis suggested that the transaction could significantly affect competition throughout the EU, particularly in the sale of vehicle-to-everything (V2X) communication systems. This case marked the second time that the FCA has referred a case to the Commission under article 22 EUMR since its interpretation was revisited.<sup>(9)</sup>

In this case, the FCA considered that despite Autotalks only having limited turnover to date, like Qualcomm, it is already a world leader in a highly concentrated technology market with high barriers to entry and that the transaction might therefore lead to increased prices and have adverse effects on innovation.<sup>(10)</sup>

The FCA had been calling for several years for the adoption of a new tool allowing it to review transactions which fall below its jurisdictional thresholds, but which are likely to harm competition (so-called "killer acquisitions"). This revised interpretation of Article 22 EUMR provided the FCA with such a tool<sup>(11)</sup> and it has since then shown that it is not shy to use it. Indeed, whilst such referrals remain very rare compared to the number of transactions with possible effects in France, they show that the FCA also keeps a close eye on the mergers that are below its jurisdictional thresholds, even where their centre of gravity is not in France.

The FCA's attention to these 'below jurisdiction' mergers is expected to continue. The President of the FCA, Benoit Coeuré, expects article 22 to "be a powerful tool to fight against killer acquisitions, including by digital gatekeepers, in combination with [the Digital Markets Act]".<sup>(12)</sup> More recently, he stressed that the ruling issued in March 2023 by the EU Court of Justice in the *Towercast* case gave the FCA yet another tool, as he now considers it clear that the FCA can open an abuse of dominance investigation into acquisitions by companies that have not been looked at under merger control rules.<sup>(13)</sup>

### Comment

Considering the merger control landscape in 2023 across France, these highlighted trends emphasise, once again, the need for businesses contemplating acquisitions in France to plan carefully, prepare in advance relevant legal arguments and economic evidence and engage proactively with the FCA to obtain approval of their project in a timely manner. As the above examples show, the FCA has a whole raft of different angles at which it can consider restrictive effects of a merger: whilst horizontal overlaps usually remain the most problematic, vertical and now more conglomerate style effects have recently been more on the FCA's radar, which is also often directed towards transactions in the overseas territories as well as those below its jurisdictional thresholds.

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### Endnotes

(1) 238 decisions on 30 November 2023 vs 229 decisions at the same time last year, including in each case four conditional clearances.

(2) Decision 23-DCC-77 of 16 May 2023 on the acquisition of joint control of Cityscoot by RATP Capital Innovation and Caisse des Dépôts et Consignations.

(3) French Competition Authority, Decision 23-DCC-98 of 24 May 2023 on the acquisition of sole control of General Electric's GE Steam Power division by EDF.

(4) French Competition Authority, Decision 23-DCC-191 of 15 September 2023 on the acquisition of sole control of the ZEturf group by La Française des Jeux.

(5) French Competition Authority, Decision 23-DCC-137 of 30 June 2023 on the acquisition of sole control of Make Distribution by the IBL Group.

(6) Benoit Coeuré, Président of the French Competition Authority, Hearing before the Commission of Inquiry on the Cost of Life in the overseas, 24 March 2023.

(7) *Entretien avec Benoît Coeuré, Président de l'Autorité de la concurrence*, Option Finance / Option Droit & Affaires, November 2023.

(8) See paragraph 6 of the Commission's Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation.

(9) The FCA, "The European Commission opens a review of Illumina's acquisition of Grail under the procedure of article 22 of the 2004 Merger Regulation".

(10) The FCA, "The European Commission is initiating a review of Qualcomm's acquisition of Autotalks under Article 22 of the 2004 Merger Regulation".

(11) The FCA, "The Autorité welcomes the announcement by the European Commission, which will henceforth allow national competition authorities to refer sensitive merger transactions to it for examination, including when they are not subject to national merger control".

(12) Benoit Coeuré, 13 July 2022, on X (Twitter).

(13) *Entretien avec Benoît Coeuré, Président de l'Autorité de la concurrence*, Option Finance / Option Droit & Affaires, November 2023.