French Works Councils have a right of appeal against merger control decisions of the French Competition Authority

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The *Conseil d'État* (the French administrative supreme court) ruled on 9 March 2021 that the French Works Council (or Social and Economic Committee) (**CSE**) of a target company has standing to bring an action against the decision of the French Competition Authority (**Competition Authority**) authorizing a merger.

Merger control and employment law processes are traditionally largely independent from one another. The provision of information to, and consultation with the CSE are provided for by the labour law code, with specific sanctions in case of non-compliance; whereas the merger control filings to the Competition Authority are the subject of the commercial law code, with separate sanctions in case of non-compliance.

This new case law creates an opportunity for a CSE to challenge merger clearance decisions of the Competition Authority. In answering the following questions, we will examine the definite implications of this case law, and also some of the issues which require clarification.

On what basis did the *Conseil d'État* recognise a CSE's right to appeal a merger clearance decision of the Competition Authority?

French corporate law requires that a company must be represented by at least one individual or non-physical legal person, who will manage the company and be its legal representative. Depending on the form of the company, the main legal representative is the CEO/*Président* or President-General Manager or Manager/*Gérant*, expressly identified on the Extrait K-bis, the French official identification document for companies, and upon appointment is automatically a corporate officer (see our previous article on this subject available here). Under French labour law, in companies with at least 50 employees, the legal representative must arrange for the election of the CSE composed of employees elected by their peers. The CSE has an operating budget financed by the company and the legal representative to enable it to act (relevantly) before courts and tribunals to protect its own interests and prerogatives.

Labour law specifies many topics on which the CSE must be informed and/or consulted as a platform of discussion between the representatives of the company and the employees. Alongside recurring topics of information and consultation (such as the strategic orientations, the economic and financial situation of the company and the working conditions), the CSE must also be involved in one-time projects falling into its area of authority.

More precisely, the labour code (articles L.2312-8 and seq.) specifies that the CSE's "*mission is to ensure a collective expression from employees to allow that their interests are always*

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taken into account in decisions relating to the management, the economic and financial evolution of the company, the work organization (…)".

To perform its mission, in a French company with more than 50 employees, the CSE must (relevantly) be informed and consulted on M&A transactions contemplated by the legal representative of the company. The provision of information and consultation must be undertaken and finalized prior to any formal decision of the legal representatives in respect to the proposed M&A transaction.

The process starts with the remittance to the CSE of a clear, detailed and complete information note on the contemplated M&A transaction and its consequences on the company's employees. At the end of the consultation, the CSE is asked to give its opinion on the M&A project and its consequences for the employees represented by the CSE. The opinion of the CSE is non-binding and the legal representative can in any event decide to enter into the transaction.

A legal representative having to inform and consult with the CSE cannot conclude an agreement (e.g. by entering into a SPA, accepting a Put option or sending a firm binding offer) before having obtained the CSE's opinion, whether positive or negative.

When a company infringes these CSE's prerogatives, the CSE can bring an action before the *tribunal judiciaire*, through summary proceedings, to obtain an order to suspend the M&A transaction until labour code requirements have been met.

On the basis of the CSE's information and consultation prerogatives in M&A transactions, the *Conseil d'État* recognized for the first time the CSE's standing to challenge a merger clearance decision rendered in a context where the seller's CSE had not been properly informed and consulted prior to the signing of the deal and the filing before the Competition Authority.

In its decision, the *Conseil d'État* specified that recognition of the CSE's standing was also justified by the "*effects*" of the disputed clearance decision.

What can the "effects" of merger clearance decisions on the workers' situation within the merging companies be?

Generally speaking, mergers can have an effect on the level of employment within merging companies, for example by eliminating duplicated positions.

More specifically, when the Competition Authority conditions its clearance subject to the divestiture of parts of a company's business, remedies, the Authority will recommend that the divested business includes all personnel employed in that business in order to ensure the independent viability of the business and so, the effectiveness of the remedy.

The impact of mergers and merger clearance decisions on employment is recognized in France in the power granted to the French Minister of Economy by article L.430-7-1 of the French commercial code, under which the Minister of Economy can decide to overrule a Phase II decision of the Competition Authority based on public interest grounds, including the creation or maintenance of employment.

This power has been used only once since its adoption in 2008: in July 2018, the Minister decided to clear the acquisition by Cofigeo of Agripole's businesses, replacing the divestiture condition in the Competition Authority's decision by a commitment to maintain the employment within the group. In the Minister's view, complying with the divestiture condition would have led to significant job losses.

That being said, the relationship between the employment situation post-merger, on the one hand, and the clearance decision or even the merger itself, on the other hand, is not so obvious.

In a 1995 ruling, the EU General Court refused to grant employees' representatives standing to challenge a Commission merger clearance decision: in a detailed reasoning, the General Court indicated that, if the employees' representatives could be *individually* concerned by the Commission clearance decision, they were not *directly* concerned by such decision, as any layoffs and loss of employment benefits necessitated that autonomous measures be taken independently from the merger itself[1]. Interestingly, the General Court also specifically addressed the issue of the mandatory consultation process of the CSE on mergers and considered that the process is governed by applicable national legislation, and not by EU merger control[2].

In the present case, whilst giving the CSE standing to challenge a merger clearance decision, the *Conseil d'État* did not explain the relationship it sees between the clearance decision and its effects on the CSE's missions. It may be deduced from an interview of the President of the Competition Authority on the *Conseil d'État*'s decision that the outcome might have been different if the M&A transaction was not a merger but only a joint venture for example with less impact for the employees represented by the CSE.

What are the outcomes of the *Conseil d'État*'s decision?

The *Conseil d'État* seems to recognize a generic interest for a CSE to appeal merger clearance decisions of the Competition Authority, based on the CSE's information and consultation prerogatives in M&A transactions, **but not limited to such prerogatives**.

Accordingly, when the *Conseil d'État* rejected the CSE's annulment application based on an alleged violation by the Competition Authority of due process characterized by the failure of the Authority to consult the parties' competitors on the transaction, it did so on the basis that that argument was factually incorrect, not because of CSE's lack of standing.

This position of the *Conseil d'État* is at odds with previous case law that generally considered standing is confined to violations of the CSE's information and consultation prerogatives. By way of example, in another case it was decided that a CSE, when its own interests are not at stake (mainly its prior information and consultation prerogatives), has no standing to challenge the application of the automatic transfer of employment agreements in the context of a transfer

[1] EU General Court ruling, T-96/92, Comité central d'entreprise de la Société Générale des grandes sources et. al. vs Commission, 27 April 1995, paragraphs 38 to 46.
[2] *Ibid*, paragraph 39.

of business even when such transfer would negatively impact the CSE's members or operating budget.

On the main ground raised by the CSE, *i.e.* the failure for Competition Authority to verify that the requested consultation process had been complied with prior to issuing its clearance decision, the *Conseil d'État* confirmed, as did the EU General Court in its 1995 ruling, the independence of the two processes: the Competition Authority does not have to verify that the parties to the transaction have complied with the requirements of French labour law.

It should be emphasised that two specific features of the case may have influenced the *Conseil d'État*'s decision: (i) the clearance decision was subject to a divestiture condition that could have led to the transfer of employment contracts of the target company (the buyer could choose to divest one of two magazines, one on the buyer's side or one on the target's side); and (ii) a preceding ruling of a French court, rendered in a context of an injunction application which required the seller to specifically consult with its CSE prior to filing the merger clearance application with the Competition Authority. On this second point, the *Conseil d'État* rightly considered this injunction inoperative as the filing is the responsibility of the buyer, and not of the seller. The solution might have been different if it were the CSE on the buyer's side (taking for hypothesis a French buyer) that had requested such prior consultation.

What can be expected next?

The *Conseil d'État*'s decision opens up the possibility of litigation by CSEs of companies involved in an M&A transaction submitted to the Competition Authority on the validity of the Competition Authority's decision.

The enhanced standing of the CSE potentially opens the door to other challenges, for example to certain of the economic findings on which the Competition Authority's decision is based in view of the CSE's insight and knowledge of the businesses.

It would also be interesting to see in possible future decisions on this new topic, if the CSE's right to act is confirmed when its prerogatives of information and consultation have been respected prior to the merger filing. In such situation, what will be the "*effects*" of the Competition Authority's decisions authorising an action of the CSE?

Meanwhile, waiting for clarifications on these points, the case allows us as experienced antitrust and employment law practitioners to remind companies involved in M&A transactions in France of the importance of respecting the CSE's prerogatives (see our previous intervention on this subject available here).

From a practical point of view, this decision should be the occasion for companies involved in M&A transactions to provide more information to the CSE on the merger filing process and consequences, notably when remedies are proposed by the parties to the Competition Authority. An opinion given by the CSE on a detailed note of information including the antitrust aspects of the contemplated M&A transaction should avoid or reduce the risk of the CSE seeking to upset a merger clearance decision.

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Finally, the hereby commented decision from the *Conseil d'État* might inspire and incite French Unions to act against the Competition Authority's decisions. It is indeed interesting to note that Unions, contrary to the CSE, are provided with a wider right to standing by labour law code, against any decision, behaviour or breach harming the collective interests of their profession or individual members. No doubt Unions would be entitled to claim that the collective interests of their profession are harmed by some of the Competition Authority's decisions.

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