[FR] Bouygues Group takeover of Métropole Télévision: appeal against French Competition Authority's decision to investigate proposed merger rejected

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In a press release published on 17 May 2021, the TF1, Métropole Télévision, Bouygues and RTL Groups announced that they had begun exclusive negotiations with a view to merging the activities of TF1 and Métropole Télévision (M6 Group). Following the merger, Bouygues would own 30% of the new company while the RTL Group would hold 16%. Free, a company active in the audiovisual content distribution market, and Iliad, its parent company, asked the *Conseil d'Etat* (State Council) to annul the French Competition Authority's decision to investigate the proposed takeover of Métropole Télévision by the Bouygues Group on the grounds of misuse of powers. In particular, the Competition Authority had already sent both companies a questionnaire entitled "Market test – audiovisual content distributors" on 29 September 2021 and another entitled "Market test – advertisers" on 23 November 2021. In support of their requests, the applicants urged the *Conseil d'État* to ask the *Conseil constitutionnel* (Constitutional Council) to examine whether the provisions of Articles L. 450-8 and L. 464-2(V) of the French Commercial Code conformed with the rights and freedoms guaranteed by the Constitution.

According to the first paragraph of Article L. 430-3 of the Commercial Code, "A merger must be notified to the Competition Authority before it is completed. It may be notified as soon as the party or parties concerned can present a sufficiently detailed plan to enable the proposal to be examined, especially if they have signed an agreement in principle or a letter of intent, or announced the takeover bid."

Before such a merger is notified, points 191 to 200 of the Competition Authority's merger control guidelines define a "pre-notification" phase that can be triggered at the initiative of parties "who wish to present their proposed merger to the mergers authority, especially if there are uncertainties about its verifiability or in anticipation of discussions on market definitions or a complex competitive assessment" or "if the notifying party is planning to refer the matter to the Commission". According to point 200 of the guidelines: "The whole of the pre-notification phase is strictly confidential: it is not published on the Competition Authority website or discussed with third parties. However, subject to the prior consent of the notifying party, a market consultation (market test) may be carried

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out in order to gather more precise information before the merger is notified and thus help to reduce the risk of the notification being incomplete or pre-empt any competition issues."

Therefore, as the *Conseil d'Etat* notes, the Competition Authority's decision to open such a pre-notification phase at the request of the parties to a proposed merger that might subsequently be notified to it in accordance with Article L. 430-3 of the Commercial Code forms part of the procedure and may result in the Competition Authority giving its opinion on the proposal. It is therefore nothing more than a preparatory phase and consequently cannot be the subject of an appeal based on misuse of powers, even though during this phase the officials responsible for investigating a merger can ask third parties to submit information or documents, subject to the sanctions laid down in Articles L. 450-8 and L. 464-2(V) of the Commercial Code.

Conseil d'État, 1er mars 2022, N° 458272, Stés Free et Iliad

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-03-01/458272

State Council, 1 March 2022, no. 458272, Free and Iliad

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