

France fines a below threshold merger for the first time as an anti-competitive agreement

23 October 2026



On 22 October 2026, the French Competition Authority (the FCA) fined the parties to a completed acquisition for infringing the French prohibition against anti-competitive agreements, despite the acquisition not meeting any relevant merger control notification thresholds. This is the first time a competition authority has sanctioned a merger that did not require a mandatory merger control notification on such grounds.

Any businesses operating in concentrated or monopolistic local markets should now treat every acquisition as carrying residual antitrust risk even where it falls well below notification thresholds, and should build that risk into deal planning, diligence and transaction documentation, because, in the words of the FCA's President, Benoît Cœuré, "*being under the thresholds does not confer immunity*".

Key issues

- 1 France issues its first fine on a below threshold M&A deal for constituting an anti-competitive agreement
- 2 Below threshold mergers are not immune to post-completion antitrust scrutiny
- 3 Business operating in concentrated markets should factor in this risk into deal planning, diligence and transaction documentation

A first: a merger sanctioned as an anti-competitive agreement

The decision concerns the market for the treatment, collection and transport of infectious clinical waste on the Réunion Island. Until 2020, two competitors shared that market: Point Net, which held around 80% of the treatment segment, and Ecolys, which held the remaining 20%. In November 2019, the Nicollin group, Point Net's parent, signed an agreement to sell the whole of Point Net to Drapkoc, Ecolys's parent; the transaction completed in 2020 and the two businesses were subsequently merged into a single entity, Ecostrill.

Because the deal fell below both the French and EU merger notification thresholds, it was never examined, *ex ante*, by any competition authority. Seven years on, the FCA found that the transaction should nonetheless be sanctioned as an anticompetitive agreement under Article L. 420-1 of the Commercial Code and Article 101 TFEU. The FCA reasoned that, once a transaction falls outside the scope of merger control because it does not meet the applicable thresholds, there is no conflict between the *ex ante* merger control regime and the *ex post* prohibitions on anticompetitive agreements and abuses of dominance in Articles L. 420-1 and L. 420-2 of the Commercial Code – so whichever of those prohibitions fits the facts can be applied.

Having established that an "agreement" existed (the sale-and-purchase agreement itself), the FCA then assessed its competitive effects and found that the transaction had eliminated all competition, creating a lasting monopoly reinforced by significant regulatory barriers to entry (administrative authorisation, access to waste storage facilities, traceability requirements) and by the Réunion's island geography, which rules out alternative treatment methods or exports. It also found at least potential anticompetitive effects, of a vertical nature, on the related collection and transport market, where the merged entity's integrated position left independent collectors with no alternative treatment outlet and therefore in a position of dependency.

The FCA fined both the buyer and the seller €1 each – a symbolic amount explained by this being the first-ever sanction under Article L. 420-1 applied to a concentration.

Arguably, a fine of that size gives the sanctioned parties little or no economic incentive to incur the cost of an appeal to the Paris Court of Appeal. If neither party appeals, the finding that the transaction constituted an unlawful agreement under Article L. 420-1 (and, by extension, Article 101 TFEU) will become final and binding, with no appellate court ever having tested the FCA's application of merger control analytical tools to an agreement-based theory of harm, or its characterisation of a sale-and-purchase agreement as "direct and sufficient proof" of a cartel.

The *Towercast* litigation itself illustrates how significant that loss of appellate scrutiny can be: nearly ten years after the underlying TDF/Itas Tim transaction, and more than three years after the Court of Justice's

preliminary ruling, the French Cour de cassation's judgment of 23 September 2026 sent the case back to a lower court for further economic and legal analysis, precisely because the application of the *Towercast* test to the facts raises difficult questions that only sustained adversarial litigation can resolve. A symbolic fine short-circuits that process.

One may also wonder why the FCA did not apply the Towercast/Article 102 framework it had already used, one year earlier, in its *Doctolib* case. In *Doctolib*, the FCA sanctioned Doctolib for abusing its dominant position by acquiring its rival MonDocteur and issued its first fine of a below threshold merger under Article 102 TFEU and Article L. 420-2 of the French Commercial Code. The answer lies in the relative market shares of the parties. Point Net, the target, held around 80% of the market before the deal; Drapkoc, the acquirer (parent of Ecolys, which held the remaining 20%), was the smaller of the two. Towercast's test requires the authority to show that the acquirer was already dominant before the transaction and that the deal reinforced that pre-existing dominance to the point of substantially impeding competition – the paradigm being a dominant incumbent absorbing a smaller rival, as in Towercast itself (TDF/Itas Tim) and in Doctolib (Doctolib/MonDocteur). Here the dominant party was being bought. Therefore, Drapkoc could not be said to have abused a dominant position it did not hold at signing. Article 101/L. 420-1 provided an alternative route precisely because it does not require either party to be dominant beforehand – only an agreement that restricts competition – allowing the FCA to reach the resulting monopoly regardless of which side of the transaction was the larger player. The practical lesson is that "who is buying whom" is no longer a relevant question to assess the antitrust risk: an acquisition by a company with a low share that eliminates competition is just as exposed, only under a different legal heading.

What this means for M&A transactions going forward

A transaction below EU and national merger notification thresholds was long thought immune from subsequent antitrust scrutiny: merger control was seen as a self-contained, *ex ante* regime. Turnover-based notification thresholds precisely aimed to give dealmakers predictability: the ability, in the Court of Justice's own words in *Illumina/Grail*, to "easily and quickly identify to which authority they must turn, and within what time limit and in what form". That assumption has been dismantled in stages over the past three years.

The practical consequence is that companies can no longer rely on a mechanical check of thresholds to conclude that a transaction carries no competition law risk. *Towercast* and this Réunion decision together mean that a transaction between undertakings active in a concentrated market can be challenged on antitrust grounds if it eliminates or significantly reduces competition. This is a materially lower bar than the "killer acquisition" scenario that originally motivated the European Commission's Article 22 policy and the FCA's own 2017 work on the topic: a killer-acquisition theory typically requires showing that an incumbent eliminates a nascent competitive threat; the Réunion decision shows that a straightforward horizontal consolidation between two existing competitors

is enough, without any need to show "predatory intent" the FCA found (and emphasised) in Doctolib.

For businesses, this means that a dedicated, documented substantive competition analysis – covering market definition, market shares, barriers to entry, the existence (or elimination) of alternative suppliers or outlets, and the counterfactual state of competition absent the transaction – is now prudent for any acquisition of a competitor in a concentrated market, regardless of whether a merger control filing is required.

This evolving risk should also be reflected in how transaction documentation is drafted, particularly for acquisitions of competitors in concentrated sectors that fall outside mandatory merger control filing requirements. Points to consider include:

- Representations and warranties on competition risk: sellers are increasingly likely to be asked to warrant not only that no mandatory merger filing is required, but that the parties have conducted and documented a substantive competition assessment, and that nothing in that assessment identifies a material risk of an *ex post* Article 101/102 TFEU or Article L. 420-1/L. 420-2 challenge.
- Conditionality and walk-away rights: in borderline cases, buyers may wish to build in a right to delay or walk away from closing (or a right to require remedial undertakings) if, between signing and closing, the FCA or another competition authority signals interest in the transaction – mirroring, on a voluntary basis, the gun-jumping-style standstill that applies to notifiable deals.
- Indemnities and price adjustment mechanisms: specific indemnities, earn-out adjustments or other arrangements addressing the cost of a future *ex post* competition investigation – including potential fines, legal costs, and the cost of any later-ordered remedial or structural measures – are likely to become a more routine feature of SPAs for transactions in concentrated markets, even absent any merger filing obligation.

Businesses are left to navigate a landscape in which the absence of a filing obligation provides comfort only against *ex ante* procedural risk, not against a later, open-ended substantive challenge that can materialize years after closing. Unless and until the FCA's proposed call-in power is adopted and brought into force, that structural uncertainty is likely to persist, and should be factored into the risk pricing, timeline and documentation of every acquisition of a competitor in a concentrated market, however small the transaction.



Clémence Carlier

Counsel, Paris

Email: clemence.carlier@cliffordchance.com
Mobile: +33633817223

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

cliffordchance.com

Clifford Chance, 1 rue d'Astorg, CS 60058, 75377 Paris Cedex 08, France

© Clifford Chance 2026

Clifford Chance Europe LLP est un cabinet de sollicitors inscrit au barreau de Paris en application de la directive 98/5/CE, et un limited liability partnership enregistré en Angleterre et au pays de Galles sous le numéro OC312404, dont l'adresse du siège social est 10 Upper Bank Street, London, E14 5JJ.

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest** • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague** • Riyadh* • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, DC

*AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

**Clifford Chance has entered into association agreements with Clifford Chance Prague Association SRO in Prague and Clifford Chance Badea SPRL in Bucharest.



David Tayar

Partner, Paris

Email: david.tayar@cliffordchance.com
Mobile: +33619897809