

Impact of Antitrust Law on the Purchase of an Insolvent Company

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Where two companies intending to merge control more than 25% of the relevant market (or have a turnover of over €1,067,143), the concentration will be considered illegal under French antitrust law. This rule has the potential to impact upon the purchase of an insolvent company.

Where a failing company is to be taken over by a new owner as part of the insolvency procedure, the acquirer will be either (i) a new investor wishing to enter the particular market, or (ii) an experienced player with an understanding of how the market works.

In the latter instance, if the acquisition is approved by the bankruptcy court on the grounds of the price offered, the number of jobs saved and the economic prospects, there is still a risk that the acquisition may result in the creation of a dominant position, or even a monopoly. Thus, while the acquisition will save the company and its employees, it may have the effect of eliminating competition in the market.

So how is it possible to determine whether such an acquisition could be interpreted as abuse of a dominant position? The French and European authorities have established a theory on this point. The acquisition of an insolvent company will not be considered to create or strengthen a dominant position if the acquiring company can prove that it alone is in a position to assume the insolvent company's market share.

However, if the acquisition will increase the healthy company's turnover to more than €150 million, the minister of the economy must also give his prior consent to the deal. A constitutional problem thus arises. For procedural reasons, the minister's consent must be obtained after the bankruptcy court has already agreed to the acquisition as part of the insolvency procedure. In this way the executive power can interfere in the judicial process if it does not agree with it and use its influence to change a judgment.