

## FAQs on concentration control

### What is a concentration operation?

It is:

- either an operation by which two or more previously independent companies merge;
- or an operation by which one or more persons, already holding control of a company, or one or more companies, acquire, directly or indirectly, whether by taking a stake in the capital or by purchasing elements of assets, by contract or by any other means, the control of all or parts of one or more other companies (article LP 310-1 I of the Competition Code).

An operation consisting in the creation of a joint venture performing in a sustainable manner all the functions of an autonomous economic entity is a concentration (article LP 310-1 II of the Competition Code).

### What are the guidelines for?

The guidelines summarize how the Authority applies the procedural rules on concentration control. They aim to provide transparency, by giving an overview of how this happens in practice with regard to the scope and procedure. They therefore constitute a user guide intended for companies, which will find details on the applicable procedure and on the types of decisions likely to be made at the end of the procedure.

This guide may be modified or supplemented to take into account the decision-making practice of the Authority and/or any evolution of legal texts.

### When must a concentration operation be notified to the Polynesian Competition Authority?

According to article LP 310-2 of the Competition Code, a concentration operation must be notified to the Polynesian Competition Authority as soon as the total turnover excluding tax, generated in French Polynesia, of all parties (companies or groups of persons who are parties) is greater than XPF 2 billion and that the total turnover excluding tax generated individually, in French Polynesia, by at least two of the companies concerned, is greater than XPF 500 million.

These thresholds are lowered to XPF 1.5 billion for all parties and XPF 200 million for one of the parties taken individually when at least two of the parties operate one or more retail stores with a predominantly food supply.

These figures include the amounts resulting from the sale of products and the provision of services carried out by the parties during the last financial year and corresponding to their ordinary activities, net of reductions on sales as well as VAT and other taxes directly related to turnover (article 101-02 of the Authority's internal regulations).

The concentration operation must be notified before it is carried out (article 310-3 of the Competition Code). This notification can take place when the party or parties concerned are able to present a sufficiently successful project to allow the file to be examined (after the conclusion of an agreement in principle, the signing of a letter of intent or announcement of a public offer). The assessment of the sufficiently successful nature of a project is done on a case-by-case basis.

#### Who is responsible for the notification of the concentration operation to the PCA?

The obligation to notify the concentration is incumbent on natural or legal persons who acquire control of all or part of a company. The target is not responsible for the notification.

In the event of a merger or the creation of a joint venture, this obligation weighs on all the parties concerned who must then notify jointly (article 310-3 of the Competition Code).

#### Is it possible to make a pre-notification?

A pre-notification of the case is not compulsory. However, it is essential to limit the risk of incompleteness of the notification. This informal phase allows companies and the Authority to discuss the controllable nature of the operation, the specificities of the markets concerned or possible competition problems. It allows companies to be warned if information related to market definition and market shares needs to be completed.

It is therefore strongly recommended that the parties and their counsel contact the Investigation Department as early as possible.

This phase is strictly confidential and does not give rise to any publicity or contact with third parties, unless the parties agree.

#### What are the consequences if a concentration operation is not notified to the PCA?

If a concentration has been carried out without being notified, the Polynesian Competition Authority may impose, on the party (or parties) on which the notification obligation falls, a financial penalty which may amount to up to 5% of the turnover generated in French Polynesia for legal entities and up to XPF 20 million for natural persons.

The Authority may also order the parties to notify the transaction under penalty, unless they return to the state prior to the concentration (article LP 310-8 I of the Competition Code).

#### What are the consequences of an omission or an incorrect declaration in the notification of a concentration to the PCA?

Article LP 310-8 III of the Competition Code provides that the Polynesian Competition Authority may impose on persons having made an inaccurate or incomplete notification a

financial penalty of up to 5% of the turnover of the business generated in French Polynesia for legal persons and up to XPF 20 million for natural persons, which may be accompanied by the withdrawal of the decision to authorize the operation, if the latter has already been completed.

To determine the amount of the fine, the Authority takes into account, in particular, the circumstances which led to the omission or the incorrect declaration as well as the behaviour of the companies in question vis-à-vis the Authority.

The implementation of this penalty mechanism is carried out under an adversarial procedure.

#### When can a concentration operation take place?

The concentration operation can only be carried out if the decision of the Polynesian Competition Authority authorizes it (article LP 310-4 of the Competition Code). The parties must wait for this decision to be issued before carrying out their transaction.

Only a dispensation from the Polynesian Competition Authority, obtained in application of paragraph 2 of article LP 310-4 of the Competition Code, can allow the parties, in the event of a duly justified particular need, to carry out any or part of their project before the decision is issued.

#### Can the notification of a concentration be withdrawn?

At any time during the procedure, the notifying parties can withdraw the notification by sending any document attesting to the abandonment of the project.

#### What is the regime applicable to the treatment of business secrecy in terms of concentration control and the control of retail space?

A special regime exists for the control of concentration operations and for the control of retail space.

- During the investigation

Persons providing information to the Polynesian Competition Authority must specify which information constitutes trade secrets. The General Rapporteur ensures that their information is transmitted to the Authority and that the Investigation Department produces non-confidential versions if these elements must be forwarded, for example to third parties or to the parties who have notified the concentration operation or the opening (or modification) of retail spaces.

- Publication of decisions

The parties who have notified the concentration operation have a period of 15 calendar days from the date of receipt of the decision to notify the Authority of the information relating to

business secrecy. The company must justify the merits of its request and submit a proposal for a public version of the decision.

The Polynesian Competition Authority is not bound by secrecy requests. When the requests are not accepted in their entirety, the Authority sends an amended version of the decision, before its publication, so that the parties can make their observations. However, in the end, it is the Competition Authority that decides.