Mergers below the control thresholds : Following the public consultation, the Autorité is continuing its work to propose a reform ensuring effective control

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Following the public consultation on the modalities for introducing a merger control framework for addressing below-threshold mergers likely to harm competition, the *Autorité de la concurrence* is continuing its work to propose a balanced reform that will ensure effective control and sufficient legal certainty for companies

Background of the concerns raised by below-threshold mergers

As part of the work carried out since 2017, the *Autorité de la concurrence ("The Autorité")* observed the existence of transactions involving companies that play or are likely to play a significant competitive role in the relevant markets, but which escape its merger control due to the target's low turnover at the time of the proposed transaction. The *Illumina/Grail* ruling of 3 September 2024 by the Court of Justice of the European Union (CJEU) limited the scope of Article 22 of the EU Merger Regulation thus calling into question the mechanism that would enable control of such transactions in France. The CJEU has specifically invited the EU legislator and Member States to intervene where the current thresholds do not allow the *Autorité* to control certain transactions likely to have a significant impact on competition.

Against this backdrop, on 14 January 2025, the *Autorité* opened a public consultation to inform its thinking on possible changes to the legal framework for controlling mergers below the current notification thresholds.

Two options that would complement the existing legal framework were submitted for public consultation: a targeted call-in power by the *Autorité*, based on quantitative and qualitative criteria, similar to frameworks already in place in ten Member States of the European Economic Area (EEA)(Option 1) or a new mandatory notification criterion for certain companies identified through previous decisions as holding a degree of market power (Option 2). Further, the Autorité noted that certain below-threshold mergers could be qualified as anticompetitive practices (anticompetitive agreements and abuse of dominant position).

The main contributions of the public consultation on the two options that would require changes to the applicable legal framework

First of all, the *Autorité* welcomes the large number and quality of the contributions received, since 26 stakeholders - law firms, companies, academics, professional entities, consumer associations and non-governmental organisations - responded to its consultation, almost twice as many as in the previous public consultation in 2018. The contributions received reflect French, European and American perspectives.

Regardless of the contemplated option, the contributors emphasised the need to strike a balance between, on the one hand, the effective control by the *Autorité* of only those transactions that are potentially harmful to competition on the French territory and, on the other hand, sufficient legal certainty and predictability for companies in all sectors, with greater concerns having been expressed in certain innovative sectors.

Firstly, the *Autorité* takes note of the strong criticism voiced against Option 2. The implementation of this framework, in each of the three branches that have been envisaged (reference to previous decisions adopted in merger control, anticompetitive practices or based on the EU Digital Markets Act, "DMA") would raise several legal questions and, in the case of its third branch, difficulties of interaction with the aforementioned regulation. Further, the framework could lead to the review of non-problematic transactions, which would increase the burden on both companies and on the *Autorité*, while certain transactions that deserve scrutiny could, conversely, escape control.

Secondly, the *Autorité* notes that the option of it having the power to call-in a transaction based on quantitative and qualitative criteria (Option 1) is better received, even if respondents call for further specifying the criteria and how the framework would be implemented. The main advantage of a call-in power is that it allows the Autorité to only review potentially harmful transactions that do not meet the notification thresholds, thus avoiding the notification of unproblematic transactions and offering the *Autorité* the flexibility to act when necessary. However, the *Autorité* is paying particular attention to the concerns expressed by several respondents regarding the potential risks of legal uncertainty and the possible financial and administrative consequences of such a mechanism, especially for SMEs and start-ups, and will ensure that these are taken into account in its reflections.

With regard to the application of anticompetitive practice provisions to concentrations after they have been implemented, the majority of respondents indicated that this should remain the exception, for both legal and operational reasons. In any case, this option does not require any legislative change.

The *Autorité* is continuing its work to propose a balanced reform that ensures effective control and sufficient legal certainty for companies

Taking into account the main contributions of the public consultation and the experience from ten Member States of the EEA which apply similar provisions, the *Autorité* is continuing its work to introduce a call-in power based on clear criteria for companies and their advisors, including:

- a turnover threshold that can be easily assessed by the companies concerned;
- a nexus to the French territory, to prevent mergers that would have no impact on the French territory from falling within the scope of the framework;
- a criterion for identifying a risk to competition on the French territory;
- time limits for implementing the call-in power, which are clearly defined and short enough to ensure the predictability required by companies.

Should such a mechanism be adopted, the *Autorité* also undertakes to publish guidelines specifying the practical details of its implementation, such as the conditions under which a concentration would be likely to raise competition issues that justify the use of the *Autorité*'s call-in power.

In the coming months, the *Autorité* will define the outlines of this new framework, to ensure that it enables effective control of potentially problematic transactions that do not exceed the current notification thresholds, and that it responds to the main concerns expressed by stakeholders in the public consultation. The Autorité aims at submitting a proposal to French public authorities in the course of 2025.

All the responses to the public consultation are available on the *Autorité*'s website.

Responses to the public consultation
(in french)

Visit the public consultations page (in french)

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