Public consultation on the introduction of a merger control framework for addressing below-threshold mergers

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The *Autorité de la concurrence* opens a public consultation until 16 February 2025 on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition

Background

Noting the consequences of the Illumina/Grail judgement of the Court of Justice of the European Union (CJEU) of 3 September 2024, the *Autorité de la concurrence* undertook to identify the existing or necessary tools to ensure that no merger, including those that are not subject to prior notification, would harm competition on the French territory.

As part of this process, the *Autorité* is opening this public consultation to gather stakeholders' observations until 16 February 2025.

2017 and 2018 public consultations

As part of the work undertaken since 2017 on modernising and simplifying French merger control, the *Autorité de la concurrence* has submitted to public consultation several potential approaches that would give the *Autorité* the power to examine mergers likely to raise competition concerns and falling outside the scope of the current merger control framework. For several years, the *Autorité* has observed a steady increase in the number of mergers involving companies that play or are likely to play a key competitive role in the markets concerned but escaping control due to the low turnover generated by the target at the time of the merger.

Following a first public consultation in October 2017, the *Autorité* considered that Article 22 of the EU Merger Regulation offered a practical solution within the existing legal framework. Under Article 22, a national competition authority can ask the European Commission to examine a merger that does not exceed European notification thresholds but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. The *Autorité* also considered that the introduction into French law of a targeted system for addressing mergers falling below notification thresholds should be explored, and launched a second specific consultation on this question in June 2018.

Other options were ruled out, notably the introduction of a threshold based on transaction value (as in Germany and Austria) or the reintroduction of a threshold based on market shares.

In September 2020, the European Commission announced a change in approach, with national competition authorities being encouraged to refer transactions meeting the conditions of Article 22 of the EU Merger Regulation to the Commission for review, including where such transactions fall below national notification thresholds.

Illumina/Grail judgement of 3 September 2024

In its Illumina/Grail judgement of 3 September 2024, the Court of Justice of the European Union (CJEU) clarified the framework for referrals under Article 22 of transactions falling below national notification thresholds, indicating that the Commission could accept such referral requests only in cases where the national competition authorities themselves have competence under their national law. In the event that the thresholds in force do not allow for the competition authorities to examine certain transactions likely to have a significant impact on competition, the CJEU also called for the legislature to take action.

Noting the consequences of this ruling, the *Autorité* undertook to identify the existing or necessary tools to ensure that no merger, including those that are not subject to prior notification, would harm competition on the French territory.

This public consultation is part of this process.

In order to balance the importance of legal certainty for companies and the need for an effective merger control system to prevent harm to competition, the *Autorité* is submitting for public consultation two options that would complement the existing legal framework:

- the creation of a targeted call-in power by the *Autorité*, based on quantitative and qualitative criteria (Option 1). Similar systems are already in place in ten Member States of the European Economic Area (EEA) and in several countries outside the EEA;
- the introduction of a new mandatory notification criterion for certain companies holding a degree of market power, for example a dominant position or designation as a gatekeeper, as established by a decision of the European Commission or the *Autorité* (Option 2), which is inspired by a system already in place in Switzerland.

In addition, the *Autorité* is proposing a third option that would limit the scope of its action in respect of mergers falling below national notification thresholds to

the enforcement of provisions on anticompetitive practices (anticompetitive agreements and abuse of dominant position).

Public consultation open until 16 February 2025

Stakeholders are invited to submit their observations on each of these three options, which are described in more detail in the document submitted for public consultation, until **16 February 2025**, to the following address: consultation.concentrations@autoritedelaconcurrence.fr

The observations may be made public by the *Autorité*.

Public consultation
See the document

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