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

CCIA Europe response

February 2024

The Computer & Communications Industry Association (CCIA Europe) welcomes the public consultation run by the French Competition Authority (FCA) on the introduction of a merger control framework for addressing below-threshold mergers.

CCIA Europe supports a merger control framework that ensures both effective competition enforcement and legal certainty. As competition authorities reassess their approach to below-threshold transactions following the Illumina/GRAIL ruling,[1] maintaining predictability in merger control is crucial. While we recognize the FCA's objectives, we believe that any new framework must balance enforcement powers with the fundamental principles of legal certainty, respect European legislations already in place, and avoid duplicating provisions. In response to this consultation, CCIA Europe thus offers the following recommendations:

1. Maintain the *status quo* under option 3 of the public consultation
2. Dismiss option 2: the suggestion contradicts existing EU law and results in duplicative effects
3. Provide additional safeguards to option 1, should it be selected

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I. Maintain the *status quo* under option 3 of the public consultation

As provided in the public consultation,[2] option 3 foresees the "limitation of the scope of action of the FCA to the enforcement of provisions on anti-competitive practices after the implementation of the merger concerned" (Option 3).

Of the three options presented, CCIA Europe supports Option 3 as the most appropriate approach for addressing below-threshold mergers. We indeed believe the FCA already has the necessary tools to investigate potentially anticompetitive transactions under Articles 101 and 102 TFEU and their French counterparts.

Moreover, Option 3 has the key advantage that it preserves legal certainty while providing the FCA with substantial enforcement powers. Companies can move forward with transactions that meet established jurisdictional thresholds with certainty, while the FCA retains the authority to investigate and address genuine competitive concerns as they arise. To enhance the effectiveness of this approach, we recommend that the FCA issue guidelines clarifying its enforcement priorities and establishing a voluntary consultation process for companies seeking early clarity on potential interventions.

[1] Case 611/22 P - Illumina v Commission, Judgment - 03/09/2024, available here.
[2] Autorité de la concurrence, "Public consultation on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition", available here.

II. Dismiss option 2: the suggestion contradicts existing EU law and results in duplicative effects

As provided in the public consultation,[3] option 2 foresees "a new mandatory notification threshold based on the existence of a prior decision of the Autorité or the European Commission (i) to prohibit or clear a merger subject to commitments or (ii) to impose a fine or accepting commitments in the event of anticompetitive practices on the basis of Article 102 TFEU or Article L. 420-2 of the French Commercial Code or (iii) when one of the parties to the merger has been designated as a gatekeeper by the European Commission under the Digital Markets Act (DMA)" (Option 2).

The proposal to impose special notification requirements on the companies designated as gatekeepers under the Digital Markets Act (DMA), would conflict with EU law, duplicate existing obligations under the DMA, and risk significant damage to France's reputation as a balanced voice in digital regulation.

Indeed, Option 2 directly conflicts with Article 1(5) of the DMA,[4] which explicitly prohibits Member States from imposing additional obligations on gatekeepers based solely on their DMA designation. Furthermore, the proposal would lead to unnecessary duplication of existing DMA requirements. Article 14 of the DMA already establishes a reporting mechanism for gatekeeper acquisitions, ensuring that relevant information is shared with national authorities. Introducing a parallel notification system at the national level would create excessive administrative burdens without clear benefits, ultimately undermining the efficiency objectives of both the DMA and national merger control frameworks.

Given the serious legal concerns outlined above, particularly the direct conflict with Article 1(5) of the DMA, Option 2 would likely face legal challenges in both French and European courts. Such proceedings would create prolonged uncertainty for businesses and the FCA, weakening the predictability that effective merger control requires. This legal uncertainty would not serve any stakeholder's interests and could hinder the establishment of clear, workable standards for reviewing below-threshold transactions.

The proposal's lack of clear territorial link requirements is also highly concerning, as it could mandate the notification of transactions with little or no connection to France, exceeding the FCA's legitimate authority. This overreach is particularly problematic in the digital sector, where many services operate across borders. It risks diverting FCA resources to global transactions with minimal relevance to the French market, creating unnecessary barriers to commerce. Additionally, Option 2 introduces discriminatory treatment by subjecting transactions to different standards based solely on the acquirer's identity. This asymmetric approach undermines the principle of equal treatment and could distort competition by placing disproportionate burdens on certain companies.

[3] Autorité de la concurrence, "Public consultation on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition", available here.
[4] Article 1(5) of Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act), available here.

CCIA Europe strongly suggests the FCA to dismiss Option 2 and instead adopt an approach that upholds fairness and equal treatment for all businesses. Merger control should be enforced through non-discriminatory mechanisms that comply with EU law and international standards. Imposing additional obligations based on DMA designation would not only fail to meet the FCA's policy goals but could also undermine France's standing as a balanced and forward-thinking regulator in digital markets, deterring investment and stifling innovation in the country's digital economy.

III. Provide additional safeguards to option 1, should it be selected

As provided in the public consultation,[5] option 1 foresees "a call-in power for the Autorité based on quantitative and qualitative criteria" (Option 1).

CCIA Europe notes that while call-in powers of national competition authorities are already foreseen in other European jurisdictions, they come with more checks and balances. On the other hand, the proposed call-in power of Option 1 does not have enough safeguards, and raises concerns about legal certainty and predictability. Hence, should the FCA proceed with this approach, CCIA Europe believes that several key safeguards would have to be included:

1. Objective criteria with a clear territorial link: the call-in power should be based on well-defined criteria, ensuring a strong territorial link by connecting thresholds to each party's turnover in France rather than cumulative turnover. This would prevent undue risk for companies with significant French operations.
2. Strict deadlines for intervention: FCA's authority to review transactions should be subject to clear deadlines.
3. Transparent and efficient voluntary consultation: the FCA should implement a clear consultation process with defined information requirements and response timelines, enabling companies to seek early clarity and minimising unnecessary delays.

By incorporating these safeguards, Option 1 could strike a better balance between effective merger control and maintaining a predictable regulatory environment.

Conclusion

As digital markets evolve, it is crucial to strike a balance between effective merger control and preserving France's appeal as a hub for investment and innovation. The FCA's approach to below-threshold mergers will play a key role in shaping these objectives.

In this context, CCIA Europe supports Option 3 as the most balanced and legally sound framework, equipping the FCA with adequate tools to address competitive concerns while

[5] Autorité de la concurrence, "Public consultation on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition", available here.

ensuring legal certainty. If Option 3 is not adopted, Option 1 could serve as a viable alternative, provided it includes the necessary safeguards outlined above. In any case, we believe that Option 2 should be dismissed, as it would lead to legal conflicts, duplicative regulatory burdens, and unnecessary court proceedings.

We commend the FCA's initiative to consult on this fundamental issue, and suggest the authority to prioritize legal certainty, predictability, and non-discrimination in its final decision. These principles are not just procedural necessities—but quintessential to fostering a competitive and innovative European digital economy.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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