Digital Merger Watch Submission to the French Competition Authority on the introduction of a merger control framework for addressing below-threshold mergers

Introduction

Digital Merger Watch welcomes the opportunity to contribute to The Autorité de la Concurrence's public consultation on the introduction of a merger control framework for addressing below-threshold mergers. Digital Merger Watch is a global network of civil society and research organisations with the objective to prevent potentially harmful mergers in digital markets. Therefore we find it particularly important to address the enforcement gap created following the *Illumina/Grail*[1] decision by the Court of Justice of the EU (CJEU) and to ensure that potentially harmful small national or European mergers do not avoid examination.

We support option 1 in the consultation document as the most effective and comprehensive means to capture below threshold mergers likely to raise competition concerns. Without an updated merger control regime to examine acquisitions that do not meet current turnover thresholds but risk negative consequences for consumers and companies in France, the *Illumina/Grail* decision could lead to far-reaching negative consequences for the economies of both France and Europe; without it there is no possibility to investigate the consequences of this type of acquisition and prevent the entrenchment of market power. This threatens to erode the innovative capabilities of companies across the continent, diminish the potential for market diversification in Europe, and pose a serious risk to the foundations of European democracy.

Current gaps in merger review

The CJEU's *Illumina/Grail* decision highlights the pressing need for a recalibration of merger control for merger regimes that rely on ex ante mandatory notification thresholds, such as those in France and the EU. The legal constraints of this system were highlighted by the OECD back in 2016: "…*clear and objective notification thresholds do not always adequately capture whether a transaction is likely to prove problematic. The main consequence is that the overwhelming majority of notified transactions do not give rise to competition issues, while some transactions that may give rise to competition issues do not have to be notified at all.*"[2] The rationale behind this turnover approach was that acquisitions of companies with turnovers below this threshold were not likely to produce any problems. And therefore,

[1] Joined Cases C-611/22 P and C-625/22, *Illumina vs European Commission,* ECLI:EU:C:2024:677

[2] OECD (2016), *Local Nexus and Jurisdictional Thresholds in Merger Control*, Secretariat Background Paper for WP3 on Cooperation and Enforcement, p.16

competition authority assessments of these kinds of acquisitions would lead to unnecessary administrative costs.

However, today's markets are shaped by rapid technological developments, digitalisation and innovation and there is now significant merger activity that involves acquisitions by large incumbents of highly valued start-ups especially in the technology, pharmaceutical and biotechnology sectors, with low turnover at the early stages of their development. The acquisition of these start-ups can protect a company with market power against future competition – the so-called "killer acquisition" strategy. But as these start-ups do not generate any significant turnover they escape regulatory scrutiny, despite the potential for them to have anti-competitive effects.

And even where mergers have been subject to regulatory scrutiny, there is often an implicit assumption that synergies and efficiencies generated from mergers benefit the consumer. But the driving force behind most mergers is not to bring benefits to the consumer, but to maximise shareholder value, and the merger synergies that are generated, notably profits, are likely channeled towards shareholders; not necessarily towards consumers. Often the merger will give the acquirer a better market position and a greater market share by absorbing a nascent potential competitor and its innovation. Consumers may benefit where the acquiring company continues to develop innovative products and services, but this at the expense of potential competitive rivalry driving lower prices and improved products, had the challenger company stayed in the market. Merger control frameworks would benefit from a broader assessment of the rationale and drivers behind the decisions of investors and dominant firms.

There is significant potential for killer acquisitions to stifle innovation efforts in markets, particularly in the technological and pharmaceutical industries where innovation is critical. A 2021 study on the pharmaceutical sector provides a conservative estimate that between 5.3% and 7.4% of all acquisitions of firms with drug projects in development are killer acquisitions, which equates to approximately 50 killer acquisitions a year.[3] And a report prepared for the UK's Competition and Markets Authority (CMA) by economics consultancy, Lear, found that between 2008 and 2018 Alphabet had acquired 168 companies, Meta 71, and Amazon 60. Very few of these received a Phase I review by the CMA and even fewer were reviewed in detail. And similarly few were examined by the European Commission.[4] Another study into the 175 acquisitions by Google, Amazon, Facebook, Apple and Microsoft in the period 2015-2017, found that in more than 60% of the acquisitions, the brands of the target firms were discontinued.[5]

By way of example, the following is a selection of Facebook acquisitions that were not reportable and where the products and services were apparently subsequently discontinued:

- Social travel recommendation site Nextstop acquired in 2010 and closed a couple of months later[6];

[3] Cunningham, Colleen, Florian Ederer, and Song Ma. "Killer acquisitions." *Journal of political economy* 129.3 (2021): 649-702.
[4] Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report, Prepared for the CMA, (May 2019)
[5] Gautier, Axel and Lamesch, Joe, "Mergers in the Digital Economy" (2020), CESifo Working Paper No. 8056, Available at SSRN: https://ssrn.com/abstract=3529012 or http://dx.doi.org/10.2139/ssrn.3529012
[6] https://techcrunch.com/2010/07/08/facebook-acquires-social-travel-recommendation-site-nextstop/

- Location based social networking company Gowalla acquired in 2011 and shutdown a few months later[7];
- Social messaging Belua acquired in 2011 and closed several months later[8];
- Photo sharing app Lightbox acquired in 2012 and subsequently shut down.[9]

Effective merger oversight is a pre-requisite for competitive and innovative markets

The importance of innovation as a driver of economic growth is well recognised.[10] And in the context of increased market concentration, as noted in the European Commission's report on the evolution of competition, which highlighted the comparatively high average market concentration in France[11], all levers of competition are needed to ensure that markets remain dynamic and competitive. It is a false economy to follow the siren call of pursuing market concentration as a means of achieving sustainable economic growth. As the European Commission report states: "… *weak competition harms (i) customer firms in industries downstream from those with weak competition, (ii) final consumers and (iii) if it is weak across sectors, the overall competitiveness of an economy and the long-term living standards of citizens.*"[12]

Killer acquisitions, or any anti-competitive transaction where large players takeover innovative targets with low turnover, pose a threat to the government's holistic approach of pursuing an innovation agenda. For all the new incentives to innovate created by policy reforms in other areas, a killer acquisition or pre-emptive acquisition can eliminate these incentives. It is therefore necessary to double down on efforts to reform and align merger frameworks with the government's pursuit of fostering innovation in markets. This will bolster the resilience of France's economy in both developed and emerging high-tech industries, such as AI, providing a necessary counterweight to the trend of dominant US companies entrenching their market power – as evidenced with the various partnerships and the recent Nvidia acquisition of start-up Run:ai - and their hold over EU companies.[13] Timely intervention by way of effective merger review will ensure that potential anti-competitive effects are identified and addressed before market structures are irreversibly altered. And strengthening merger oversight will protect the competitive environment, ensuring fair market conditions for consumers, businesses, and innovation.

Examples of below-threshold mergers that raised competition concerns

A key concern about the acquisition strategies of dominant Big Tech is the creation of entire digital ecosystems that reinforce and protect their existing market power and open up

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[7] https://www.theguardian.com/technology/2011/dec/05/facebook-buys-gowalla-location-sharing or https://www.zdnet.com/article/facebook-acquisition-complete-gowalla-shuts-down/

[8] https://www.theverge.com/2011/10/29/2523159/beluga-group-messaging-shutting-down-closing-december-15th-facebook-messenger

[9] https://techcrunch.com/2012/05/15/facebook-lightbox/

[10] Primo Braga, C. et al. (eds.) (2009), *Innovation and Growth: Chasing a Moving Frontier*, OECD Publishing, Paris, https://doi.org/10.1787/9789264073975-en.

[11] European Commission: Directorate-General for Competition, *Protecting competition in a changing world – Evidence on the evolution of competition in the EU during the past 25 years*, Publications Office of the European Union, 2024, https://data.europa.eu/doi/10.2763/089949, pg.5

[12] Ibid pg.15

[13] https://www.reuters.com/markets/deals/nvidia-closes-700-mln-runai-acquisition-after-regulatory-hurdles-2024-12-30/

possibilities for abuses of this market power, including through a refusal of interoperability with services and products provided by competitors. Another concern is the data that these big platforms can collect as a result of the merger. It provides the platforms with an unmatched competitive advantage because competitors are unable to replicate the data sets, an issue that becomes particularly pressing because of the versatile nature of data that the incumbent platform can use in many different ways and markets. This includes: targeted advertising, where the platform can leverage merged datasets to refine user profiling and ad placement to an extent that competitors cannot match; e-commerce, where data from different services can be combined to predict consumer behavior and optimise product recommendations, giving the platform an undue advantage over third-party sellers; and AI development, where access to vast and diverse datasets enables the dominant firm to train superior machine-learning models, reinforcing its market power across multiple industries.

There have been several high-profile Big Tech mergers that were not examined by competition authorities reliant on a turnover-based threshold to trigger a notification. Google's acquisition of YouTube in 2006 escaped antitrust scrutiny in the EU because YouTube did not generate any turnover at that time. Today it has some 50 million users in France.[14] The merger not only eliminated one of the world's fastest growing websites at the time, it also eliminated a nascent competitive constraint to the Google Videos service that could have competed with Google on the selling of ad space in the years following its development. Further, it strengthened Google's advertising empire. In 2012 Facebook acquired Instagram for USD 715 million, but the deal was reviewed (and subsequently cleared) in only a few jurisdictions that had a share of supply threshold – and indeed questions have since been raised over the analysis, given that the deal gave Facebook increased control over digital advertising, reducing choice and innovation in social media platforms.[15] But at the time, the competition authorities that analysed this transaction considered that Facebook was a social network service provider and that Instagram was a photo-sharing app; they concluded therefore that they were not horizontal competitors in the same market. The deal was not reviewed by the European Commission since at the time Instagram did not generate any revenue. It is notable that in 2025, Instagram is expected to make more than half of Meta's US advertising revenue.[16] Moreover, Facebook holds a dominant position in the worldwide market for social networks since at least 2012, the year it acquired Instagram, thus eliminating its most immediate competitive threat and reinforcing its market power through data-driven externalities. The merger entrenched Facebook's dominance of social network markets. It was able to impose contractual terms on consumers enabling pervasive tracking that it could not have otherwise imposed under competitive conditions, with the ensuing concerns about privacy violations.[17] This also enabled it to access browsing data to strengthen its position in the display advertising markets and exclude competition in that sector.[18]

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[14] https://www.statista.com/statistics/280685/number-of-monthly-unique-youtube-users/

[15] The US Federal Trade Commission (FTC) has initiated proceedings against Facebook accusing it of illegally maintaining its monopoly in personal social networking through a systematic policy of acquiring aspiring entrants to its market (Federal Trade Commission v. Facebook Inc. FTC Matter/File Number 191 0134).

[16] https://www.reuters.com/technology/instagram-make-up-more-than-half-metas-us-ad-revenue-2025-report-shows-2024-12-18/

[17] For example, European Commission recently fined Meta for imposing unfair trading conditions on other online classified ads service providers, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5801

[18] Lovdahl Gormsen, Liza and Llanos, Jose Tomas, Facebook's Anticompetitive Lean in Strategies (June 6, 2019). Available at SSRN: https://ssrn.com/abstract=3400204 or http://dx.doi.org/10.2139/ssrn.3400204

When WhatsApp was acquired by Facebook in 2014 for USD 19 billion, it had over 600 million users worldwide and up to 150 million users in the EEA. But the acquisition did not reach the EU turnover thresholds and in the end the European Commission was only able to review the deal because the parties volunteered to notify it under Article 4(5) of the EU Merger Regulation. However, Facebook's notification concealed a crucial detail. The Commission fined Facebook in 2017 for misleading it during the merger investigation, after WhatsApp changed its privacy policy in 2016 and started sharing the personal data of its users with Facebook. During the merger Facebook claimed that it would be unable to link users accounts with those of WhatsApp. The Commission imposed the fine to send a clear signal that companies must comply with EU competition rules. But critics argue that these fines are seen by Big Tech companies as a cost of doing business, which further frustrates and undermines the existing frameworks.[19]

In the pharmaceutical sector, the overriding concern is that killer acquisitions can reduce research and development (R&D) efforts and innovation, ultimately eliminating future competition and innovation of better drugs. Market consolidation in the pharma sector can result in significant reductions in research spending and patent output of the merged firms. The challenge of killer acquisitions is particularly acute in the pharma industry, where breakthrough innovations often come from smaller players with limited market share. A recent European Commission report sheds light on the prevalence of killer acquisitions in European pharmaceutical markets.[20] It reviewed 3,193 transactions in the pharmaceutical industry between 2014-2018 of which 240 transactions involved the acquisition of potentially substitutable drug R&D projects. Alarmingly, 37% of these deals (89 out of 240) led to the shutdown of a drug research project, without a clear technical or safety explanation.

There are a number of pharma mergers that have escaped merger scrutiny in Europe. For example, the European Commission identified the USD 21 billion acquisition of Pharmacyclics by AbbVie as a transaction "*which had a cross border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction*".[21] Nor does it appear to have been reviewed at Member State level. AbbVie was a US based pharmaceutical company generating billions of dollars of revenue, while Pharmacyclics was a US based biopharmaceutical company that only started to generate significant turnover in Europe after it received the regulatory authorisations to market its then blockbuster product (Imbruvica), a drug used in the treatment of rare forms of blood cancer. The transaction was closed in March 2015, only five months after Pharmacyclics received the marketing authorisation to

[19] FT (2024) "Why Big Tech Fines Do Not Work"
https://www.ft.com/content/ba6eb664-b981-42d7-b24a-65e7e19889f8
[20] European Commission: Directorate-General for Competition, *Ex-post evaluation, EU competition enforcement and acquisitions of innovative competitors in the pharma sector leading to the discontinuation of overlapping drug research and development projects – Final report and appendices,* Publications Office of the European Union, 2024, https://data.europa.eu/doi/10.2763/3714497
[21] European Commission: Directorate-General for Competition, *Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control,* 2017, question number 15.

supply Imbruvica within the EU.[22] [23] Therefore, it seems unlikely that in such a short period of time the company was able to reach the turnover requirements necessary for the acquisition to have been reviewed by the European Commission.

And the Illumina/Grail merger is a case in point of the importance of being able to examine significant pharma acquisitions. The European Commission's in-depth review of Ilumina's acquisition of Grail for USD 8 billion revealed serious competition concerns that the merger would stifle innovation and that Illumina would have the ability and the incentive to engage in foreclosure strategies against Grail's rivals. This led to the Commission's decision to prohibit the merger. However, in light of the subsequent CJEU ruling mentioned above, this merger would not have qualified for review in the first place.

Other examples include the EUR 1 billion acquisition of French pharmaceutical company Amolyt Pharma by AstraZeneca in 2024, which does not appear to have been subject to any merger review. Another is Sanofi's acquisition of Principia Biopharma for USD 3.7 billion in 2020 and Ablynx for USD 4.1 billion in 2018. Although the Sanofi/Ablynx merger was subject to merger control in certain jurisdictions around the world, there was no merger scrutiny of the takeover of Principia Biopharma. After the acquisitions, Sanofi discontinued several pipeline drug products in 2023 and 2025 which it had obtained through the Principia and Ablynx mergers.[24]

Limitations of the existing French merger control system

The point is to demonstrate that there is a clear enforcement gap in a merger control system based on turnover only. This approach has not kept pace with market developments characterised by fast-moving markets and increased market concentration. And it is made weaker following the CJEU's judgement in *Illumina/Grail* that curtails Article 22 referrals from Member States to the European Commission for mergers that fall outside national competence. The acquisition of nascent competitors raises concerns that merit consideration and it is therefore necessary to review the scope and effectiveness of France's jurisdictional criteria and to ensure that each of the Autorité's enforcement efforts pull in the same direction, otherwise they will fall short of expectations.

The benefits of introducing of a call-in power

There are approximately 40 call-in merger control regimes around the world, including Member States of the EU and EEA. This equates to almost a quarter of all jurisdictions that have national merger control in place. And this comprises six of the world's top 20 leading economies, including the USA, China, Japan, Korea, Canada and Mexico. It is therefore not a novel or untested approach.

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22 https://www.reuters.com/article/world/europe/abbvie-boosts-cancer-drug-pipeline-with-21-billion-pharmacyclics-deal-idUSKBN0M1098/

23 https://www.prnewswire.com/news-releases/imbruvica-ibrutinib-now-approved-in-europe-for-treatment-of-two-blood-cancers-279550192.html

24 See, Fierce BioTech, “Sanofi cuts programs tied to multibillion-dollar deals from pipeline” on 30 January 2025 by Nick Paul Taylor, <https://www.fiercebiotech.com/biotech/sanofi-cuts-programs-tied-multi-billion-dollar-deals-pipeline> ; also see, BioSpace, “Sanofi Cleans House Cuts Assets From Principia and Ablynx Buyouts” on 27 April 2023 by Kate Goodwing <https://www.biospace.com/sanofi-cleans-house-cuts-assets-from-principia-and-ablynx-buyouts>

Option 1 in the public consultation for a new call-in power based on quantitative and qualitative criteria would, in our view, address the underenforcement of below-threshold transactions and improve the overall deterrence effect of the merger control system.[25] A merger system updated in this manner has the potential to be more responsive and, on a case-by-case basis, target those transactions that raise serious competition concerns and move away from a system of administrative review based merely on size.

This option also has the advantage that it would not be reliant on a prior enforcement decision by the Autorité or the European Commission (Option 2), which is inevitably rigid and will be more burdensome for the Autorité to apply as it requires a decision to be adopted before the threshold can apply. Moreover, the flexibility of the Option 1 proposal will be better suited to preventing markets from tipping.

Option 1 has the benefit that it combines a more ad hoc ex ante power with the possibility of an ex post intervention (within a defined timeframe). This has the potential to steer business incentives away from structuring potentially anti-competitive transactions to fall below the relevant notification thresholds in order to avoid regulatory scrutiny.

The introduction of a call-in power is, in our view, preferable to Option 3 as a stand-alone option. Option 3 limits the scope of action of the Autorité to the enforcement of provisions on anticompetitive practices after the implementation of the merger concerned. This would not address the enforcement gaps discussed above. While the CJEU's *Towercast* judgement confirmed that Member States have the power to review acquisitions by dominant firms under abuse of dominance rules, even if the transaction is not notifiable under EU or national merger rules[26], it is not as attractive an option for a number of reasons, not least because it only applies when specific circumstances are met, such as a position of dominance. Such an approach is messier, more disruptive and offers companies less legal certainty.

Call-in powers: implementation and safeguards

To overcome concerns about legal uncertainty and fears of regulatory overreach, the Autorité has helpfully proposed that it will set qualitative and quantitative criteria to frame the circumstances when call-in powers are likely to apply and that it will provide guidance and an open-door policy for parties to consult the Autorité on the reportability of their transaction.

The Autorité references time limits, the merging parties' cumulative turnover and a significant effect on competition in France as supplementary criteria to shape a proposed call-in power. While the characteristics of call-in powers vary from jurisdiction to jurisdiction, what is key is that there are clear substantive and jurisdictional criteria set out in guidelines to provide legal certainty and predictability. Furthermore, the different approaches of the call-in powers in other EU Member States are underpinned by the opportunity for pre-notification discussions with the competition authority, especially when competition concerns are likely to be evident to the parties and their legal advisers, to reduce business uncertainty and address fears of a potential flood of voluntary notifications out of an abundance of caution.

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[25] Buccirossi, Paolo; Ciari, Lorenzo; Duso, Tomaso; Spagnolo, Giancarlo; Vitale, Cristiana (2009) : Deterrence in Competition Law, SFB/TR 15 Discussion Paper, No. 285, Sonderforschungsbereich/Transregio 15 - Governance and the Efficiency of Economic Systems (GESY), München, https://doi.org/10.5282/ubm/epub.13269
[26] Case C-449/21 Towercast, Judgment of 16 March 2023, ECLI:EU:C:2023:207

In addition, it is possible to envisage that a call-in power is accompanied by a rationalisation of the application of the merger control regime. Specifically this could include better use of, and reviewing, the simplified procedure and short form merger decisions to expand the scope of the Autorité's review of unproblematic mergers. Taken together, these make for a more effective application of the merger control framework.

The setting of time limits for the intervention of a call-in power following the closing of a transaction can also minimise the problem of disentangling a completed transaction. For example, a (potentially) short deadline after the announcement of the completed transaction (before which the Autorité would have to indicate whether it wanted to review the merger) could then be taken into account in business planning, given that it takes time to make a merger happen in practice. This provides a balance between the public interest of preventing market power and business interests in legal certainty and lower regulatory costs.

The criteria outlined in Option 1 includes reference to the merger having a significant effect on competition in France. Guidelines can clarify the jurisdictional parameters to ensure there is a sufficient nexus to France, through metrics such as the merging parties having a minimum combined domestic turnover or customers in the territory, and the merger having the potential to impede competition in a substantial portion of national or local markets.

Additionally, the proposal for a call-in power should take into account the wider EU context of other Member States adopting or considering regulating below-threshold mergers. To avoid the risk of jurisdictional uncertainty with a patchwork of Member State approaches to below-threshold mergers potentially resulting in competing reviews or some Member States referring cases to the European Commission for review, there is strong case for a shared competence over below-threshold merger review.[27]

Conclusion

We support the proposal for the introduction of call-in powers as an essential tool for the Autorité to protect domestic markets from anti-competitive mergers and prevent the unchecked consolidation of market power. A call-in power provides a more flexible approach that would ensure that harmful mergers are not overlooked simply because they fall below a specific threshold. A call-in power with clear guardrails would ensure more comprehensive oversight of an evolving global business landscape and help maintain fair, competitive markets. The reform of French merger control through the adoption of a flexible call-in power with clear guidelines would achieve both an expanded and predictable merger control framework.

[27] Anna Tzanaki, *"Dynamism and Politics in EU Merger Control: The Perils and Promise of a Killer Acquisitions Solution Through a Law & Economics Lens",* Antitrust Law Journal (forthcoming)

Signatory Organisations

SOMO

IT for Change

CTS-FGV

Balanced Economy Project

Rebalance Now

Open Markets Institute