TOWARDS A MERGER CONTROL FRAMEWORK FOR ADDRESSING LIKELY HARMFUL BELOW-THRESHOLD MERGERS

Response to the Public Consultation of the Autorité de la Concurrence on Possible Options to Close the Merger Enforcement Gap in France

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Introduction

- Merger control in the EU is in a state of transformation. Both the European Commission and several Member States have considered recalibrating their approach to merger control[1] in response to recent scholarship on "killer acquisitions" that were shown to escape regulatory scrutiny.[2]
- Concerns regarding likely harmful below-threshold mergers concentrate on dynamic industries. In innovation-driven markets, the turnover of innovative target companies (startups) may be limited at the time of the merger even though they hold significant competitive potential. In addition, innovation is an important parameter of competition and EU competitiveness.[3]
- These concerns are particularly serious for merger control regimes that rely almost exclusively on ex ante mandatory notification thresholds such as the French or the EU system. An expansive approach to Article 22 of the EU Merger Regulation (EUMR) that would allow case referrals from non-competent Member States such as France to the

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[1] 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).

[2] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 JOURNAL OF POLITICAL ECONOMY 649.

[3] President von Leyen's Political Guidelines for the Next European Commission 2024-2029; Mario Draghi, *The future of European competitiveness – A competitiveness strategy for Europe*, Part B – In-depth analysis and recommendations (2024).

Commission was considered a practical solution to the legal constraints posed by such turnover-based systems of merger control.[4]

- However, the Court of Justice of the EU (CJEU)'s judgment in *Illumina/ Grail* curtailed the ability of Article 22 EUMR referrals from Member States to the Commission for mergers that fall outside national competence.[5] In response, the case for revisiting national and EU legislation and policy in regard to below-threshold mergers has gained prominence across the EU.[6]
- Against this backdrop, the Autorité's initiative to explore ways to close this enforcement gap to ensure the effectiveness of merger control and rebalance it against the importance of legal certainty for companies is welcome.
- The observations below address two issues: (i) the merits of the three options put forward by the Autorité from a substantive point of view when considering a potential reform of French merger control; and (ii) the broader EU context within which such reform may take place and important institutional considerations that need to also be taken into account.

Assessment of Options for Merger Control Reform in France

I. Option 1: A new call-in power based on quantitative and qualitative criteria

- This option could most effectively and comprehensively close the perceived enforcement gap in France. If designed appropriately, it has the potential not only to reverse any systematic underenforcement vis-à-vis below-threshold transactions but also to improve the deterrence effects of French merger control.[7]
- A move from a fixed jurisdictional regime based solely on ex ante notification and turnover thresholds to one with a flexible ad hoc power for ex post intervention could have several advantages. The possibility of ex post enforcement could rationalise business incentives and reduce their incentive to propose likely anticompetitive mergers that fall just below the

[4] Autorité de la concurrence, Public consultation on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition, January 14, 2025: https://www.autoritedelaconcurrence.fr/en/press-release/public-consultation-introduction-merger-control-framework-addressing-below-threshold.

[5] Joined Cases C-611/22 P and C-625/22 P Illumina v Commission and Grail v Commission, Judgment of 3 September 2024, ECLI:EU:C:2024:677.

[6] Anna Tzanaki, *Illumina's Light on Article 22 EUMR: The Suspended Step and Uncertain Future of EU Merger Control Over Below-Threshold "Killer" Mergers*, CPI ANTITRUST CHRONICLE DECEMBER 2024 (2024).

[7] Paolo Buccirossi et al., *Deterrence in Competition Law*, Volume 4 *in* THE ANALYSIS OF COMPETITION POLICY AND SECTORAL REGULATION 423 (Martin Peitz & Yossi Spiegel eds., 2014); George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 THE JOURNAL OF LAW & ECONOMICS 225.

applicable notification thresholds.[8] Likely competition harm could be either prevented or remedied ex post.

- Such a regime may better target potentially harmful below-threshold transactions on a case-by-case basis. As such, it need not overdeter transactions that are harmless or beneficial for society and overburden competition authorities and merging parties with unnecessary costs related to the merger review process.[9]
- For such "call-in" merger regime to be really targeted and effective, it is imperative that clear guidelines and limiting principles are carefully carved out and implemented. Clarity regarding the criteria and circumstances under which the new ex post review powers apply will minimise legal uncertainty and enhance business confidence as to the type of transactions that are likely to be subject to merger control enforcement.
- The Autorité's proposed quantitative and qualitative criteria (time limits, merging parties' cumulative turnover, significant effect on competition in France) are a useful starting point when considering how to shape the content of the guidance.[10] The latter two criteria would need further elaboration.
- It is important to introduce clear jurisdictional indicators in the guidance that ensure that any reviewed transaction has a sufficient link (nexus) to France[11] (e.g. the merging companies having significant operations in its territory by reference to a specific metric such as turnover, customers etc.) and significant effects on competition in France (e.g. the merger having an impact on national or local markets) relative to other jurisdictions (e.g. a cross-border merger with impact across the EU or involving multiple Member States).[12]
- Ideally, mergers with national or local effects within the scope of the new "call-in" regime will be reviewed by French authorities under national law and those with cross-border or multijurisdictional impact could be referred to the Commission under Article 22 EUMR in light of its new reading post *Illumina/ Grail*. This would minimise jurisdictional uncertainty regarding below-threshold transactions and elucidate which authority is to assert jurisdiction in a given case.

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[8] Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AMERICAN ECONOMIC REVIEW: INSIGHTS 77 (2019).
[9] Luke M. Froeb, Steven Tschantz & Gregory J. Werden, *Deterrence in Merger Review: Likely Effects of Recent U.S. Policy Changes*, CPI ANTITRUST CHRONICLE MAY 2024 (2024).
[10] Autorité de la concurrence, Public consultation, *supra* note 4.
[11] Alec Burnside & Adam Kidane, *Double Dutch: Illumina/GRAIL, Article 22 and the General Court*, 8 COMPETITION LAW & POLICY DEBATE 140 (2024); OECD, *Local Nexus and Jurisdictional Thresholds in Merger Control*, Background Paper by the Secretariat (2016).
[12] Cf Tzanaki, *supra* note 1; Tzanaki, *supra* note 6.

- Shared competence over below-threshold mergers would thus operate on a principled basis. Such a principled approach to diving merger competence in the EU could minimise or avoid negative side effects from several Member States regulating below-threshold transactions, and competing to review them or potentially some of them referring cases to the EU level for review at their and the Commission's discretion.
- Expansion of EU competence below the EUMR turnover thresholds, through the Article 22 EUMR referral mechanism relying on national competence, could be justified and applied by reference to objective and predictable criteria. Thus, the transition from a fixed "zero-sum" allocation of *exclusive* merger competences between the EU (above EUMR thresholds) and Member States (below EUMR thresholds) to a flexible regime of "non-zero-sum" competence allocation with *concurrent* EU and national competences (below EUMR thresholds) could be managed constructively.[13]
- Cooperation among competition authorities and coordination of enforcement efforts based on a clear, principled framework could help address unintended consequences of such transition or even lead to mutually beneficial outcomes. Fragmentation of the internal market, proliferation of merger review procedures and costs and prisoners' dilemma situations could be avoided. The transformed ("non-zero-sum") merger competence allocation in the EU has the potential to be turned into a "positive-sum" game.[14]
- Expansion of national competence by means of discretionary ex post "call-in" powers would not need to lead to arbitrary enforcement, negative externalities or allow strategic or political considerations to enter EU or national merger control through the back door.[15] Clear substantive and jurisdictional criteria incorporated in guidelines will ensure that the principles of legal certainty, predictability and cooperation are abided by. This would promote accountability of competition agencies and transparency of their enforcement activities and decisions.[16]
- Expansion of French merger control together with guidelines following this model could act as a catalyst and precipitate further constructive changes both at EU and national level.

II. Option 2: A new mandatory notification threshold based on a prior decision by the Autorité or the European Commission under merger control (prohibition or

[13] Tzanaki, *supra* note 1.
[14] *Id.*
[15] *Id.*
[16] DAMIEN NEVEN, ROBIN NUTTALL & PAUL SEABRIGHT, MERGER IN DAYLIGHT: THE ECONOMICS AND POLITICS OF EUROPEAN MERGER CONTROL 79 (1993).

conditional clearance), abuse of dominance rules (fine or commitments) or the Digital Markets Act (designation as gatekeeper)

- This option suggests a sophisticated regime of ex ante notification that has certain appeal and advantages. Key favorable features of such regime would be its relative simplicity, ease of application and predictability. Prior enforcement decisions by the French or EU authorities relating to the application of specific rules offer an objective criterion for triggering notification. Accordingly, ex ante legal certainty is provided to business and competition harm is prevented for cases that fall within the scope of such regime.
- The main drawback of such notification regime, no matter how sophisticated, is its inevitably rigid nature. The threshold upon which notification is based may be objective but need not be accurate in targeting only likely harmful below-threshold transactions.[17]
- Such regime will thus be over- or under-inclusive. Transactions will be notified that may not merit regulatory scrutiny. This entails unnecessary compliance and deterrence costs for regulated companies.[18]
- Presumably such companies pose a higher risk of being involved in anticompetitive mergers. However, it is not clear why all companies that have been subject to a non-favorable enforcement decision under merger or abuse of dominance rules should be subject to a special prophylactic regime of merger control. It is equally unclear why an EU enforcement decision should serve as the basis for a national merger filing obligation.
- A sector-specific approach to regulating below-threshold mergers has a potentially stronger justification as "killer acquisitions" may be a more frequent and likely harmful phenomenon in dynamic industries.[19] What needs to be carefully balanced is whether the benefits of a mandatory notification obligation for mergers involving companies designated as gatekeeper under the Digital Markets Act (DMA) would justify the costs.
- Unlike the simpler reporting obligation applying to all gatekeepers' mergers under Article 14 of the DMA that facilitates transparency and allows competition authorities to screen and target suspect harmful transactions, a mandatory notification regime entails significant more costs for all companies captured within its scope.

[17] Rachel Brandenburger, Logan Breed and Falk Schöning, *Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?*, 31(2) ANTITRUST 28 (2017).
[18] Froeb, Tschantz, and Werden, *supra* note 9.
[19] For a literature review, see Tzanaki, *supra* note 1.

- A mandatory notification regime may not only regulate "too much" but also "too little". Cases below the newly proposed threshold would still escape merger review and there will be gaps remaining in French merger control.
- Interestingly, this option could create tensions with other competent Member States that may wish to refer cases falling within the new French mandatory notification regime to the Commission for review at EU level under Article 22 EUMR. For cases involving cross-border or multijurisdictional mergers, this could be a serious issue.
- The *Meta/Kustomer* merger provides an illustration of this scenario from actual practice. Due to the applicability of its new transaction value threshold, the Bundeskartellamt did not join on time the request for referral of the merger by 10 other Member States to the Commission.[20] This disallowed a one-stop-shop review of the merger at EU level despite its arguably weak link to Germany and the affected markets being wider than national.[21]
- The result could be multiple merger review procedures even when not clearly justified. Or worse, legal and political conflicts could arise. The major risk with this option is introducing a heavy-handed regulatory approach to below-threshold mergers at national level that is too broad.
- On the other hand, the objective indicators upon which mandatory notification would be based under option 2 (certain prior enforcement decisions) could be integrated as relevant qualitative criteria in the guidelines to be developed for ad hoc ex post enforcement under option 1 above. Alternatively, a lighter-touch transparency regime for below-threshold mergers based on these criteria could be considered under option 2.

III. Option 3: Enforcement of EU antitrust rules (Articles 101 and 102 TFEU) and their national equivalents

- This is a valuable enforcement option in the hands of the Autorité. Its key advantage is that it requires no legislative change: the CJEU's *Towercast* judgment made clear that EU antitrust rules are enforceable in merger cases.[22] Rather a change of enforcement

[20] Bundeskartellamt considers Meta/Kustomer merger to be subject to notification, December 9, 2021: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/09_12_2021_Meta_Kustomer.html.

[21] Kaan Gürer and Dorothee de Crozals, *Facebook/Kustomer – Germany's attack on the EU's One-Stop-Shop principle in merger control?*, August 5, 2021: https://techinsights.linklaters.com/post/102h49y/facebook-kustomer-germanys-attack-on-the-eus-one-stop-shop-principle-in-merge; Marcel Nuys and Florian Huerkamp, *Düsseldorf Court clarifies transaction value threshold in Meta/Kustomer deal*, January 4, 2023: https://www.herbertsmithfreehills.com/notes/crt/2023-01/dusseldorf-court-clarifies-transaction-value-threshold-in-meta-kustomer-deal.

[22] Case C-449/21 Towercast, Judgment of 16 March 2023, ECLI:EU:C:2023:207.

priorities,[23] preferably accompanied by clear guidance, would suffice to reactivate this tool and indicate in what cases and under what conditions it could be used.

- As a stand-alone option, ex post antitrust enforcement is limited in that it may leave enforcement gaps. For instance, the legal elements of "agreement" or "dominance" required under EU or national antitrust rules may not be satisfied in certain cases of below-threshold mergers. In comparison, ex post merger enforcement based on a "call-in" regime under option 1 above seems at least theoretically more encompassing and flexible.
- As a "back up" enforcement option, however, it could enhance the effectiveness of Frech merger control. Below-threshold mergers could be subject to antitrust enforcement after their implementation possibly based on more extensive time limits compared to option 1 above. The credible threat of antitrust enforcement could provide additional deterrence of likely harmful below-threshold mergers even if not actually used.[24] It could also help discipline Member States' and Commission incentives to request and accept (or not) Article 22 referrals as appropriate.[25]
- Effectively, the possibility of applying antitrust law to mergers below national thresholds could operate as an extension of the newly proposed discretionary ex post "call-in" power (option 1) or the new ex ante mandatory notification threshold based on certain prior enforcement decisions (option 2). This could enrich the competition law toolbox, rationalise business and enforcers' incentives and further close enforcement gaps.
- Resort to antitrust rules as a means of merger enforcement should be dealt with care. This is because under the decentralised system of EU antitrust enforcement, all national competition authorities (NCAs) have broadly concurrent jurisdiction to apply antitrust law. The European Competition Network (ECN) has a key role within this institutional framework to coordinate antitrust enforcement, ensure convergence and allocate cases.[26]

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[23] The Autorité de la concurrence takes note of the Illumina/Grail judgment by the Court of Justice of the European Union and remains committed to tackle mergers that may harm competition in innovative sectors, September 3, 2024: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european; Meat-cutting sector: for the first time, the Autorité examines, under antitrust law, mergers below the national notification thresholds, and dismisses the case, May 15, 2024: https://www.autoritedelaconcurrence.fr/en/press-release/meat-cutting-sector-first-time-autorite-examines-under-antitrust-law-mergers-below.

[24] Robert D. Cooter & Michael D. Gilbert, *Theory of Enforcement*, in PUBLIC LAW AND ECONOMICS (Robert Cooter & Michael Gilbert eds., 2022).

[25] Tzanaki, *supra* note 1.

[26] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1; Speech by EVP Margrethe Vestager at the EU Competition Day: "Competition and competitiveness in uncertain geopolitical times" (Brussels, April 26, 2024).

- To avoid jurisdictional conflicts, a similar approach to that outlined for option 1 above could be taken. Antitrust enforcement by NCAs could primary target merger cases with national or local effects rather than cross-border or multijurisdictional impact. Accordingly, guidance should clarify that national antitrust enforcement is appropriate in cases of mergers with limited geographic scope and size of externalities.[27]
- Unprincipled antitrust enforcement at national level – operating as a substitute for or a de facto "call-in" power for Member States that do not yet have it – could also lead to parallel proceedings, risk regulatory fragmentation and cost duplication when not called for.
- The European Commission could take the lead to streamline antitrust enforcement efforts when appropriate to minimise such concerns. Compared to EU merger control including the case referral system under the EUMR, it has a stronger institutional role in the EU antitrust enforcement context.[28]
- The Commission could monitor and discipline any attempts by NCAs to "overenforce" antitrust rules against below-threshold mergers, either ex post or ex ante,[29] in cases where it may not be justified (e.g. cross-border or multijurisdictional mergers). It could also take and handle cross-border cases itself as the most appropriate authority.[30] Alternatively, close cooperation between NCAs with overlapping jurisdiction over certain merger cases or across borders (e.g. where one or more NCAs take the lead on behalf of others) may be fostered within the ECN.[31]
- With option 3 available, stronger cooperation and coordination is needed to ensure that national antitrust enforcement takes place in appropriate cases and circumstances.

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[27] Tzanaki, *supra* note 1.

[28] Andreas Bardong, *Cooperation between National Competition Authorities in the EU in Multijurisdictional Merger Cases—the Best Practices of the EU Merger Working Group*, 3 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 126 (2012); Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation, January 2005; Bruno Lasserre, *The European Competition Network*, 1 ITALIAN ANTITRUST REVIEW 11, 15 (2015).

[29] Press release Nº 10/2023, The Belgian Competition Authority opens an ex officio investigation into a possible abuse of dominance by Proximus in the context of the takeover of edpnet, in application of the Towercast case law, March 22, 2023: https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-10-2023; and Press release Nº 3/2025, The Belgian Competition Authority opens ex-ante proceedings into the possible anti-competitive effects of Dossche Mills' proposed takeover of Ceres' artisan flour business, January 22, 2025: https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-3-2025.

[30] Vestager speech, *supra* note 26.

[31] Giorgio Monti, *Galvanising National Competition Authorities in the European Union*, in RECONCILING EFFICIENCY AND EQUITY (Damien Gerard & Ioannis Lianos eds., 1 ed. 2019).

Conclusion

- An important lesson to be drawn from *Illumina/Grail* and its aftermath is that any solution to killer acquisition concerns should be assessed not only on its merits in isolation but also in view of the broader institutional context within which it may operate in the EU. As national "call-in" powers may dovetail with Article 22 EUMR post *Illumina/Grail*, this is a key parameter to consider when deciding the type and shape of merger control reform in France.
- A targeted and multilayer approach may offer the most likely effective and efficient solution to regulating below-threshold mergers. In this light, option 1 in combination with option 3 that could activate ex ante and ex post enforcement based on new national "call in" powers and existing antitrust rules could bolster merger control enforcement. Flexible rules together with clear guidelines could ensure an expanded yet predictable regime of French merger control.
- In any event, stronger cooperation and coordination would be needed to effectively apply an expanded French merger control framework to below-threshold mergers and its smooth interaction with the EU or other national regimes.